



Service of Documents by E-mail

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Submitted to: Falguni Debnath, Secretary,
Civil Rules Committee and Senior Legal Officer,
Court of Appeal for Ontario

Submitted by: The Ontario Bar Association



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Introduction

The Ontario Bar Association's (the "OBA") Civil Litigation Executive, together with input from members of the OBA's Insurance Law and Class Actions Law Executive, have formulated a proposal for consideration by the Civil Rules Committee. The proposal recommends changes to the *Rules of Civil Procedure*¹ (the "Rules") that would permit service by e-mail as a valid method of service for most documents, without a party's consent, or a court order.² This proposal sets out information relating to the OBA, the current use of e-mail in Ontario in litigation matters, e-mail as a valid form of service in other Canadian jurisdictions, and the OBA's preference that Ontario adopt a model similar to that already in place in Saskatchewan.

Three appendices set out relevant rules of practice in Saskatchewan, list the specific proposals that the OBA makes to modify the Saskatchewan regime for application in Ontario, and provide quick reference to relevant Rules already in place in Ontario.

The OBA

The OBA is the largest voluntary legal organization in the province, representing lawyers, judges, law professors and students in Ontario. In addition to the Civil Litigation section, this proposal has benefitted from the input of the Insurance Law and Class Actions sections of the OBA, which collectively have over 2000 members. Our members regularly represent the broadest range of clients in the Superior Court of Justice across the province.

Use of e-mail in civil litigation in Ontario

As part of its mandate the OBA's Civil Litigation Executive focuses efforts on proposing small changes to practice that can make a significant and immediate impact on litigation matters across the province, for the benefit of lawyers, clients and the courts. One such

¹ R.R.O. 1990, Reg. 194.

² See subclause 16.01(4)(b)(iv), or clause 16.05(1)(f) of the Rules. Relevant Rules are set out, for reference, in **Appendix C**.



proposal is to amend the Rules to encourage service by e-mail for documents not required to be served personally, without requiring the consent of the parties or a court order.³

In the experience of members of the OBA, e-mail has displaced letter mail and fax as the main method by which lawyers communicate and exchange documents in litigation matters. Amending the Rules to encourage service by e-mail will reflect the realities of practice in Ontario, reduce the time and expense incurred by parties serving documents in litigation matters, and facilitate access to justice for self-represented litigants (many of whom do not have ready access to process servers or fax machines).

Service by e-mail has already been adopted by certain Ontario Courts. The Commercial List in Toronto has adopted the Guide Concerning Commercial List E-Service (the “**Guide**”), as a “uniform method of ‘substituted service’ under the Rules”.⁴ However, the Guide was specifically tailored for the stakeholders and parties normally involved in matters on the Commercial List and, in our view, a different approach should be taken when considering service by e-mail across the province. Other courts permit the filing of electronic documents by email, setting out useful requirements for transmitting and formatting of electronic documents.⁵

Moreover, a valid e-mail address is now a (de facto) requirement for Ontario lawyers. Ontario lawyers and licensing candidates are required to register for online accounts to gain access to several Law Society of Ontario functions and tools, such as:

- registration in the Lawyer Licensing Process,⁶ the application process for admission to the Bar of Ontario; and,
- registration on the Law Society of Ontario Portal,⁷ which is required by lawyers in Ontario to receive notifications from, and report to, the Law Society with respect to certain regulatory obligations.

³ This proposal is not intended to alter the *Rules* for documents that are required to be served personally or by an alternative to personal service, such as an originating process.

⁴ The Guide Concerning Commercial List E-Service, [online](#).

⁵ See, for example, “Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario”, [online](#).

⁶ See “Application for Admission to the 2018-2019 Lawyer Licensing Process”, [online](#).

⁷ See LSO Portal “Help” Page [online](#).



In addition, e-mail is the method by which Ontario's new electronic filing system provides "issued" documents to a person who files a Statement of Claim or Notice of Action online. The issued document is sent from the court to the person, as an e-mail attachment.⁸

We are aware that service by e-mail may be impractical in some regions of Ontario that are unserved or underserved by broadband internet.⁹ However, our view remains that service by e-mail should be promoted under the Rules for the majority of cases where such a rule will aid in securing the most just, expeditious and least expensive determinations of civil proceedings on their merits. Indeed, in our view, service by e-mail should be properly considered as another option for service, in the same way as letter mail or fax are options for counsel to consider in a given circumstance.

Service by e-mail in other jurisdictions

Other Canadian jurisdictions have already set out rules that permit service by e-mail. In this respect, we note that these jurisdictions are similar to Ontario in that they each have regions that are unserved or underserved by broadband internet coverage. Many still require the effective consent of a party to be valid service. Our view is that this undermines the intention behind the rule.

