INSTITUTE OF LAW RESEARCH AND REFORM

THE UNIVERSITY OF ALBERTA

EDMONTON, ALBERTA

REPORT NO. 34

SERVICE OF DOCUMENTS DURING POSTAL INTERRUPTIONS

June, 1979

TABLE OF CONTENTS

The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The members of the Institute's Board of Directors during the time when this Report was prepared were Judge W.A. Stevenson (Chairman); W.F. Bowker, Q.C.; Emile Gamache; W.H. Hurlburt, Q.C.; Dr. M. Horowitz; D.B. Mason, Q.C.; Dean J.P.S. McLaren; Professor Ellen Picard; and W.E. Wilson, Q.C. Dr. Horowitz is an ex officio member as Vice-President (Academic) of the University of Alberta and bears no responsibility for this Report.

The Institute's legal staff consists of W.H. Hurlburt, Director; Gordon Bale, Associate Director; T.W. Mapp, Deputy Associate Director; Margaret A. Shone, Counsel; and Vijay K. Bhardwaj, J.T. Daines, A.R. Hudson, D.B. McLean, I.D.C. Ramsay, and J.M. Towle, Legal Research Officers.

SERVICE OF DOCUMENTS DURING POSTAL INTERRUPTIONS

I
INTRODUCTION

1. Inception of Project

The Rules of Court Advisory Committee asked the Institute to suggest a solution to the difficulties caused by the interruption of postal service when a statute or rule provides for service by mail. The Institute subsequently asked Professor L.J. Pollock of the Faculty of Law, University of Alberta, to consider the problem. He concluded that there is no useful precedent elsewhere, and suggested that a draft Act be prepared to cover the situation. The Institute accordingly asked him to prepare one.

The draft Act was duly prepared. It was considered at an early stage by a committee of practitioners consisting of N.H. Silverman, Q.C., Tom Mayson, Q.C., Lynn A. Patrick and John E. Côté, the majority of whom thought that there is a problem that should be dealt with, and all of whom made useful suggestions. The Board of the Institute then gave the matter preliminary consideration and thereafter directed that a Memorandum for Discussion be sent to a selected list of some 48 private practitioners and corporate counsel, of whom some fifteen, who are mentioned in the Acknowledgments at page 20 gave useful and constructive comments. We also sent a copy to Mr. Helmut Entrup, the Farmer's Advocate, and received a helpful reply. We have taken these comments into consideration and made some changes in our proposal.

For reasons which will be given later, we have extended the project beyond that suggested by the Rules of Court Advisory Committee to include service by mail when a contract provides for it and to include cases in which the common law permits

acceptance of an offer by mail.

2. Statement of problem

It is first necessary to describe the problems which arise or which can arise, so that consideration can be given to the question whether or not a legislative solution should be provided.

The first problem arises when a statute or statutory instrument provides for the service of a document by mail, and there is a mail strike. The threshhold question under those circumstances is whether or not a purported service by mail would be effective. Two recent Alberta decisions suggest that the courts will struggle against an affirmative answer. In Northside Electric Ltd. v. Brynko Construction Limited (1977) 1 Alta. L.R. (2d) 157, Judge Miller, as he then was, held that a plaintiff was not entitled to enter default judgment in reliance on service of a statement of claim by registered mail addressed to the defendant company's registered office when the envelope had been returned to the plaintiff's solicitors undelivered. In Hopper v. Municipal District of Foothills (1977) 71 DLR (3d) 374, the Appellate Division held by a majority that the municipal district could not rely on service by registered mail of a notice of an expropriation hearing, despite statutory authority for it, when its officials knew that the plaintiff had left on an overseas vacation and would not receive the notice before the hearing. However, these cases are not directly on point and turn to some extent on the particular statutory provisions involved in them; and we do not think that a confident answer can be given to the question of the effectiveness of the service by depositing an envelope in the mail during a mail strike.

