

The Guide Concerning Commercial List E-Service

EFFECTIVE JULY 1, 2014



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This Guide applies to proceedings on the Commercial List in the Toronto Region, effective July 1, 2014. It *supersedes* all E-Service Protocols for the Commercial List in the Toronto Region, issued before July 1, 2014, which are hereby revoked.

Counsel and parties are advised to refer to the relevant Parts of the Consolidated Provincial Practice Direction, the Consolidated Practice Direction for Divisional Court Proceedings as well as any other relevant Toronto region-specific Practice Directions and Guides which are available on the Superior Court of Justice website at: <https://www.ontariocourts.ca/scj/>.

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Part I: Introduction

Proceedings on the Ontario Superior Court (Commercial List) (the “**Court**” or the “**Commercial List**”) frequently involve multiple and evolving stakeholders located nationally and internationally. These proceedings involve “real time litigation” which, by its nature, requires efficient, effective and cost efficient methods of providing service and notice to stakeholders.

The usual methods of service provided for under the *Rules of Civil Procedure* (Ontario) (the “**Rules**”) do not always operate efficiently in multi-party, multi-jurisdictional proceedings, nor do they take advantage of the most current technologies. Service provisions in Commercial List orders before the development of this guide evolved in an *ad hoc* manner without precision or specificity with respect to such fundamental terms as the “service list”.

The purpose of this Commercial List E-Service Guide (“**E-Service Guide**”) is to provide a uniform method of “substituted service”, under the Rules, that engages modern and efficient processes to effect service and give notice in certain Commercial List proceedings. In order to achieve this purpose the E-Service Guide utilizes three tools:

- a. Service of documents by electronic mail;
- b. A “service list” with defined parameters; and

- c. Mandatory websites containing defined minimum levels of information.

The E-Service Guide will be incorporated by reference in orders at the initial stages of certain Commercial List proceedings as a form of substituted service pursuant to Rule 16.04 of the Rules subject to Rule 17.05.[1] A copy of the E-Service Guide will be available on the Commercial List website at:

<https://www.ontariocourts.ca/scj/commercial-list-forms-and-model-orders/> and need not be appended to the incorporating order.

The E-Service Guide permits service upon persons on the E-Service List [2] by those who have the right to serve and file material in the proceeding under the Rules, an order of the Court or otherwise. The E-Service Guide does not itself give any person the right to serve and file material. To that end, the E-Service Guide is not meant to alter or replace requirements under the Rules with respect to such matters as the delivery of Notices of Appearance. The E-Service Guide is subject to modification by the Court in appropriate cases.

Nothing in this E-Service Guide varies any requirements under the Rules or applicable practice directions with respect to the filing of Court Documents with the Court.

The E-Service Guide will be used in the following insolvency proceedings (collectively, the “**Insolvency Proceedings**”) pending before the Commercial List:

- a. Proceedings under the *Companies’ Creditors Arrangement Act (Canada)* (“**CCAA**”);
- b. Receivership proceedings, including proceedings under the *Bankruptcy and Insolvency Act (Canada)* (“BIA”), the *Courts of Justice Act* (Ontario), the *Securities Act* (Ontario) and other legislation which provides for the appointment of court officers;
- c. Proceedings under the *Winding-Up and Restructuring Act*;
- d. Division I proposal proceedings under the BIA; and
- e. Any other insolvency-related proceedings, including bankruptcy proceedings under the BIA or other Commercial List proceedings, where the Court determines that it would be beneficial to use the E-Service Guide.[3]

In addition to the Insolvency Proceedings, the E-Service Guide may be used in large or complex arrangement, re-organization or similar court proceedings under the *Business Corporations Act* (Canada) and the *Business Corporations Act* (Ontario) where the Court determines that its use would be beneficial (“**Reorganization Proceedings**”).[4] Insolvency Proceedings and Reorganization Proceedings are referred to collectively as “**Commercial List Proceedings**”.

