



The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

April 1, 2014

VIA EMAIL: john.kromkamp@ontario.ca

John Kromkamp
Secretary
Civil Rules Committee
Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2N5

Dear Mr. Kromkamp:

RE: Proposed Amendments to Rule 16.05 - Service By Fax and Email Upon Lawyer of Record

I am writing, on behalf of The Advocates' Society, to propose amendments to the *Rules of Civil Procedure* with regard to service by fax and email on a lawyer of record (Rule 16.05) for the consideration of the Civil Rules Committee. I attach a memo we have prepared in this regard.

Our aim is to propose amendments which would increase the efficiency of serving documents through recognition of the capabilities of modern technology. In this regard, the proposed amendments would provide a more realistic and up-to-date procedure than what are, in our view, the outdated provisions regarding service by fax and email.

We would be pleased to answer any questions you have about these submissions and to address them at an upcoming meeting of the Civil Rules Committee, at your discretion.

Yours very truly,

Alan H. Mark
President

Encl.



MEMORANDUM

To: Civil Rules Committee

Date: April 1, 2014

From: The Advocates' Society

Re: Proposed Amendments to Rule 16.05 - Service By Fax and Email Upon Lawyer of Record

The Advocates' Society hereby proposes the following amendments to Ontario's Rules of Civil Procedure.

A. Executive Summary

Subrules 16.05(1)(d) and (f), 16.05(3), (3.1) and (3.2) and 16.05(4) of the Rules of Civil Procedure govern service by fax and email upon lawyers of record. These subrules have been in place for 13 years. Portions of these subrules are inefficient and based on outdated assumptions regarding their related technologies. In particular, it is no longer necessary for documents 16 pages or longer to be faxed after 4 p.m. and for service by email to be effective only if the lawyer of record provides by email an acceptance of service. In this regard, proposed reforms to subrules 16.05(1)(f), 16.05(3.1), and related rules are outlined below. What precedes these proposed reforms is the legislative history of Rule 16.05, the specific concerns with Rule 16.05 and judicial treatment of Rule 16.05 and examples from other provinces.

B. Salient Legislative History of Rule 16.05

The Rules in force on November 16, 1992 included in subrule 16.05 (1) (d) a provision allowing the solicitor of record in a given matter to receive service of a document by fax subject only to the requirement that certain information be included on a cover page.¹

On February 3, 1997, subrule 16.05 (1) (d) was amended so that service by fax was subject to the conditions found in newly introduced subrules 16.05 (3.1) and (3.2). Subrule (3.1) noted that faxes made between 5 p.m. and midnight would be deemed to have been made the following day and also that documents longer than 16 pages *must* be sent between 5 p.m. and 8 a.m. unless the opposing party consented otherwise. Subrule (3.2), set out that certain documents such as motion or trial records could not be served via fax without the prior consent of the opposing party.²

Less than three years later on March 1, 2000, subrule 16.05 (1) (f) was introduced to allow service by email, providing that the solicitor of record provided an acceptance of service by return email. Unlike service by fax, the date at which service was deemed to take effect was based on when the email *acceptance* was received, rather than the date the original email serving

¹ R.R.O 1990, Regulation 194, r 16.05 (1) (d) and (3) set out in Appendix A below.

² O Reg 536/96 s 3. Set out in Appendix B below.



the documents was sent. Where such an acceptance email was received between 5 p.m. and midnight, service of the document was deemed to have taken place the following day.³

Finally, on December 31, 2002 both these subrules were amended such that service by fax or receipt of an email of acceptance between 4 p.m. (rather than 5 p.m.), and midnight would result in service being deemed to occur the following day.⁴ No other substantial changes have been made since that time.

C. Concerns with Rule 16.05

There are at least two major problems with the current version of Rule 16.05.

(i) Problem #1

The requirement found in subrule 16.05 (3.1) that documents longer than 16 pages can only be faxed after 4 p.m. and thus will be deemed received the following day is needless and burdensome. It in effect requires lawyers to serve their materials a day in advance. While longer documents can be served with the consent of the lawyer being served, obtaining such consent is impractical.