Depending upon the answer to that question, one of two evils will arise:

(1) If the law is that the service is effective, the person being served may be bound by the service even though he cannot possibly receive the document and the server knows that he cannot. In that case time may then run against the person being served without his knowledge, and he may lose his rights.

(2) On the other hand, if the courts hold that service by mail cannot be effected during the interruption notwithstanding the terms of the statute or statutory instrument, then the other party is deprived of his right to effect service by a simple and legally effective procedure. For example, if a notice of a hearing relating to a development cannot be sent out by mail, the developer may suffer severe loss while the project is held up, and the delay may even make it impossible for the project to continue. It seems likely that personal service will usually be an acceptable alternative, but it may well be impractical or impossible to effect personal service upon dozens or even hundreds of affected landowners.

The second problem arises in contract and is somewhat similar. Some contracts provide for service of notices by mail and some provide for the acceptance of options by mail, with or without the money being enclosed. Again, it would be unfair, on the one hand, to bind the person to be served with a form of service which is obviously not going to come to his attention, and it would be unfair, on the other hand, to prevent the person who wants to effect service from doing so, particularly if service by mail is the only form of service available to him and if he will miss his time limit if he does not serve.

The third problem arises where an offer is made by mail. Under the common law, the recipient has a reasonable time within

which to accept the offer, and under some circumstances he effectively accepts the offer by mailing his acceptance.

Should a statutory solution be provided? Opinion is not unanimous. One of the committee of practitioners who initially considered the question was not persuaded that there is a problem which should be dealt with by statute: in his view, there is not sufficiently substantial evidence that a problem exists in fact which would justify interference with the normal operation of statutes and of contract law. Of the lawyers who commented one agreed with him and another, in conjunction with a distinguished member of the Bench, thought that the proposed solution was overly elaborate to solve a problem which, in their view, could be met by giving the courts broad powers to order substitutional service. The other members of the committee, and the greater number of those commentators who addressed the basic problem, however, were of the opinion that because of the increased incidence of postal interruptions, the substantial number of statutes, statutory instruments and contracts which provide for service by mail, and the possible consequences mentioned above, there is enough reason to make statutory provision to cover the situation. In addition, Mr. Entrup referred to cases in which farmers had not been able to exercise their full rights because disruptions in the postal service have interfered with the time periods provided for by surface rights legislation and private contracts.

Our opinion is that a solution should be provided. Certainly the theoretical possibility of problems can be demonstrated, and we think the likelihood that they will arise in practise, and their magnitude when they do arise, are sufficient reason. We think also that the solution should be in a statute and not merely in rules of court, as the problems are not restricted to court proceedings.

3. Alternative solutions

(1) Federal statute

The Postal Services Interruption Relief Act R.S.C. 1970, c. P-15 deals with some aspects of the problem. It may be summarized as follows:

(a) A person who suffers loss or hardship from an "interruption of normal postal services" by reason of his failure to comply with any time requirement or period of limitation contained in any law of Canada may apply to the court for relief.

(b) The court must be satisfied

(i) that there is a loss or hardship as a result of the interruption,

(ii) that the applicant took such reasonable steps as were open to him to comply with the time requirement or period of limitation, and

(iii) that the application was made without undue delay.

(c) The court may then waive the time requirement or period of limitation and allow the applicant to exercise the right that he would have been able to exercise if he had not failed to comply with the time requirement or period of limitation.