Part II: Service by Email

1. Electronic mail ("**Email**") will be the required mechanism to serve documents to be filed in court ("**Court Documents**") in Commercial List Proceedings. If service by Email is not practicable Court Documents may be served as provided in the Rules.
2. Court Documents are documents that must be served under the Rules with respect to motions or applications in Commercial List Proceedings such as notices of motion, notices of application, affidavits, facta, Court Officer [5] reports and orders.
3. Service by Email on the E-Service List shall be used only for the following purposes:
 - a. Service of Court Documents;
 - b. Delivery of correspondence containing information with respect to motions or applications such as the location or timing of a Commercial List Proceeding or other directions with respect to a proceeding; and
 - c. Circulation of material related to motions or applications such as draft orders.
4. Email sent to the E-Service List shall not be used in order to provide a party's general comments on the proceedings or to advocate positions or for any other use not specifically provided for herein.
5. The moving party in a Commercial List Proceeding shall seek Court adoption of the E-Service Guide in the order initiating the proceeding (or as soon as practicable thereafter). The following provision shall be included in such order unless varied by the Court:

Substituted Service and Case Website [6]

THIS COURT ORDERS THAT the E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: <https://www.ontariocourts.ca/scj/commercial-list-forms-and-model-orders/>) shall be valid and effective service. Subject to Rule 17.05 [7] this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL '<@>'. '

6. Except as otherwise provided herein, Email service is a sufficient mode of service of Court Documents without duplicating service by facsimile, hard copy delivery or other method of service.
7. Court Documents should be served by Email by way of HTML link or PDF files. If the party serving the Court Document can create an HTML link to the Court Document prior to serving the Court Document, service of such document by PDF file shall not be necessary. The HTML link must be a link directly to the document being served.[8]
8. To the extent practicable, Court Documents shall be in a format which is compliant with the Guide Concerning e-Delivery.
9. Where a party is serving more than one document by Email of HTML links, the Email shall specify each document being served and shall include a separate HTML link for each document being served.
10. If a Court Document is being served by way of an Email of a PDF file, the party serving the Court Document shall be cognizant of the size of the file and send the Court Document in multiple Emails if the PDF file would appear to be too large to serve in a single Email.
11. If the party serving the Court Document by Email receives notification of a transmission failure, the party serving the Court Document shall make reasonable efforts to ensure that successful Email transmission of the Court Document occurs or that the Email comes to the attention of the intended recipient or his or her firm.
[9]
12. Any Court Document served by Email should clearly state in the subject line of the Email: (i) notification that a Court Document is being served; (ii) a recognizable short form name of the Commercial List Proceeding; (iii) the nature of the proceeding; and (iv) the nature of the Court Document.[10] The body of the Email should contain a description of the party serving the Court Document, a brief description of the nature of the Court Document being served, the date of the proceeding and any other specific information with respect to the proceeding such as, for example, a specific commencement time or court location if known.
13. In accordance with Rule 3.01(1)(d), a Court Document served by Email before 4:00 p.m. shall be deemed to be received that day and Court Documents served after 4:00 p.m. or at any time on a holiday shall be deemed to be received on the next day that is not a holiday.
14. Each party serving a Court Document in a Commercial List Proceeding is responsible for complying with the E-Service Guide. Nothing herein, however, is intended to change the substantive law about who is required to be served with materials in respect of any particular motion or proceeding brought within a Commercial List Proceeding.

15. Even though a Court Document has been served in accordance with this E-Service Guide, a person may show that the Court Document:
 - a. did not come to the person's notice;
 - b. came to the person's notice later than when it was served or effectively served, or
 - c. was incomplete or illegible.
16. Each party serving a Court Document by Email shall prepare an affidavit of service containing the particulars of the service including the E-Service List served, the Email addresses to which Court Documents were sent and the time of the Emailing. A copy of the affidavit of service shall be filed with the Court.

Part III: The E-Service List

17. The E-Service List in a Commercial List Proceeding ("E-Service List") is a mechanism to facilitate service of Court Documents on stakeholders who should be served with Court Documents ("Stakeholders"). Stakeholders include a corporation, body corporate, partnership or individual that has a legal interest in the Commercial List Proceeding. The E-Service List is not intended as a mechanism to generally disseminate information with respect to the status of a Commercial List Proceeding.
18. The E-Service List shall list the names, contact coordinates, including Email addresses, of Stakeholders or their counsel, who may be served by Email in accordance with Part III hereof. Inclusion of a party on the E-Service List allows effective service of Court Documents on such party by Email.
19. After the order is issued authorizing the use of the E-Service Guide in a Commercial List Proceeding, counsel for the party initiating the proceeding, or the appointed Court Officer, if appropriate, (the "**E-Service List Keeper**") shall prepare the initial E-Service List containing the names and e-mail addresses of Stakeholders upon whom service is to be effected by Email.
20. The E-Service List Keeper shall use its best efforts to ensure that the Email address of a Stakeholder is correct and will result in an effective transmission of Court Documents to the intended recipient when initially placed on the E-Service List. Stakeholders on the E-Service List shall notify the E-Service List Keeper of any subsequent change of their Email address.

