

**EXPLANATORY NOTES TO
ELECTRONIC CASE INFORMATION AND SERVICE PROTOCOL
DECEMBER 6, 2017**

A. INTRODUCTION

These notes are to be read in conjunction with the Electronic Case Information and Service Protocol (the "**Protocol**") developed by the subcommittee (the "**Committee**") of the Canadian Bar Association, Saskatchewan Branch, Bankruptcy & Insolvency Section, in consultation with the Bankruptcy and Insolvency Panel of the Court of Queen's Bench (Saskatchewan) (the "**Insolvency Panel**").

When undertaking revision of the Saskatchewan Template CCAA Initial Order and the Saskatchewan Template Receivership Order, the Committee thought it appropriate to survey existing practice and resources respecting the use of technology to effect service elsewhere in Canada. That survey pointed the Committee to the work done by the Commercial List Users Committee in Ontario, which was implemented by the Ontario Superior Court for the Toronto Region in 2014 by way of "The Guide Concerning Commercial List E-Service" (the "**Ontario Guide**"). The Protocol borrows heavily from the Ontario Guide, and the Committee expresses its appreciation for the extensive work undertaken in Ontario, which has proven invaluable in the development of this Protocol.

Except for those terms defined herein, capitalized terms in these notes have the definitions ascribed thereto in the Protocol.

B. BACKGROUND AND PURPOSE

The phrase "real time litigation" is frequently used to describe insolvency proceedings, which reflects the need of stakeholders and courts to expedite action to preserve and/or prevent damage to property, and the need to communicate information respecting pending proceedings, determinations made by the courts and other related information in an efficient, effective and cost-effective manner.

A practice has developed in insolvency proceedings whereby service by Email (and, though rapidly declining in importance, facsimile) is used to ensure near-instantaneous communication of pending proceedings and orders of the Court. This has been supplemented by the use of a dedicated website to provide information to those affected by proceedings and the general public.

These practices have developed, in part, because the usual methods of service provided for under *The Queen's Bench Rules* (the "**Rules**") do not always operate efficiently in such proceedings, nor do they always take advantage of the current technologies widely employed by the legal community.

While counsel, clients and the courts have generally adapted to new technologies, the result has been somewhat ad hoc, and those not practicing regularly before the Insolvency Panel are not as familiar with such proceedings and the speed with which they unfold.

The first purpose of the Protocol is to provide to those engaged in insolvency proceedings (and the bar generally) a reasonable, accessible and uniform understanding and expectation as regards the service of documents in court proceedings. The second purpose is to provide for processes which are effective in dealing with certain challenges arising in insolvency proceedings.

C. APPLICATION

The Protocol operates where incorporated in orders granted the initial stage of certain matters heard by the Insolvency Panel (as established pursuant to Civil Practice Directive CV-PD #2).

Those matters include:

1. proceedings under the *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**");

2. receivership proceedings, including proceedings under the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**"), *The Queen's Bench Act, 1998*, *The Personal Property Security Act, 1993*, and other legislation which provides for the appointment of court officers in the context of bankruptcy and insolvency proceedings;
3. proceedings under the *Winding-Up and Restructuring Act*;
4. Proceedings in relation to proposals pursuant to Division I of Part III of the BIA; and
5. any other insolvency-related proceedings, including bankruptcy and consumer proposal proceedings under the BIA where the Court determines that it would be beneficial to employ this Protocol.

The Protocol may lend itself to analogous proceedings, such as plans of arrangement under *The Business Corporations Act*, but such matters are beyond the ambit of the Committee.

D. SCOPE AND EFFECT

To meet the goals referenced above, the Protocol provides for the following:

1. a mandatory case website containing certain required information;
2. the creation and maintenance of a "Service List" with defined parameters; and
3. the service of documents by electronic mail.