The expression "interruption of normal postal services" is not defined. The Federal Court of Appeal has however held that it does not include the mishandling of one letter (See Re Deputy Attorney-General of Canada and Van Dale, Inc. (1978) 87 DLR (3d) 63), and it therefore presumably applies only to a more general interruption of service, though the as yet unreported decision of the same court in Didier-Werke AG v. The Deputy Attorney-General of Canada pronounced on October 20, 1978, leaves open the question whether it applies to a delay resulting from the moving of Post Office facilities from one place to another. Our tentative view is that the federal statute does not provide an appropriate solution of the problems we have mentioned. It may be useful in relieving a person against the consequences of a failure to file a document with the federal government on time, but it does not appear to us that as a provincial statute it would provide a satisfactory balance of the conflicting interests of private individuals. We think that the solution, whenever possible, should allow a party to protect his own rights by following a clearly defined procedure which will not cause prejudice to the rights of others. When the rights of one party must give way to some extent, the solution adopted should provide for the proper balancing of rights between the parties whose interests are in conflict. Our view, therefore, is that we should not recommend the adoption of a statute based upon the federal Act.

(2) Proposed solution

It would be possible to provide a solution which would merely extend the time for service to allow for the period of the postal interruption. We do not think that that is sufficient. To take the example of service by mail under contract, the party to be served has stipulated for a method

of service which is intended to reach him within a given time, and it might have serious consequences to tell him for the first time a month later that the other party has effectively exercised a contract right. To take another example, there are often very proper reasons for a person to want to serve a notice to take proceedings on a caveat and to be sure that the time for the caveator to take proceedings will expire by a given date; and a simple extension of the time will cause unfair prejudice to such a person.

Another possible solution would simply be to preclude the sender from effecting service by mail during the postal interruption. We do not think that that would be a sufficient solution, either. A provision for service by mail in a statute or a contract is likely to be there for a valid reason. For an example, we refer again to a developer who must give notice of a hearing to a large number of landowners whose interests would be affected by the proposed development; a failure to provide him with a mechanism by which he can take reasonable steps to effect service of the notice would be unfair, and, in a particular case, might be contrary to the public interest. For another example, a contract may contain an absolute requirement that service be effected by mail, and a prohibition against sending the document that way may deprive a party of his rights under the contract.

We think that in order to balance the interests of the server and the person to be served, the solution which is adopted should include the following provisions:

(1) it should protect a person against being bound by service by mail when the mails are not in operation.

(2) it should allow the person who wants to effect service to do so personally or at an address for service provided by the person to be served, or by an alternative mode allowed by the particular

authorizing instrument.

(3) it should empower the court in appropriate cases to give directions for service, and, except in the case of service by mail under contract, it should allow the court to extend the time limit for service.

We have previously given our reasons for protecting a person against being bound by mail service during a mail strike. We will now give our reasons for the other two proposed provisions.

As we have already said, it would be unfair to deprive the person wishing to effect service of his right to do so by a simple and legally effective procedure. Therefore, alternatives should be provided. It is obviously fair that one alternative be an alternative mode allowed by the statute or contract itself. If is also fair that one alternative be personal service, because it will be more likely to come to the attention of the person being served, or of its appropriate officials. For a similar, though somewhat less forceful reason, it is fair that another alternative be service at an address for service provided by the person to be served, e.g., the registered office of a company or an address for service given in a contract.

But there will be cases in which personal service is not practicable and there is no address for service. Fairness requires the provision of a further alternative procedure to be followed in such a case by the person wishing to effect service. However, it is not possible to make legislative provision for all the circumstances which will arise, and we therefore propose that the court should be given power to prescribe a mode of service designed to achieve fairness in a particular case.

Before leaving the discussion of alternative modes of

service, we should refer to one suggestion which was made to us, that is, that service by courier should be a further alternative mode of service. We are attracted by that suggestion, particularly since the letters of many who replied to us disclosed which might be characterized as a flight from mail service by those to whom reliability is a major concern. We do not, however, think that the time has yet come to give effect to it. The post office is an official institution with official levels of service and protective laws which are not yet applicable to all couriers, and we do not think that we should recommend the substitution, even in emergencies, of an undetermined group of private business organizations with varying characteristics.

We have so far discussed provisions for alternate modes of service. The solution which we propose has one further element in it, that is, a provision which would allow the court to extend the time for service.