21. The E-Service List Keeper shall send an Email to each proposed Stakeholder identifying themselves as the E-Service List Keeper and advising that: (i) the proposed Stakeholder has been placed upon the E-Service List, (ii) Court Documents will be validly served upon the proposed Stakeholder by Email; and (iii) that any Stakeholder on the E-Service List may serve Court Documents on any other Stakeholder on the E-Service List in accordance with this E-Service Guide.
22. During the course of the Commercial List Proceeding, the E-Service List Keeper shall add Stakeholders to the E-Service List from time to time as required subject to the procedure set out in paragraph 21.
23. The E-Service List must include the following parties:
 - a. Counsel for the applicant/moving party in the Commercial List Proceeding;
 - b. The Court Officer appointed in the Commercial List Proceeding and counsel for the Court Officer;
 - c. Counsel for any party that has delivered a Notice of Appearance under the Rules from time to time;
 - d. Any party or counsel to any party who should be served with Court Documents in accordance with the Rules and the practice in the Commercial List; and
 - e. Any Stakeholder or counsel to a Stakeholder who has filed a Request for Electronic Service (“**RES**”).[11]
24. Stakeholders who wish to be placed on the E-Service List in order to receive service of Court Documents in a timely and efficient manner shall Email to the E-Service List Keeper a duly completed RES in the form attached as Schedule “A” hereto [12].
25. If a Stakeholder on the E-Service List no longer has an ongoing legal interest in a Commercial List Proceeding, that Stakeholder may request that the E-Service List Keeper delete that Stakeholder from the E-Service List.
26. Those persons who are interested in monitoring a Commercial List Proceeding but are not required to be served with Court Documents in accordance with the Rules or the practice in the Commercial List are not to be placed on the E-Service List. Such parties should monitor the Commercial List Proceeding by accessing the Case Website.[13]
27. A lawyer who files an RES on behalf of a client must identify such client. Lawyers receiving E-Service of Court Documents on behalf of clients must be properly accredited lawyers within the jurisdiction in which they practice. By delivery of such RES, the lawyer warrants his or her authority to receive service on behalf of his/her client.

28. In addition to the E-Service List referred to in paragraph 18 hereof, the E-Service List Keeper shall create and maintain a copyable Word document containing up to date Email addresses of the Stakeholders on the E-Service List (the “**Address List**”). The purpose of the Address List is to allow Stakeholders on the Service List to copy and paste the Email addresses of the current Stakeholders on the E-Service List into Emails serving Court Documents. This process is designed to avoid E-Service of Court Documents using out of date or inaccurate E-Service Lists. The practice of serving Court Documents by “replying to all” on a previous Email is discouraged. The E-Service List Keeper shall provide a current copy of the Address List to the WebHost [14] each time the list is updated, as Stakeholders are added or removed.
29. Any party wishing to serve a Court Document in a Commercial List Proceeding shall use the then current copy of the Address List posted on the Case Website to serve the Court Documents. If possible, the serving party shall make enquiries of the E-Service List Keeper to determine if the E-Service List Keeper is aware of parties to be added to the Address List who have not yet been added.
30. During the course of a Commercial List Proceeding, certain motions or applications require service of Court Documents on respondents with an interest in that particular motion or application only; for example, service on lien claimants with an interest only on specific property with respect to a sale approval and vesting order. In such circumstances, the party bringing the motion or application shall prepare a Supplementary E-Service List listing the names and Email addresses of the “one time” respondents that the moving party wishes to serve by Email. The cover Email shall contain the information designated in paragraph 12 and 21 hereof. The affidavit of service with respect to that motion shall include the Supplementary E-Service List.
31. The E-Service List Keeper shall use its best efforts to maintain the E-Service List current and accurate. In addition to any other protection that may be available to it by statute or Court order, the E-Service List Keeper shall incur no liability in carrying out the provisions of this E-Service Guide and, in particular, with respect to the creation or maintenance of the E-Service List, except for any gross negligence or wilful misconduct on its part.