The Protocol permits service upon a Service List by those who have the right to serve and file material under the Rules, an order of the Court or otherwise. This Protocol does not itself give any person the right to serve and file material. Nothing in the Protocol varies any requirements under the Rules or applicable practice directions with respect to the filing of Court Documents with the Court.

The Protocol is, of course, subject to modification by the Court as circumstances may require.

E. MECHANISMS

The Committee notes the significance of a blanket order abridging the time for service, and the responsibility which attaches to the granting of such a blanket order. Thus, while the Protocol provides for abridgment up to the time of the hearing of any matter to accommodate circumstances of extreme necessity and the service of reply material, certain principles, including the following, should govern the use of short service by counsel:

1. short service should be employed where circumstances reasonably require and:
 - (a) it is a case of urgency which requires an early hearing and resolution and serves to have the matter heard on notice while accommodating such urgency (notice of proceedings fewer than five business days in advance requiring substantial urgency); and/or
 - (b) it is required to ensure that the matter will be before a member of the Insolvency Panel (and where applicable, a justice of the Court who is familiar with the proceeding), having due regard to the subject matter and the scheduling needs of the Court.
2. Counsel should always be cognizant of the issues created by short service when seeking to get material before the Court in a timely manner.
3. As a general rule, and in particular where less than seven days notice is provided, counsel should alert the Service List as soon as a hearing date and time is set, and advise of the nature of the intended application and the time at which application materials will be forthcoming.

The availability of Email service should not be used as an excuse for failure to serve documents in a timely manner.

F. GENERAL PRINCIPLES

The following general principles inform the Protocol:

1. the service of documents and any application to abridge time prior to the adoption of the Protocol will be in accordance with the Rules;
2. Email is the default mechanism for service of Court Documents on parties who are on the Service List;
3. facsimile transmission is a legacy technology which is substantially less expeditious than email; as such, service by facsimile should be discouraged and used only where necessary; and
4. the repetitive service of the same documents is to be avoided by instead posting documents for service on the Case Website.

G. IMPLEMENTING THE PROTOCOL

The Protocol may be implemented by including the following paragraphs in a court order:

The Electronic Case Information and Service Protocol attached as Schedule * to this order (the "**Protocol**") is approved and adopted for this proceeding. Terms which are capitalized herein but otherwise not defined shall bear the respective meanings ascribed to them in the Protocol. Service of documents made in accordance with the Protocol shall be (subject to review by the Court at the time of any application) constitute valid and effective service. Applications in respect of this matter may be made upon three days notice.

A case website (the "**Case Website**") shall be established in accordance with the Protocol at the following URL: *

The Saskatchewan Template CCAA Initial Order and the Saskatchewan Template Receivership Order adopted by the Committee contemplate the implementation of the Protocol in relation to such proceedings by default. The applicable notice period with respect to any particular proceedings will be within the discretion of the Court at the time of the hearing of the application for the Initial Order.

H. SPECIFIC PROVISIONS IN THE PROTOCOL

1. The Case Website

The provisions governing the establishment and operation of the Case Website are self-explanatory. The Protocol reserves some discretion (in paragraphs 8 and 9) to the Web Host, to permit the Web Host to deny posting of material which is inappropriate for the proceeding. Where the Web Host is uncertain about whether to post a document, paragraph 10 permits the Web Host to seek guidance.

In general, the Case Website is intended to mirror the Court's file in the matter except for non-substantive documents such as affidavits of service and administrative correspondence, and documents which are subject to a sealing order (or for which a sealing order is being requested).

The posting of Books of Authorities is a matter left to the discretion of the Web Host due to their volume and the potential lack of value to the general public. As more experience is gained, it may be that counsel sending briefs for posting on the Case Website may assist in resolving this difficulty by including Hyperlinks to publicly available case law in such briefs.

The Protocol also permits the Web Host to post other relevant case-related information. For example the Web Host would be permitted, where appropriate, to post a case calendar, if this might be of assistance to those affected and the general public. In particular, a listing and notice of important dates, such as deadlines for submission of proofs of claim and claims bar dates, could be a useful addition.