The proposal which we circulated for discussion contained a broad provision which would have allowed the extension of time in all cases, and was capable of being construed to allow the extension to be granted after the expiration of the original time for service. That proposal attracted strong criticism, and we have revised it in two ways. One change is to make it inapplicable to cases under contract, where the parties have stipulated for a definite time period. An extension would do violence to the intention of the contracting parties, and might well be unfair to a contracting party who changes his position on the strength of the time for service having expired. The second change is to allow the extension to be granted only within the original time for service. In the result, our proposal would apply only if a person is, by statute or statutory instrument, given a time for service, and applies during that time for an extension. Within that limited scope we think that it may be of some value and is fair.

The proposal which we circulated also contained a provision which would have given the court power to validate service in a case in which loss is suffered by reason of the proposed Act. The provision would have helped only the person attempting to effect service, and it would have helped him only if he had placed in the mail the envelope containing the thing to be served. Upon reflection it seemed to us that this would be an unnecessary complication and might result in unfairness to the addressee. We have accordingly deleted that proposal.

The draft Act attached as Appendix B to this Report would give effect to our proposal and provide the details to make it workable. Detailed comments will be found in the notes to the sections which comprise the draft Act.

We should mention here that we have received some suggestions that we should go further and devise a solution for the problems which arise because of the failure of the Post Office to deal properly with an individual letter. While we have much sympathy with these suggestions, we have decided that it would be inappropriate for us to comply. It is one thing to provide a way of carrying out the true intention of the Legislature or the contracting parties when it is likely to be frustrated because its basic substratum (the functioning post office) has temporarily disappeared. It would be quite another to go farther and deal with accidental happenings the degree of likelihood of which is present to the minds of legislator and citizen, who must have considered that the general likelihood that the letter will reach its destination within a reasonably predictable time is sufficiently great for the purposes of the statute or contract.

RECOMMENDATION #1

That a provincial statute be enacted which will

(a) invalidate service by mail when the mails are not in operation;

(b) in such a case allow a person to effect service personally or at an address for service provided by the person to be served; and

(c) empower the court

(i) to give alternative directions for service, and

(ii) to extend the time for service, though not under contract and only if the order is made within the original time for service.

4. Alberta Rules of Court

We think that the solution which we have proposed would be suitable for the Alberta Rules of Court as well as for statutes and statutory instruments. The proposed draft Act is broad enough to apply to the Rules without more, but, for two reasons, we think that something should be said in the Rules themselves. The first reason is that putting these provisions in a separate statute without a cross reference in the Rules might constitute a trap for the unwary. The second is that Rule 562(2) provides that the Supreme Court rules (and not the provisions of an Alberta statute) are to be applied mutatis mutandis to proceedings under the Divorce Act.

We have considered suggesting that the whole of the subject matter of the proposed Act appear in the Rules insofar as it is relevant to the Rules. That would avoid the necessity of looking in two places to find the provisions for service during postal interruptions. However, we think that the better course is to provide in the Rules that the proposed Act applies to service by mail under the Rules. On the one hand, that will avoid having the provisions written out twice; and on the other, it will avoid the danger of having the two provisions get out of step by amendments to one inadvertently not being made to the other. We will make a recommendation to the Rules of Court Committee accordingly.

RECOMMENDATION #2

That the Alberta Rules of Court be amended to provide that the proposed statute applies to service by mail under the Rules.

5. Section 18(4) of the Interpretation Act

Sec. 18(4) of the Interpretation Act, RSA 1970, c. 189, provides that where a statute authorizes or requires any document to be served by mail, the service shall be deemed to be effected by posting a properly addressed and prepaid letter containing the document. It then goes on to say that unless the contrary is proved, service is effected at the time at which the letter would have been delivered in the ordinary course of mail.

In our Memorandum for Discussion we expressed a tentative opinion that the subsection should be removed from the Interpretation Act and placed in the proposed Act. Having received a number of adverse comments on the subsection, and having been advised that a mere cross-reference would be a more appropriate drafting device, we have decided to deal with section 18(4) by recommending that the proposed Act expressly override it.