Part IV: The Case Website

32. The case website hereinafter described (the “**Case Website**”) will be established for the purpose of:
 - a. Creating a comprehensive and current record of Commercial List Proceedings;

- b. Allowing easy and inexpensive access to the record of proceedings to Stakeholders involved in Commercial List Proceedings and to parties with a potential interest in the proceedings;
 - c. Providing a mechanism to facilitate service of Court Documents by Email with HTML links to particular Court Documents; and
 - d. Provide a mechanism to facilitate the dissemination of notices and information to larger groups of interested parties such as employees, retirees or general unsecured creditors.
- 33. The Case Website shall be hosted by the Court Officer appointed in the Insolvency Proceeding or by counsel to the applicant in Reorganization Proceedings (the “**WebHost**”) or as the Court may order.
- 34. The Case Website, or a link to the Case Website, shall be located on the WebHost’s website and shall be prominently identified to ensure easy public access to the Case Website and the Court Documents posted thereon. The Case Website shall be specifically devoted to the posting, organization, storage and display of electronic versions of all Court Documents delivered in a Commercial List Proceeding.
- 35. The Case Website shall be organized in a manner that facilitates the ability of any interested party to easily locate Court Documents delivered in the Commercial List Proceedings and other documentation relevant to the Commercial List Proceedings such as proof of claim forms and creditor meeting documentation.
- 36. The WebHost shall post the following categories of documents, as served or to be served:
 - a. Notices of application/notices of motion;
 - b. All affidavits, including exhibits, and other material filed by an applicant/moving party with respect to an application/motion;
 - c. All responding affidavits, including exhibits, and other material delivered in response to the application or motion by all respondents;
 - d. All facts and written arguments delivered by any party to an application or to a motion;
 - e. Books of authorities;
 - f. All court reports filed by Court Officers;
 - g. All Court Orders, Reasons for Decision and Endorsements;
 - h. The current version of the E-Service List and Address List;
 - i. The name and Email address of the E-Service List Keeper; and

- j. Any document that requires dissemination to interested parties, such as proof of claim forms, notices of creditor meetings, plan disclosure statements, plans of reorganization and voting letters as requested by the restructuring debtor or the Court Officer.

If the WebHost is uncertain whether a document should be posted on the Case Website as a result of its content, the WebHost may seek directions from the Court at a 9:30 appointment.

- 37. This list of information to be posted to the Case Website is not meant to be an exhaustive list. The WebHost may post other case-related information to the Case Website in its discretion. In the case of a Monitor under the CCAA, nothing in this E-Service Guide shall affect any requirements set out in the CCAA or the regulations thereunder with respect to the posting of documents to a website by the Monitor.
- 38. Documents that have been sealed by Court order or documents in respect of which sealing orders are being requested shall not be posted on the Case Website.
- 39. Any party intending to bring a motion or application in a Commercial List Proceeding shall, if reasonably possible, provide an electronic copy of the motion or application record to the WebHost for posting on the Case Website prior to service. If the motion or application record has been posted on the Case Website, the moving party or applicant may serve the proceeding by Email using a HTML link to the Case Website. Where time does not permit the prior posting of motion or application records on the Case Website, the applicant or moving party shall serve the Court Documents on the E-Service List by Email of a PDF or by HTML link in accordance with paragraph 7.
- 40. Counsel shall send an electronic copy of Court Documents to the WebHost at the time of service of the Court Documents on the E-Service List.
- 41. The WebHost shall use its best efforts to post documents provided to it by counsel in PDF format on the Case Website as soon as practicable.
- 42. The WebHost shall maintain the Case Website for a period of at least six months after the earlier of completion of the Commercial List Proceeding or the discharge of the WebHost if a Court Officer.
- 43. To the extent practicable the WebHost shall post links to foreign proceedings related to the Commercial List Proceedings on the Case Website.
- 44. The WebHost is entitled to charge for the time spent maintaining the Case Website at the usual hourly rates charged by its staff. No additional charges or fees may be claimed with respect to the establishment and maintenance of the Case Website.

