

Service by Facebook: Canadian courts adapting to new technologies

Courts and law have often been criticized for being slow moving and not keeping up with new technologies, however, Canadian courts, in the recent past, have shown a resolve to keep up with, or at least not fall too far behind, technology particularly in the area of serving legal process. While the rules of court in all Canadian provinces, including British Columbia, normally require personal service of legal process on the other party, in some cases that cannot be achieved for a variety of reasons including inability to find the party or repeated and deliberate attempts by a party to evade service. In such cases, there is, in the rules of court of all Canadian provinces, available a process to use an alternative method to serve a party called “substitutional service”. A party must apply to court for an order to serve another substitutionally. In such an application, the party seeking a substitutional service order must file an affidavit showing what attempts were made to serve the other party. The affidavit must contain evidence of the steps a party took to serve another; if a process server was hired; what is the last known address of the party sought to be served; any information of the whereabouts of the party sought to be served; any attempts by the party sought to be served to avoid service and the like. The court will need to be convinced that the applicant made a diligent effort to serve the party before it will grant an order for alternative service.

Some of the traditional methods of serving legal process substitutionally ordered by courts have included publication in the local newspaper; leaving documents at the party’s most usual residence with an adult person; taping the documents on the door of the last known residence of the party; faxing the documents at the last known fax number of the party; leaving it with a family member or a friend of the party who could bring the documents to the attention of the party; and the like.

However, with the commercialization of internet in the mid-1990s and the creation of social networking sites such as facebook, twitter, LinkedIn and MySpace, it was a matter of time before courts adapted to technology and took notice of the internet medium and social networking sites as an alternate source for one to serve a party, otherwise difficult to find, with legal process. In this regard, Australia can be credited with being one of the pioneers in embracing service by facebook with the decision of the Australian Capital Territory Supreme Court in *MKM Capital Property Limited v Corbo and Poyser* (No. SC 608 of 2008). In this case, a mortgage lender, MKM, obtained a default judgment against two defendants and after failing to serve the defendants personally with the default judgment sought an order to serve them substitutionally by facebook. Counsel for MKM was able to show personally identifiable information on the defendants’ facebook profiles including their birthdates, friends and email addresses and that the defendants were friends on facebook. The Court, satisfied that the facebook profiles or accounts

belonged to the defendants, ordered substituted service of the default judgment by a private email message through computer to the defendants' respective facebook pages.

The Canadian, New Zealand¹ and English² courts shortly followed suit. In the case of Canada, in *Knott v. Sutherland*³, the Alberta Court of Queen's Bench ordered substitutional service of an amended statement of claim by sending it to the profile of the defendant on facebook together with a publication of a notice of the action in a local daily newspaper and a copy of the action sent to the human resources department of the defendant's last known employer. Unfortunately, in the brief reported decision, the Court did not give reasons explaining the order.

In British Columbia, in *101 West Hastings Residential Limited Partnership v. Ursula Maria Schweighofer*⁴, Counsel for the Plaintiff, Mr. Gareth Carline of our firm, Kornfeld Mackoff Silber LLP, represented the Plaintiff who was suing for repayment of monies it had been required to pay to Revenue Canada on the Defendant's behalf. The Defendant's former counsel advised that the Defendant was a non-resident and did not give her contact information. A diligent search for the Defendant's residential address and telephone listing within the province returned no leads. However, the Plaintiff's counsel who had the email address of the defendant and had been corresponding with the husband via email sought to find out from the husband whether the Defendant would accept service via email at his email address and the husband responded in the negative. At such point, counsel conducted an internet search of the defendant's name and discovered profiles of the defendant on two social network sites, namely, on LinkedIn and on facebook. Both profiles had the defendant's name and the same geographical location, Nigeria. On an application to serve the defendant substitutionally, the Court allowed the Plaintiff to serve the defendant substitutionally via her husband's email and the former counsel's office, as well as by sending a message to her of the claim via her LinkedIn or facebook profile (although service via the latter mode was not specifically sought).

While courts are embracing technology in ordering substitutional service, there are some concerns with substitutional service using social networking sites. As with traditional alternatives to personal service, there is no guarantee that the party sought to be served will be served. In the case of social networking site accounts, a person registering for a social networking profile may not be who he or she claims to be. It is possible that the registrant on the site may be impersonating another person or may have a name identical to the party you are intending to serve. Another concern is that the party holding the social media accounts maybe an infrequent user of the accounts and may not receive notice of legal process in a timely fashion. However, similar concerns can be identified in the case of traditional methods of substitutional service employed in the bricks and mortar world. In the end result, whether in the ethernet world or in the bricks and mortar world, courts must consider all such concerns and weigh all available evidence in determining the probability or likelihood of achieving service on a party using the method ordered.



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¹ *Axe Market Gardens v Craig Axe* (CIV: 2008-485-267)

² *Blaney v. Persons Unknown* (unreported)

³ [2009] A.J. No. 1539

⁴ Vancouver Registry No. M114652