



IMPORTANT CHANGES TO SERVICE UNDER RULE 74

February 2023 - By Suzana Popovic-Montag

There are two noteworthy changes to service rules under the *Rules of Civil Procedure*,¹ effective January 30, 2023, that could impact the practice of wills and estates lawyers. First, a new instrument for proving service called a "lawyer's certificate of service", previously available only in the context of applications for certificates of appointment of estate trustees, is being introduced. Second, the means by which an application to pass accounts may be served is expanding. Each change is addressed in further detail below.

Lawyers' Certificates of Service

After decades of relying on affidavits of service to prove that court documents have been served in compliance with the *Rules*, now a lawyer's certificate of service can also be used to prove service in Ontario. True to its name, this is a tool that only lawyers can use. Rule 16.09(1.1) expressly provides:

A lawyer may prove service of a document through a lawyer's certificate of service (Form 16B.1) if the lawyer served the document or caused it to be served and is satisfied that service was effected. O. Reg. 520/22, s. 3(1)

A lawyer's certificate of service can now be utilized under rule 74 to prove service of an application for a certificate of appointment of estate trustee,² and to prove service of an application to pass accounts,³ including an application for increased costs,⁴ in addition to proving service of other court documents.

A lawyer can complete a certificate of service even if he or she did not actually serve the pertinent court documents. As noted in rule 16.09(1.1.), a lawyer's certificate of service may be filed as long as the lawyer *caused* service to be effected. Therefore, if a lawyer directs another person (such as their assistant) to serve documents and the lawyer is satisfied that the necessary persons were served, a lawyer's certificate of service may be completed. In that situation, however, the certificate must also note who actually served the documents.

Since a lawyer's certificate of service is not an affidavit, it is not necessary for counsel to swear this instrument before another lawyer or commissioner of affidavits. Form 16B.1, the court-

¹ R.R.O. 1990, Reg 194 [*Rules*].

² *Ibid.*, r. 74.04(1)(a).

³ *Ibid.*, r. 74.18(9).

⁴ *Ibid.*, r. 74.18(11.3).

prescribed template for a lawyer's certificate of service, also requires the lawyer to confirm that they are licensed by the Law Society of Ontario.⁵

Lastly, a lawyer's certificate of service is not applicable to all probate applications. When seeking a small estate certificate under rule 74.1, service is still confirmed through Form 74.1B (Request to file an application for a small estate certificate), rather than using an affidavit of service or a lawyer's certificate of service.

It is anticipated that the option of using certificates of service to document service of court documents will make it easier for lawyers, such as sole practitioners whose staff may work remotely or part-time, to satisfy proof of service requirements.

Service of Applications to Pass Accounts

Effective January 30, 2023, it is also now possible to serve an application to pass accounts in one of three ways – via personal service, via mail or courier, or lastly, via email.⁶ Previously, an application to pass accounts could only be served in compliance with the *Rules* via regular lettermail.⁷ All three of these forms of service are already permitted under rule 74 when serving an application for a certificate of appointment of estate trustee.⁸

There are also unique rules for effecting service of an application via email that warrant noting. When serving an application to pass accounts electronically, the email must contain specific information, including (a) the sender's name, address, telephone number and email address; (b) the date and time of transmission; and (c) the name and telephone number of a person to contact in the event of a transmission problem.⁹ Further, if an email is used to serve an application, service between 4 p.m. and midnight will be deemed to have occurred the following day.¹⁰

These two changes to the *Rules* – the expanded use of a lawyer's certificate of service, and permitting applications to pass accounts to be served personally or via email, in addition to via regular mail – are significant in modernizing the rules related to service under rule 74, and ought to be embraced for their potential to make the day-to-day practice of lawyers who practice wills and estates more efficient.

⁵ Form 16B.1 is available online. See Ontario Court Services: Form 16B.1. <<https://ontariocourtforms.on.ca/static/media/uploads/courtforms/civil/16b1/rcp-e-16b-1-0822.docx>>.

⁶ *Rules*, *supra* note 1, r. 74.18(3), as amended by O.Reg. 520/22, s. 5(1), and r. 74.04(7).

⁷ *Ibid.*, r. 74.18(3), as it appeared prior to January 30, 2023.

⁸ *Ibid.*, r. 74.04(7).

⁹ *Ibid.*, r. 16.06.1(1).

¹⁰ *Ibid.*, rr. 16.01(4)(b)(iv), 16.05(1)(f).