45. The WebHost shall use its best efforts to maintain the Case Website current and complete. In addition to any other protection that may be available to the WebHost by statute or Court order, the WebHost shall incur no liability or obligation in carrying out the provisions of this E-Service Guide and, in particular, with respect to the creation and maintenance of the Case Website, except for any gross negligence or wilful misconduct on its part.

SCHEDULE "A"

REQUEST FOR ELECTRONIC SERVICE ("RES")

Please refer to important notes below

In the Matter of the	XYZ Company Ltd (the "Debtor")
<input type="checkbox"/> CCAA <input type="checkbox"/> Receivership <input type="checkbox"/> BIA Proposal	<http://www.caseurl.com>
<input type="checkbox"/> Other _____ of:	
Legal Counsel to Stakeholder listed below: (please provide firm name, lawyer's name, address and email address) Please indicate your preference (by checking applicable box below): <input type="checkbox"/> Serve counsel only <input type="checkbox"/> Serve counsel & Stakeholder listed below	<LawfirmLLP> <Lawyer name> <Address line 1> <Address line 2> <email address>
Name of Stakeholder requesting E-Service: (please provide full legal name, address, email address and describe Stakeholder's legal relationship to the Debtor)	ABC Company Inc. <Address line 1> <Address line 2> <email address>
Date:	< Insert current date>

I acknowledge having read the Ontario Superior Court of Justice Commercial List E-Service Guide. I hereby request to be placed on the E-Service List. By so doing, I agree as a Stakeholder or as counsel to a Stakeholder that the Stakeholder accepts service by electronic means in this case and will be bound by that service:

Stakeholder/ Counsel to Stakeholder

PLEASE RETURN SIGNED COPY OF FORM TO <insert name of E-Service List Keeper here>: <email address> | 416-xxx-xxxx

IMPORTANT NOTES

1. The E-Service List is intended to provide a timely and efficient method for effecting service in Commercial List Proceedings in accordance with the **E-Service Guide**, a copy of which has been posted on the Commercial List website at: www.ontariocourts.ca/scj/practice/practice-directions/toronto/#Commercial_List.
2. Persons interested solely in monitoring the proceedings should do so by reference to the Case Website noted above and should not request to be placed on the E-Service List.
3. By filing this RES form, you hereby agree that the Stakeholder accepts service by electronic means as the sole means of service and will be bound by that service.
4. Parties residing outside of Ontario should consider whether, based on substantive law, the delivery of an RES constitutes an attornment to the Ontario proceedings.

[1] Rule 17.05 deals with service of parties in a “contracting state” within the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965 – Special requirements may apply to such service which are outside the scope of this E-Service Guide.

[2] As defined in Part III below.

[3] CCAA proceedings involve, by definition, cases with more than \$5 million of debt. No debt level criteria have been provided for other Insolvency Proceedings that may take advantage of the E-Service Guide – though the E-Service Guide, and in particular, the Case Website, may be inappropriate for smaller cases.

[4] Before seeking an order incorporating the E-Service Guide in Reorganization Proceedings, counsel should ensure that their firm has the capability to host the Case Website or that other suitable arrangements are made for the hosting of the site.

[5] Court Officers include Monitors, Receivers, Information Officers, Interim Receivers, Trustees in Bankruptcy, Proposal Trustees and other similar persons.

[6] As defined in Part IV below.

[7] See Note 1.

[8] Where the HTML link is not to the Case Website, the party serving the Court Document shall ensure that the link remains active until the completion of the motion or proceeding relating to that Court Document.

[9] Parties who are on the E-Service List shall ensure that “out of town notifications” or other similar notifications contain the name and Email address of another member of that person’s firm or business to whom the Court Document should be sent.

[10] By way of example – E-SERVICE: Nortel – Approval of Sale of Assets – Motion Record.

[11] As defined in paragraph 24 below.

[12] Parties who do not reside in Ontario should consider whether, based upon the substantive law, the delivery of an RES constitutes attornment to the Ontario proceeding.

[13] As defined in Part IV below

[14] As defined in Part IV below.