For instance, in British Columbia, *Supreme Court Civil Rules* indicate that if an e-mail address is provided as one of the person's addresses for service, ordinary service of a document can be effected by e-mailing the document to that e-mail address.¹⁰ Similarly, in Nova Scotia, a document may be delivered by e-mail to a "designated" e-mail address.¹¹ However, in both cases, the party must voluntarily provide such an e-mail address.

By contrast, the Queen's Bench Rules in Saskatchewan require a lawyer representing a party to have an e-mail address, and permits service on that party at that e-mail address for most documents (i.e., documents other than an originating process).¹² In our view, the

⁸ File civil case documents online. See "[after you file](#)".

⁹ The Canadian Radio-television and Telecommunications Commission (CRTC) has a website that provides an indication of "Broadband Internet Service Coverage in Canada" as of 2014.

¹⁰ See [Supreme Court Civil Rules](#) 4-1(1), and 4-2(2)(d).

¹¹ See [Nova Scotia Civil Procedure Rules](#) ss. 31.16(2), and 31.18.

¹² See [Rule 12-4 and 17-2](#) of The Queen's Bench Rules in Saskatchewan



Saskatchewan rule (set out as Appendix A) offers the following features that make it a preferred starting point for an Ontario rule in that it:

- requires lawyers to provide e-mail addresses in the normal course thereby facilitating service by e-mail as between counsel;
- provides some flexibility for unrepresented parties, who are not required to have an e-mail address, but permitting those parties to serve and be served by e-mail;
- treats service by e-mail as an option for parties to use at their discretion, retaining other methods (such as fax, and courier); and,
- is a simple rule which allows lawyers and parties to respond to the realities of practice.

However, the OBA prefers a form of rule that does not incorporate a requirement for an “acknowledgment of receipt” or “acknowledgment of service.” Instead, the OBA recommends a rule that:

- permits lawyers to attach a copy of a “sent” e-mail to an affidavit of service;
- does not permit a lawyer to rely on an e-mail where the party receives a notification of transmission failure; and,
- permits a party served electronically to nonetheless show that the document was not, in fact, received.

The OBA’s specific proposals to modify the Saskatchewan rule are set out in full in **Appendix B**.

Conclusion

The OBA’s proposal to amend the Rules to permit service by e-mail as a valid method of service for most documents, without a party’s consent, or a court order would be a valuable tool that will be used by lawyers across the Province on a daily basis to reduce the time and expense of civil proceedings. We thank you for considering this proposal.



Appendix A – Excerpts from Saskatchewan Queen’s Bench Rules

Service by alternative modes

12-4 (1) If expressly authorized by enactment, an order of the Court or these rules, service of a document may be effected by an alternative mode, including:

- (a) courier;
- (b) registered or ordinary mail;
- (c) fax; or
- (d) electronic transmission.

(2) Subject to subrule (3), if an address for service in a proceeding has been filed respecting the person to be served, a document required to be served may be served at the address for service by any of the following modes:

- (a) courier, including any adult person who delivers the document;
- (b) registered or ordinary mail;
- (c) fax; or
- (d) electronic transmission.

(3) Subrule (2) does not apply to a subpoena or an application for committal of a person for contempt of Court.

...

(7) In the case of service by electronic transmission:

- (a) the document must be electronically transmitted to the electronic transmission address shown in the address for service of the person to be served; and
- (b) the electronic transmission must set out all of the following information:



(i) the sender's name, address, telephone number, electronic transmission address and the sender's fax number if there is one;

(ii) the name of the person to be served;

(iii) the date and time of transmission;

(iv) the electronic file name of the document being transmitted, the style of cause, name and date of the document being transmitted and the total number of hard copy pages of the document;

(v) the name and telephone number of a person to contact in the event of transmission problems;

(vi) confirmation that the original document has been signed, that the original signed document has been or will be filed with the Court and that the original signed document is available for inspection at the place and times specified.

...

12-13(6) - Service of a document by electronic transmission is effective on the date set out in the electronically transmitted acknowledgment of receipt or, if no date is specified, on the date the sender receives the acknowledgment of receipt.

...

Requirements for stating address for service

17-2 (1) If a party is represented by a lawyer, the party's address for service is the office of that lawyer in Canada, and that address for service:

(a) must include the name, physical address, mailing address, email address and telephone number of the legal firm, and the name of the lawyer in charge of the file; and

(b) may include the fax number, if any, of the legal firm.