The Rules Committee was concerned with lawyers having their fax machines tied up during business hours. Given the state of today's robust communication technologies and the increased reliance on email, this should no longer be a concern.

(ii) Problem #2

According to subrule 16.05 (1) (f), service by email will only be effective upon receipt of an email accepting service and confirming the date of service. Further, if this acceptance email is received between 4 p.m. and 12 a.m., service will be deemed to take effect the next day. This subrule leaves the serving lawyer entirely in the hands of the lawyer being served. The receiving lawyer may not accept service in a timely fashion or at all.

In the case of both fax and service by regular lettermail, we do not require acceptance from the receiver despite a relative lack of certainty regarding whether the document has reached its intended recipient. Given its standardization of file formats and the stability of modern email services, email is as reliable as faxes and regular lettermail. Rule 16.05 should be amended to allow for service via email with either the consent of the parties or upon an order of the court on such terms as are just.

D. Judicial Treatment of Rule 16.05 and Examples from Other Jurisdictions in Canada

There is little in the way of case law or literature regarding the portions of Rule 16.05 at issue in this memorandum.⁵ However, there is support for reforms proposed herein.

³ O Reg 24/00 s 4. Set out in Appendix C below.

⁴ O Reg 206/02 s 3. Set out in Appendix D below.

⁵ *Jollette v Jollette*, 2002 CanLII 2746, 2002 CarswellOnt 2483 (ONSC) [*"Jollette"*]. In that case, Del Frate J. states that "Rule 16 adopts the reality of today's advances in communication and methods of doing business" and further that "[t]he purpose of these Rules is to expedite in a reasonable and economic manner the conveyance of



First, it is common in the context of proceedings under the *Companies' Creditors Arrangement Act* for service rules to be flexible.⁶ In *Muscletech Research*, Ground J. ordered that letters, notices or other documents could be delivered by the Monitor by email with delivery effective on the day of emailing, unless after 5 p.m. with no requirement for an acceptance email.⁷

Second, there is precedent elsewhere in Canada. Nova Scotia allows for email service of documents without requiring an acceptance email.⁸ In Quebec, service via fax is not limited to 16 pages, though it is subject to a 4:30 p.m. cut-off.⁹ Finally, in British Columbia service by fax has a 30 page limit and a 5 p.m. cut off while service via email takes effect without an acceptance email.¹⁰

E. Proposed Reforms

Having regard to the foregoing, the proposed reforms to subrules 16.05(1)(f), and 16.05(3.1) along with a consequential change to rule 16.09(6) are set out below:

documentation between the parties.” His Honour does not, however, justify this statement or engage with the rationale behind the rules as they stand. Specifically, there is no discussion of the basis behind the “16 page rule” or why the deeming provision for transmissions between 5 p.m. (now 4 p.m.) and midnight exists.; Victoria Starr & Zehra Daudi “Electronic (E-mail and Web Based) Service” (2010) 21 OBA Newsletter 2.

⁶ In particular, we note the newly introduced Toronto E-Service Protocol for insolvency proceedings pending before the Ontario Superior Court Commercial List. The introduction to the Protocol states that the proceedings at issue involve “real time litigation” and require “efficient, effective and cost efficient methods of providing service and notice to stakeholders”; however, the methods provided for by the Rules are not always efficient, “nor do they take advantage of the most current technologies”. To that end, the Protocol allows for service via email in accordance with the rules it sets out. Notably, the requirement for an acceptance email is not a part of the Protocol. For more information, see: <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>

⁷ *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 2571.

⁸ Nova Scotia, *Nova Scotia Civil Procedure Rules*, r 31.16(2).

⁹ Arts 140.1 and 142, CCP.

¹⁰ British Columbia, *Supreme Court Civil Rules*, r 4-2 (2),(5) and (6).



SERVICE ON LAWYER OF RECORD

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

...

(d) by faxing a copy to the lawyer's office in accordance with subrules (3), ~~(3.1)~~ and (3.2) but, where service is made under this clause between 4 p.m. and midnight, it shall be deemed to have been made on the following day;

...