Good practice by the Web Host includes appropriate backup and archive of the site material, and the maintenance of a log for tracking the posting and amendment of information on the Case Website.

The Protocol makes it clear what aspects of managing the Case Website are appropriately charged to or by the Court Officer.

2. Service List

The Service List is intended to set out the identities and contact information of those who have sufficient interest in a matter to have delivered notice that they wish to receive notification of further proceedings.

The Service List is to include those present at the initial stages of a proceeding, in person or by counsel, and those who serve the requisite notice on the Service List Keeper.

A process and forms are provided to request service by email and by facsimile. In keeping with the preference to avoid service by facsimile, those so requesting cannot include counsel, and must certify that they have no access to email. The Ontario forms for these purposes were thought to be well designed, and have been adopted with minimal changes.

Counsel have noted that once proceedings are underway, there are frequent calls from persons on the Service List expressing frustration about the volume and frequency of material received. The Protocol attempts to minimize this difficulty by providing for a warning to those who wish only to follow the progress of proceedings that they should follow generally on the Case Website, rather than seek to be placed on the Service List. For those who have not heeded that warning, or have subsequently determined that they have no real interest in further proceedings, the Protocol provides for a request to be made for removal from the Service List. The form of request is intended to make it clear to those who seek to be removed that they are waiving a right to future service in the proceedings.

The Email Address List is intended to avoid the complications which sometime arise from a small typographical error in a lengthy list of email addresses to be served, and also to avoid the problems which sometimes arise where the "reply all" function is used to serve documents.

The Protocol provides for one-off Supplementary Service Lists to accommodate single-purpose applications involving fewer interested parties than the main proceeding. Substantial latitude is granted to users here, which should be exercised with care.

3. Service by E-mail

The Protocol is aimed primarily at those who have sufficient interest in (and notice of) the proceeding to have been added to the service list.

The Protocol, of course, does not apply to the service of any document effected before its adoption. In addition, after its adoption, the Protocol relies upon the usual provisions in an Implementation Order which provide for the creation of a Creditor List from a debtor's records, and for the transmission of notice of the proceeding in accordance with long-standing practice.

Thereafter, the Protocol's preference for Email service takes effect, subject to provisions which provide for conventional service on parties who have not yet been served in the proceeding, and subject to the overriding discretion of the Court. Counsel seeking to serve someone who is not on the Service List should consider whether service and the obtaining of an acknowledgment, or some other form of compliance with the Rules of general application, is warranted.

The procedures for Email service are self-explanatory. The direction given with respect to the content of service emails is intended to create consistency and make it easy for recipients to receive the required information quickly and easily, and to identify urgent matters by reference to return date. It is preferable that all documents to be served be attached to a single Email, to avoid multiple messages and to avoid difficulty in locating served documents by the recipient. However, it is recognized that this goal cannot always be achieved.

The facsimile provisions are intended to ensure consistency of notice to those recipients.

The recommended format contains a reference to and link to the Implementation Order for the purposes of complying with the requirement that the order abridging time be served with the application.

Service by Email on the Service List is to be used for court process, and while ancillary matters may effectively benefit from usage of the list, other matters, such as informal advocacy of a party's position, fall outside the intention of the Committee.

I. PROTOCOL NOT INTENDED TO INHIBIT INNOVATION

The Protocol is intended to establish consistency and to develop a commonly understood process, and to establish a base level for timely and efficient dissemination of information. It is not intended to preclude other initiatives by a party or Court Officer which have the benefit of increasing access to information by interested parties.

J. COMMITTEE MEMBERS

The Committee consists of the following lawyers:

Jeff Lee, Q.C., Chair
Wayne Pederson
Michael Milani, Q.C.
Kim Anderson, Q.C.
David Gerecke
Janine Lavoie-Harding
Clayton Barry
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