

### “Giving” Documents under the *Construction Act*

- the *Act* requires many documents to be “given”, including the proper invoice, notices of non-payment, a notice of adjudication, a notice of termination of a contract and, in some circumstances, a claim for lien.
- determining how a document is or should be given in any particular circumstance is not simple:
  - the *Act* states that documents may be served in any manner as one would serve a court document under the Rules of Court or by certified or registered mail to the intended recipient at the recipient’s last known mailing address according to the records of the person sending the document or as stated on a document registered on title identifying the recipient as a person with an interest in the premises;
  - if given by certified or registered mail (and “absent evidence to the contrary”), the document “shall be deemed to have been received by the person on the fifth day following the date on which it was mailed, exclusive of Saturdays and holidays”;
  - accordingly, using registered mail to give a document is not optimal: it will require parties to mail the document 5 days before a deadline, which in some cases will be impractical or impossible;
  - as per the Rules of Court, a document can be served on an individual by leaving a copy with the individual or on a corporation by leaving a copy with “an officer, director or agent of the corporation or with a person at any place of business of the corporation who appears to be in control or management of the place of business.” The latter test also applies to partnerships and sole-proprietorships. Generally, the Rules of Court will require an “Affidavit of Service” of the document be prepared to confirm that the document was left with the individual or corporation as required;
  - under the Rules of Court, parties may consent to service by email, so long as the email message includes the senders name, snail-mail and e-mail address, telephone and fax numbers (if any), the date and time of the transmission and the name and telephone number of a person to contact in the event of a transmission problem;
- documents can accordingly be given by personal delivery, so long as the person delivering it does so in accordance with the Rules of Court and is able to swear an Affidavit to that effect, specifying the time, date and manner of service. Parties may wish to consider consenting, in their contracts and subcontracts, to the delivery of proper invoices, and perhaps notices of non-payment and/or notices of adjudication, by email. For certainty, documents can then also be served personally, to avoid disputes over whether or not an email was received;
- exceptions to the general rules include:
  - the giving of a Written Notice of Lien, which must be served as would an “original process” under the Rules of Court;
  - the giving of a claim for lien to the Crown, which must be given to “the prescribed office, or, where no office has been prescribed, to the ministry or Crown agency for whom the improvement is made”; and
  - the giving of a claim for lien to municipality, which must be given to the Clerk of the municipality or, for contracts procured after October 1, 2019, electronically in accordance with the municipality’s website, if the website so directs.