(f) on the consent of the parties, by e-mailing a copy to the lawyer's office in accordance with subrule (4), ~~but service under this rule is effective only if the lawyer of record provides by e-mail an acceptance of service and the date of the acceptance,~~ and where the email is sent between 4 p.m. and midnight, service shall be deemed to have been made on the following day. If the parties do not consent, the court may, on motion, make an order directing service by email of a document on the lawyer of record of a party on such terms as are just.

Fax of certain documents

~~(3.1) A document of 16 pages or more inclusive of the cover page and the backsheet may be served by fax only between 4 p.m. and 8 a.m. the following day, unless the party to be served gives prior consent.~~

(3.2) A motion record, application record, trial record, appeal book and compendium or book of authorities may not be served by fax at any time unless the party to be served gives prior consent.

PROOF OF SERVICE

16.09 (6) Service of a document under clause 16.05(1)(f) (e-mail) may be proved by a certificate of service of the person who served the document stating that he or she,

(a) served the document by e-mailing a copy in accordance with subrule (4) and ~~received by e-mail an acceptance of service, with the date and time of the acceptance;~~ with either the consent of the party served or an order of the court;

(b) has sworn an affidavit of service containing the particulars set out in the certificate of service;

(c) has kept the affidavit of service; and

(d) will, on the request of the court or a party, produce the affidavit of service.



APPENDIX A

Rules of Civil Procedure R.R.O. 1990, Regulation 194

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

...

(d) by telephone transmission of a facsimile of the document in accordance with subrule (3).

...

(3) A document that is served by telephone transmission shall include a cover page indicating,

(a) the sender's name, address and telephone number;

(b) the name of solicitor to be served;

(c) the date and time of transmission;

(d) the total number of pages transmitted including the cover page;

(e) the telephone number from which the document is transmitted; and

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



APPENDIX B

Ontario Regulation 536/96

3. (1) Clause 16.05 (1) (d) of the Regulation is revoked and the following substituted:

(d) by faxing a copy to the solicitor's office in accordance with subrules (3), (3.1) and (3.2) but, where service is made under this clause between 5 p.m. and midnight, it shall be deemed to have been made on the following day; or

(2) Subrules 16.05 (3), (3.1) and (3.2) of the Regulation are revoked and the following substituted:

(3) A document that is served by fax shall include a cover page indicating,

(a) the sender's name, address and telephone number;

(b) the name of the solicitor to be served;

(c) the date and time of transmission;

(d) the total number of pages transmitted, including the cover page;

(e) the fax number of the sender; and

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

Fax of certain Documents

(3.1) A document of 16 pages or more inclusive of the cover page and the backsheets may be served by fax only between 5 p.m. and 8 a.m. the following day, unless the party to be served gives prior consent.

(3.2) A motion record, application record, trial record, appeal book or book of authorities may not be served by fax at any time unless the party to be served gives prior consent.



APPENDIX C

Ontario Regulation 24/00

4 (1) Subrule 16.05 (1) of the Regulation is amended by striking out “or” at the end of clause (d), by adding “or” at the end of clause (e) and by adding the following clause:

- (f) by emailing a copy to the solicitor’s office in accordance with subrule (4), but service under this rule is effective only if the solicitor of record provides by e-mail an acceptance of service and the date of the acceptance, and where the e-mail acceptance is received between 5 p.m. and midnight, service shall be deemed to have been made the following day.

(2) Rule 16.05 of the Regulation is amended by adding the following subrule:

E-mail, Required Information

(4) The e-mail message to which a document served under clause (1) (f) is attached shall include,

- (a) the sender’s name, address, telephone number, fax number and e-mail address
- (b) the date and time of the transmission; and
- (c) the name and telephone number of a person to contact in the event of transmission problems.



APPENDIX D

Ontario Regulation 206/02

3. (1) Clause 16.05 (1) (d) of the Regulation is amended by striking out “between 5 p.m. and midnight” and substituting “between 4 p.m. and midnight”

(2) Clause 16.05 (1) (e) of the Regulations is amended by striking out “between 5 p.m. and midnight” and substituting “between 4 p.m. and midnight”

(3) Clause 16.05 (1) (f) of the Regulations is amended by striking out “between 5 p.m. and midnight” and substituting “between 4 p.m. and midnight”