RECOMMENDATION #3

That the proposed statute expressly override sec. 18(4) of the Interpretation Act.

W.F. BOWKER
EMILE GAMACHE
W.H. HURLBURT
D.B. MASON
J.P.S. McLAREN
ELLEN PICARD
W.A. STEVENSON
W.E. WILSON

CHAIRMAN

DIRECTOR

June 28, 1979

APPENDIX A

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION #1

That a provincial statute be enacted which will

(a) invalidate service by mail when the mails are not in operation;

(b) in such a case allow a person to effect service personally or at an address for service provided by the person to be served; and

(c) empower the court

(i) to give alternative directions for service, and

(ii) to extend the time for service, though not under contract and only if the order is made within the original time for service.

RECOMMENDATION #2

That the Alberta Rules of Court be amended to provide that the proposed statute applies to service by mail under the Rules.

RECOMMENDATION #3

That the proposed statute expressly override sec. 18(4) of the Interpretation Act.

APPENDIX B

THE POSTAL INTERRUPTION ACT

1. In this Act

(a) "authorizing instrument" means

(i) a law, contract or instrument which requires, provides for or permits service by mail; and

(ii) if the common law requires or permits service by mail, the common law.

(b) "postal interruption" means a cessation of normal public postal service in Canada or in any part of Canada which is or may reasonably be expected to be of more than 48 hours duration;

(c) "service by mail" means service by ordinary mail, registered mail, double registered mail, certified mail and any other form of delivery by a public postal service, and includes the acceptance of an offer by any of those modes.

(d) "Court" means the Court of Queen's Bench of Alberta.

2. This Act applies if

(a) an authorizing instrument provides for, requires or permits service by mail,

(b) the authorizing instrument does not require an alternative mode of service during a postal interruption, and

(c) a postal interruption causes or may reasonably be expected to cause delay in the service by mail.

Notes to sec. 2

1. *When read with the definition of "authorizing instrument" in sec. 1(a), sec. 2 makes the proposed Act applicable where provision for service by mail appears in a statute or statutory instrument or in a contract or other instrument affecting rights between individuals. It also makes the proposed Act applicable where an offer provides for its acceptance by mail, or where it is presumed to do so.*

2. *When read with the definition of "postal interruption"*

in sec. 1(b), sec. 2 makes the proposed Act applicable where there is a cessation of postal service which in fact is of more than 48 hours duration, or which may reasonably be expected to be so. Since the definition includes a local as well as a national cessation, sec. 2(c) is necessary in order to restrict the application of the Act to cases in which the postal interruption is relevant to the particular service; e.g., a cessation of service in Calgary would be relevant to service from Edmonton at a Calgary address but not to service from Edmonton at a Red Deer address.

3. The Act applies if an alternative mode of service is not required, and therefore may apply if an alternative mode is permitted. This is necessary. If the alternative mode is permitted but not required, it might be held that the person attempting to effect service is still entitled to serve by mail; the protection of the Act is therefore needed. The Act does not prevent the sender from using the alternative mode: see sec. 4(a).

3. If service by mail is attempted

(a) during a postal interruption,

(b) during the 5 days preceding the day upon which a postal interruption commences, or

(c) during the 5 days following the day upon which the postal interruption terminates,

the service is effective only upon actual receipt of the thing to be served notwithstanding anything contained in the authorizing instrument.

Notes:

1. This is the fundamental provision of the proposed Act, and gives effect to Recommendation #1(a) at page 10. In the event of a cessation of mail service, it protects the person to be served from being bound by

service by mail unless he actually receives the document.

