

A Lawyer's Office is not a Drop Box for Service (Yuk-Shum v. Jiang)

Defamation | Litigation | Litigation & Dispute Resolution | Procedure | Torts

27 July 2023

Service of an originating process, like a statement of claim, or other court documents is, in general, governed by the [Rules of Civil Procedure](#). The rules prescribe what court documents must be served personally, or if personal service cannot be made, how service can be affected by an alternative to personal service. In circumstances where a party has difficulty serving court documents either personally or by an alternative to personal service, an order can be obtained for substituted service or validating service of a court document.

Some statutes also prescribe for the service or delivery of documents. In defamation law, provincial statutes may prescribe that before an action for libel can be commenced, a plaintiff must deliver a notice of libel to the defendant. These kinds of provisions typically apply to media defendants.

In Ontario, the delivery of a notice of libel is required for a libel in a newspaper or in a broadcast. [Section 5\(1\)](#) of Ontario's [Libel and Slander Act](#) provides that this notice "...shall be delivered in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant." The failure to provide a notice where required is fatal to a claim.

The statute, however, does not provide a mechanism for authorizing substituted service or for validating service of a Notice of Libel where service has been attempted by a method other than that required by [Section 5\(1\)](#) of the [Libel and Slander Act](#). This was the issue raised before the court in [Yuk-Shum v. Jiang, 2023 ONSC 4288](#).

In this case, the plaintiffs had sued seven individual defendants and corporate defendants for alleged defamatory comments made between 30 October 2018 and 30 November 2018. The defamation action followed the commencement of two other actions related to various disputes between the parties over, among other things, the governance of a not-for-profit community organization. In those two proceedings, the individual defendants were represented by a lawyer, G.

Before issuing their action, on December 11, 2018, the plaintiffs' lawyers delivered a Notice of Libel (the "**Notice**") via fax to G. G responded that he had no instructions to accept service of the Notice and that he was "...unable to accept service."

The plaintiff contended entitlement to an order for the validation of service of the Notice on the grounds that it must have come to the attention of the individual defendants through the delivery to G. However, the motion judge noted that the letter delivered to G only named 5 of the 7 individual defendants and that the Notice named none of the individual defendants.

The burden of proving that the Notice came to the attention of the individual defendants rested on the plaintiff. Yet the plaintiff provided no direct evidence that the individual defendants received the Notice. The plaintiff merely contended that the Notice must have come to the attention of the individual defendants because it was delivered to their lawyer and relied on the decision in [The Trustee of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc., 2012 ONSC 5288 \("SNC-Lavalin"\)](#). In that decision, the court granted substituted service of a statement of claim that had been delivered to the lawyer who acted for some of the defendants therein. The lawyer in [SNC-Lavalin](#) also had not received instructions to accept service.

The motion judge distinguished [SNC-Lavalin](#) based on differences between the facts of that case and the plaintiffs' defamation action. One of the distinguishing features was that the court in [SNC-Lavalin](#) dealt with an order for substituted service, while the plaintiffs in their defamation action were seeking an order for the

A Lawyer's Office is not a Drop Box for Service (Yuk-Shum v. Jiang)

validating of service. The tests for these two kinds of orders are different. Under rule 16.08(a) of the *Rules*, the test for validating service requires evidence that the document came to the notice of the person to be served.

The plaintiffs sought to establish service of the individual defendants through an inference. The plaintiffs contended that as a result of his pre-existing retainers, G had a duty to bring the Notice to the attention of his clients and therefore the Notice must have come to the attention of the individual defendants.

To further support their motion, the plaintiffs argued that the individual defendants had not submitted any evidence:

- that they did not receive the Notice; and
- about when or how they first learned of the Notice.

Also, the plaintiffs showed that they had made other repeated attempts to serve the individual defendants without success.

The motion judge rejected the plaintiffs' arguments, concluding that they created an unacceptable rebuttable presumption that service on a lawyer was presumed actual notice. Essentially, the plaintiffs were contending that the burden of proof should be reversed and that it rested with the individual defendants. But, simply put, a defendant was not required to prove that a manner of service that was not authorized by the *Rules* was not effective.

The motion judge accepted the individual defendants' argument that "Lawyer's offices are not 'drop boxes' for service of documents."

The motion judge also concluded that the number of service attempts that were made on the individual defendants, which all occurred after the Notice was faxed to G, was irrelevant under the test for validating service.

This case is instructive to parties engaged in defamation actions and to all litigants who require an order validating the service of a court document. With respect to the law of defamation, this case demonstrates that while validation of the service of a Notice of Libel can be obtained under the *Rules*, delivery of a Notice of Libel to a lawyer in an existing relationship with a defendant accused of having defamed a plaintiff, will not necessarily constitute valid delivery under section 5(1) of the *Act*. A plaintiff must do more, especially where the lawyer who has received the notice advises that service is not accepted.

With respect to all litigation, this case shows that a plaintiff bears the evidentiary burden of satisfying the court that the court document for which the order validating service is sought has come to the actual attention of the defendant. The plaintiff must lead direct evidence to meet its burden.

Despite court rulings that the delivery of a Notice of Libel within the time prescribed under section 5(1) of the *Act* is a prerequisite to a valid claim against a defendant who falls within this section, the plaintiffs' action will continue because the motion judge was only asked to determine the issue of the validation of service. The motion judge also made no determination on the sufficiency of the plaintiffs' Notice or whether it was provided in a timely manner. A PDF version is available to download [here](#).

For more information please contact: **Stephen Thiele** at 416.865.6651 or sthiele@grllp.com

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com