(2) If a party is an individual not represented by a lawyer, the party's address for service:



(a) must include the party's full name, residential address and telephone number; and

(b) subject to subrule (3), may include the fax number or email address, if any, of the party.

(3) A party's address for service must include an email address if the party's address for service is located outside Saskatchewan.



Appendix B – Proposed Modifications to the Saskatchewan Rule

Effective Date of Service

1. Service by e-mail is effective without the need for an acknowledgement of receipt, and according to the existing Ontario rules with respect to time for service of documents by Fax.

Proof of Service

2. Service is proved by attaching a 'sent' copy of the e-mail to the affidavit of service.
3. If the party serving a document by e-mail receives notification of a transmission failure, the party serving the document shall make reasonable efforts to ensure that successful e-mail transmission of the document occurs or that the e-mail comes to the attention of the intended recipient or his or her firm or service will not be effective.

When Service is Not Received

4. Where service is otherwise in accordance with the above provisions, any party served by e-mail may nonetheless show that a document did not arrive, relying on Rule 16.07 (set out in full in Appendix C).

How Documents Served

5. Documents served by e-mail shall be served:
 - a. in Microsoft Word format (".doc" or ".docx");
 - b. text-searchable PDF format (i.e. with the ability to text search the file); or,
 - c. other format as agreed by the parties.
6. Third party electronic file sharing services may also be used as a means of serving attachments where it would be impractical to include such attachments in an e-mail.
7. The party serving the document shall be aware of the size of the file(s) to be served by email. Documents to be served by email must be 10 Megabytes (MBs) or less. Counsel may send a document in multiple e-mails if a file is too large to serve in a single e-mail. The



serving party should consider sending large files in alternative (compressed) file formats, or using a third party sharing service as described above.¹³

Other

8. Parties may request delivery of a paper copy of any document to be served, in which case, the party serving the document is obliged to do so in any other manner approved by the Rules.

¹³ The file size limit proposed here is based on the *Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario*, available [online](#).



Appendix C – Excerpt of Relevant Ontario Rules

Backsheet

4.02 (3) Every document in a proceeding shall have a backsheet in accordance with Form 4C that sets out,

...

(f) if a lawyer is serving or filing the document, the lawyer's name, address, telephone number, fax number (if any), e-mail address (if any) and law society membership number;

(g) if a party is acting in person, his or her name, address for service, telephone number, fax number (if any) and e-mail address (if any); and

(h) if the document is to be served, the fax number and e-mail address, if known, of the person on whom the document is to be served.

...

All Other Documents

...

16.01 (4) Any document that is not required to be served personally or by an alternative to personal service,

(a) shall be served on a party who has a lawyer of record by serving the lawyer, and service may be made in a manner provided in rule 16.05;

(b) may be served on a party acting in person or on a person who is not a party,

...

(iv) if the parties consent or the court orders under subrule 16.06.1 (2), by e-mailing a copy to the party or person in accordance with subrule 16.06.1 (1), but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day. R.R.O. 1990, Reg. 194, r. 16.01 (4); O. Reg. 260/05, s. 3; O. Reg. 575/07, s. 15; O. Reg. 170/14, s. 3.

...



SERVICE ON LAWYER OF RECORD

16.05 (1) Service of a document on the lawyer of record of a party may be made,

...

(f) if the parties consent or the court orders under subrule 16.06.1 (2), by e-mailing a copy to the lawyer's office in accordance with subrule 16.06.1 (1), but, where service is made under this clause between 4 p.m. and midnight, it is deemed to have been made on the following day. O. Reg. 575/07, s. 18; O. Reg. 170/14, s. 5 (1-3).

...

SERVICE BY E-MAIL

Required Information

16.06.1 (1) The e-mail message to which a document served under subclause 16.01 (4) (b) (iv) or clause 16.05 (1) (f) is attached shall include,

(a) the sender's name, address, telephone number, fax number, if any, and e-mail address;

(b) the date and time of transmission; and

(c) the name and telephone number of a person to contact in the event of a transmission problem. O. Reg. 170/14, s. 6.

Order for Service by E-mail

(2) If parties do not consent to the service of a document by e-mail, the court may, on motion, make an order directing that the document be served by e-mail, on such terms as are just. O. Reg. 170/14, s. 6.



WHERE DOCUMENT DOES NOT REACH PERSON SERVED

16.07 Even though a person has been served with a document in accordance with these rules, the person may show on a motion to set aside the consequences of default, for an extension of time or in support of a request for an adjournment, that the document,

(a) did not come to the person's notice; or

(b) came to the person's notice only at some time later than when it was served or is deemed to have been served. R.R.O. 1990, Reg. 194, r. 16.07.