2. *A document mailed immediately before the interruption is unlikely to be delivered until the interruption is over, and a document mailed immediately after it is likely to be subjected to a delay greater than that contemplated when the provision for mail service was made. Sec. 3(a) and sec. 3(b) deal with these problems. The time periods chosen are necessarily somewhat arbitrary, but they provide reasonable certainty for those who want to know how to protect their interests, and we do not think that any formula would be suitable.*

4. The service by mail required, provided for or permitted in an authorizing instrument may, notwithstanding the provisions of the authorizing instrument, be effected by

   (a) the alternative mode of service provided for or permitted in the authorizing instrument,

   (b) personal service,

   (c) delivery to an address for service given by the person to be served,

   (d) delivery to the registered office of a company,

   (e) delivery to or to the office of the attorney of an extra-provincial company, or

   (f) a mode of service directed by the Court under section 5.

Notes:

1. *Sec. 4(a) gives effect to any provision specifically made to cover the situation which arises upon a postal interruption; if the situation has been foreseen and provision made for it, the provision should have effect.*

2. *The alternatives provided by sec. 4(b) to sec. 4(e)*

are, we think, modes of service which will generally be regarded as superior in effectiveness to service by mail and therefore acceptable from the point of view of the person to be served as alternatives to it.

5(1) The Court may, notwithstanding the provisions of an authorizing instrument but before the expiration of the period of time for service of any thing prescribed in the authorizing instrument,

(a) give directions for a mode of service not specified in section 4(b) to (e),

(b) if the authorizing instrument is not a contract, substitute a new time requirement or limitation period in place of that provided by the authorizing instrument, and

(c) impose terms and conditions on the mode of service or time requirement or limitation or both.

(2) An application under subsection (1) may be made ex parte or upon notice.

(3) A copy of the order or fiat shall be served with the thing to be served.

(4) The Provincial Court may exercise the powers of the court under this section in respect of a notice or document filed in or authorized by the Provincial Court.

Notes:

1. *See the discussion at pages 7-8 of our Report. There will be cases where the person attempting to effect service cannot effect personal service and has no legal right to give notice at a particular address except by mail, but in which fairness requires that he should have some way of effecting service. The only practicable solution in such a case is to allow the court to decide upon a fair mode of service.*

2. *In some cases, an extension of time will be appropriate. See the discussion at page 9.*

3. Sec. 5(4) appears desirable for the purpose of giving the Provincial Court control over its own process in case its rules should allow service by mail.

6. This Act operates notwithstanding section 18(4) of The Interpretation Act.

Note:

See the discussion at page 12 of this Report.

7. This Act comes into force on the day upon which it is assented to.

ACKNOWLEDGMENTS

The Institute acknowledges the continuing grant from the Alberta Law Foundation which, together with the funds provided by the Attorney-General and the University of Alberta, makes the Institute's work possible.

Professor L.J. Pollock of the Faculty of Law, University of Alberta, undertook the initial consideration of this project, and produced a first draft of the proposed Act. He has taken part in each step in the project, and we have benefited much from his advice and assistance.

We are most grateful also to the committee of practitioners who examined and analysed our proposal in its early stages and met and debated the issues and gave us a great deal of constructive and useful advice. The members of the committee were N.H. Silverman, Q.C., Tom Mayson, Q.C., Lynn A. Patrick and John E. Côté.

Then we received much further help from the practitioners to whom we circulated our Memorandum for Discussion and draft Act. We should mention particularly Hon. Richard A. Bell, P.C., Q.C., of Ottawa, who initiated discussions in Ontario towards a solution to the problem of service during a mail strike. The Alberta practitioners who gave us useful and thoughtful comments were: E.L. Boyd, J.T. Burger, E.S. Cook, J.R. Dunnet, S. Fialkow, D.J. Horne, W.V. Hembroff, D.C.L. Jones, T. Jackson, G.R. Knaut, Q.C., T.F. McMahon, Q.C., J.R. Perraton, R.D. Ross, Q.C., and Ms. M.M. Szel. We also received help from Helmut Entrup, the Farmers' Advocate.

The final draft of the proposed Act was prepared by David Elliott.