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#YouGotServed – Canadian Courts Confirm the Use of Social Media for Alternative Service

As of mid 2014, an estimated 15.8 million Canadians still read newspaper content weekly and almost 10 million of those exclusively choose the print edition.[1] Alternative service by print advertisement is a convention that Courts are comfortable with, and with almost 10 million unique weekly readers, there's no mystery as to why. Publication of notice in the local newspaper's print edition is an enduring staple of the alternative service toolbox.

Recently, Courts have started upgrading that toolbox, and are increasingly turning to new, and potentially more effective alternative service methods. While print newspapers still boast substantial readership stats, those stats pale in comparison with the usage and adoption of social media platforms. An estimated 24 million Canadians visit social media sites each year, and Facebook alone is reported to have 19 million Canadian members that log on at least once per month.[2]

Civil procedure rules regarding alternative service differ between the provinces. Some jurisdictions have retained language expressly requiring applicants to establish that a proposed method of alternative service is likely to provide the intended party with actual notice of the document at issue. However, even where this requirement is not an express element of the applicable court rule,

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[1] *http://nadbank.com/en/nadbank-news/latest-study-news*.

[2] *http://www.cira.ca/factbook/2014/the-canadian-internet.html*.

the exercise of serving documents by alternative means is still guided by the objective of bringing those documents to the attention of the recipient. Thus, in an era where 87% of Canadian households are connected to the internet and 60% of Canadians are accessing it through a mobile device, it's easy to see why Facebook, Twitter and other electronic communication platforms increasingly appear attractive as mechanisms through which to reliably provide notice of documents and proceedings.[3]

By their nature, alternative service orders are rarely opposed. Few are accompanied by written reasons, and fewer still are reported. As a result, the reported jurisprudence doesn't necessarily paint a complete picture of the frequency with which courts permit alternative service through new and novel means. Mainstream platforms such as Facebook are likely more frequently the subject of alternative service orders than the case law would otherwise suggest. However, even the reported case law is starting to create a trail of alternative service methods that break from convention and acknowledge the reality of a world where our eyes spend more time focused on an LCD screen than on printed paper, and where we pay more attention to an inbox than to a mailbox.

Message Boards

In a 2013 decision *Burke v John Doe*,[4] former hockey GM Brian Burke sought an order for substituted service on seven defendants in a defamation action. The defendants had published defamatory statements on several message boards, and Burke proposed serving those defendants via private notification sent to each defendant's message board account. The content of the private message would contain the contact information for Burke's legal counsel and a means to access the notice of civil claim and substituted service order.

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[3] *http://www.cira.ca/factbook/2014/the-canadian-internet.html*.

[4] *Burke v John Doe*, 2013 BCSC 964.

The court granted the alternative service order, holding that personal service on the defendants was impracticable since there was no cost-effective means of discovering their location. The court noted that even if their email addresses were obtained through internet service provider records, there was no guarantee that those addresses would be current. On the other hand, there was evidence that the defendants were actively using the message boards on a regular basis so it was reasonably likely that the notice of the proceedings would come to their attention if sent by private message to their message board accounts.

Twitter

In a recent proceeding before the Court of Queen's Bench of Manitoba, the Honourable Justice Schulman directed a party to take all reasonable steps to bring an Order of the Court to the attention of a number of parties. In response to that direction, all but four of the listed parties were successfully personally served. It then became necessary to serve those remaining parties by substituted service.

Pursuant to Manitoba's substituted service rules, where it appears impractical for any reason to effect prompt service of a document that must be served personally, the court may make an order for substituted service or an order dispensing with service entirely. An application was made and granted (in an unreported decision issued August 8, 2014)[5] authorizing alternative service by a number of methods, including notice via Twitter. The application was supported by affidavit evidence showing frequent and recent usage of the Twitter account by its owner, and identifying elements that tended to establish the party to be served as the Twitter account's operator.

Constrained by Twitter's 140 character message limit, the alternative service order stipulated the content of the notice, which was confined to a brief alert indicating that the serving party had been directed to

[5] *Larry Philip Fontaine et al v. The Attorney General of Canada et al,* (8 August 2014), Winnipeg MBQB CI05-01-43585 (MBQB).

bring the relevant court document to the attention of the recipient, and providing an email address that the party was directed to contact.

Facebook

In a 2012 family law decision[6] in *P(JR) v D(D)*, the New Brunswick Court of Queen's Bench found that substituted service was retroactively effected through a series of Facebook private message exchanges between the plaintiffs and the defendant in a custody application. The applicants had been unable to locate the Defendant, who was allegedly attempting to keep his whereabouts hidden from the sex offender registry. The applicants were found to have made all reasonable attempts to personally serve the defendant. The court was satisfied that evidence in the form of Facebook message threads established that the defendant was well aware of the custody proceedings. The court concluded that service had been effected on the date that the Facebook exchanges took place.

In *Boivin & Associates v Scott*,[7] a 2011 decision from the Court of Quebec, a plaintiff was able to substitutionally serve a defendant over Facebook after repeated failed service attempts using traditional methods. The plaintiff was unable to locate the defendant, who had moved from her last known address in Florida, but was able to find the defendant's Facebook profile. The plaintiff submitted a copy of the defendant's Facebook page, as well as evidence showing that the profile page was in use and belonged to the defendant. The court concluded that the defendant's Facebook account was her only known contact information and that it would be a direct and practical way to notify her of the proceedings.

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[6] *P(JR) v D(D)*, 2012 NBQB 23.

[7] *Boivin & Associates v Scott*, 2011 QCCQ 10324.

In the 2009 case *Knott Estate v Sutherland*,[8] the Alberta Court of Queen's Bench dealt with the use of Facebook as a means of substitutional service in a medical negligence action. The court allowed the plaintiffs to serve the defendant, a resident of the University of Alberta hospital, by sending a notice of the action to the Facebook profile of the defendant, in addition to posting it in the Edmonton Journal and providing a copy to the hospital.

In 2012, the Alberta Court of Queen's Bench again allowed a plaintiff to serve a defendant using Facebook in *128005 Alberta Ltd v Zaghlou*.[9] The plaintiff had obtained a default judgment against the defendant in an action for debt and sought to enforce the judgment by commencing a second action for fraudulent conveyance. The court granted the plaintiff an order for service ex juris and substitutional service, allowing him to serve the defendant through both email and via Facebook private messaging.

The Takeaway - Seeking Service Via Social Media

As is always the case with substitutional service, counsel should demonstrate that traditional methods of service have been exhausted before turning to social media. A court may be more inclined to allow service via Facebook and Twitter where there is evidence that the party being served uses their account regularly, or where there is evidence of interaction between the parties through the social media platform. Evidence of frequent "status updates", tweets, post activity, or other use of the respective service, help demonstrate that the party is actively engaged in a particular social network platform, and is thus more likely to receive notice served through that mechanism.

It is also important to establish that the account holder on a social media platform is in fact the individual to be served. Evidence of the

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[8] *Knott Estate v Sutherland*, [2009] AJ No 1539 (Alta QB).

[9] *128005 Alberta Ltd v Zaghlou*, 2012 ABQB 10.

"friends" or followers of the user, photos and content they have posted, profile information and other identifying data are helpful in supporting an application for substituted service through social media. Finally, while Courts are beginning to show a willingness to accept service via social media as a sole method of alternative service, they may be more receptive to the use of a novel and unique forms of alternative service when accompanied on the same order by more than one method of service.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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