

Pre-Proceeding Service: Superior Court Clarifies the Rules on Service Prior to the Commencement of a Proceeding

July 28, 2022

By Kelin Algayer

Earlier this year, the Ontario Superior Court of Justice released its decision in *Obsidian Group Inc. v. Google LL*, [2022 ONSC 84](#), in which Justice Morgan reviewed the principles governing personal service of an originating process and motions brought before the commencement of a proceeding under Rule 37.17.

The Court found that the uniqueness of the respondent, which in this case was Google, and the fact that it broadcasted to the public its email address for the purpose of legal correspondence justified a broader interpretation of the interplay between Rule 16.01 (General Rules for Manner of Service – Originating Process) and Rule 37.17 (Motion before Commencement of Proceeding), allowing the respondent to be served via email.

In a subsequent decision (*Obsidian Group Inc. v. Google LLC*, [2022 ONSC 1286](#)), the Court found that the email address specified by Google was not expressly for the purpose of service of legal process, meaning Google could not ultimately be served via email.

This decision clarifies that motions brought before the commencement of a proceeding under Rule 37.17 will generally be subject to the personal service requirements set out in Rule 16.01. It also serves as an alert for parties who choose to broadcast to the public an e-mail address they wish to be served at if sued that a Court may accept this as consent to be served via email with an originating process despite Rule 16.01.

Background

In this case, the moving party sought an interim injunction to remove certain messages about it posted on Google Review and a *Norwich Order* to determine who has posted the impugned messages. The motion was brought prior to the commencement of a claim under Rule 37.17 of the *Rules of Civil Procedure*.

The motion was originally brought on a without notice basis and Justice Myers adjourned the matter to allow time for the moving party to bring the motion on notice to Google. Interpreting the ambiguity of Rule 16.01 and Rule 37.17, counsel for Obsidian served the motion materials on Google via email.

At the hearing before Justice Morgan, he was concerned that service via email was not adequate notice under the *Rules*.

The Decision at the Superior Court of Justice

Counsel for Obsidian argued that Rule 16.01(1) requires personal service or alternative service for an originating process only, and Rule 16.01(3) states that no other document needs to be served personally. Counsel added that Rule 16.01(3)(iv) “authorizes service by email on any non-originating process on parties who do not have counsel on record”.

Counsel argued that Rule 14.03 provides that “an originating process is the means by which an action or application is commenced”, and therefore, a motion under Rule 37.17 is not considered originating process as it is served before the commencement of a proceeding.

Justice Morgan agreed that technically the pre-commencement motion under Rule 37.17 did not constitute an originating process under Rule 16.01. However, Justice Morgan went on to note that Rule 16.01 is an important procedural safeguard to ensure that parties are given notice of any lawsuit or other legal proceeding that has been brought against them. Justice Morgan went on to add that this is a reliable way of ensuring that parties will not have any remedy issued against them without their knowledge.

The Court considered that “the rationale for personal service of an originating process applies with equal force” to pre-claim motions under Rule 37.17. Aiming to ensure procedural fairness to responding parties, the Court determined that a Rule 37.17 motion record is an initiating missive that should be brought to the attention of the respondent in the same manner as a Statement of Claim or Notice of Application.

However, Justice Morgan went on to hold that, although this interpretation of the *Rules* meant that Google ought to be personally served, its uniqueness should be taken into consideration when dealing with the ambiguity between Rule 16.01 and Rule 37.17. Justice Morgan noted that Google is often sued and provides various email addresses on its website specifically designated to receive legal correspondence. Therefore, Justice Morgan was willing to interpret the *Rules* to allow the notice to Google to have been given by email.

Justice Morgan noted that this interpretation would not be applicable to a typical respondent that did not broadcast to the public how they are to be served if sued.

In a later decision, at which counsel for Google appeared, Justice Morgan received evidence that clarified that the email address noted on Google’s website was not designated for service of legal process specifically. Rather, it was an address that Google uses for the public to make inquiries about service of process. Therefore, Google was required to be served in accordance with the *Rules*, just like any other party in civil litigation.

Takeaways

This decision clarifies that motion materials for motions brought under Rule 37.17 prior to the commencement of a proceeding are generally subject to the requirements for serving an originating process under Rule 16.01. This decision also serves as an alert for non-typical respondents that decide to make public their email address expressly indicating that it should be used for service of legal process.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Kelin Algayer

Toronto
647.715.7126

Email:
kalgayer@weirfoulds.com

Kelin Algayer is an Associate in the Municipal, Planning and Land Development Practice Group at WeirFoulds LLP.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035