

BOARD ORDER: MGB 123/08

IN THE MATTER OF THE *Municipal Government Act* being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act).

AND IN THE MATTER OF AN APPEAL from a decision of the 2007 Assessment Review Board (ARB) of the City of Calgary.

BETWEEN:

Various Assessed Persons represented by Deloitte & Touche LLP - Appellant

- a n d -

City of Calgary - Respondent

BEFORE:

Members:

W. Gagnon, Presiding Officer

D. Thomas, Member

J. Gilmour, Member

Case Manager:

P. Kemp

Upon notice being given to the affected parties, a hearing was held in the City of Calgary, in the Province of Alberta on May 26, 2008.

This is an appeal to the Municipal Government Board (MGB) from a decision of the 2007 ARB of the City of Calgary with respect to preliminary matters involving assessments entered in the 2007 assessment roll of the Respondent municipality as follows.

Roll No.	Address	Assessment
113004816	7260 12 St SE	\$6,980,000
051191708	2520 52 St NE	\$12,280,000
049014400	2555 32 St NE	\$38,840,000
200261774	2929 Sunridge Way NE	\$9,680,000
005159504	6226 64 Ave NE	\$14,720,000
112107701	6812 Fairmount Dr SE	\$1,730,000
112107750	6908 Farrell Rd SE	\$1,160,000
112108006	6909 Farrell Rd SE	\$3,730,000
112142005	7170 Blackfoot Tr SE	\$2,740,000
112140900	7056 Farrell Rd SE	\$6,970,000
049008295	3545 32 AV NE	\$30,100,000

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123189292	8500 Macleod TR SE	\$59,170,000
101013407	416 58 AV SE	\$11,020,000
031024409	2525 48 AV NE	\$1,040,000
031024508	11 Hopewell WY NE	\$1,040,000
031024706	33 Hopewell WY NE	\$1,110,000

OVERVIEW

This decision involves the requirement to file an issue statement pursuant to section 3 of the *Assessment Complaints and Appeals Regulation* (ACAR). Subject to certain exceptions, for complaints to the ARB an issue statement must be filed not later than 21 days prior to the hearing date. In this matter, the Appellant missed the deadline for filing the issue statements due to a delay in faxing. The issue under dispute is whether the circumstances justify the exercise of discretion by the MGB to extend the time for filing an issue statement.

LEGISLATION

In order to decide these matters, the MGB examined the direction provided in the Act and the relevant regulation.

Assessment Complaints and Appeal Regulation AR 238/2000 (ACAR)

A complainant is required to file an issue statement for a complaint against an assessment of \$50,000 or more.

3(1) If a complaint is to be heard by an assessment review board, the complainant must
(c) file an issue statement with the clerk of the assessment review board and with the assessor of the municipality at least 21 days before the hearing date of the complaint.

Issue statement requirements are listed.

3(2) An issue statement must be in the form set by the municipality and must
(a) be in writing,
(b) set out in detail the grounds of complaint, the particular facts supporting each ground of complaint and the change to the assessment roll or tax roll that is requested by the complainant,
(c) include a statement that the complainant and the respondent have discussed the complaint, specifying the date and outcome of that discussion, including the details of any facts or issues agreed to by the parties,
(d) include a statement, if the complainant and the respondent have not discussed the complaint, specifying why no discussion was held, and
(e) estimate the amount of time the complainant needs to present evidence in support of the complaint to the assessment review board.

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The timing of the ARB hearing notice affects whether an issue statement is required.

3(3) If the clerk of the assessment review board sends a notice of hearing to a complainant on a date that is less than 45 days before the hearing date, the complainant is not required to comply with subsection (1)(c).

Consequences for the failure to meet the issue statement requirements are provided.

3(4) Subject to subsection (3), if a complainant does not comply with subsection (1), the complaint is invalid and the assessment review board must not hear the matter and the clerk of the assessment review board must so notify the complainant.

(5) If a complainant who files an issue statement does not comply with subsection (2), the clerk of the assessment review board may refuse to file the issue statement.

(6) A complainant may appeal a refusal under subsection (5) to an assessment review board within 14 days of being notified of the refusal.

However, discretion to expand or abridge the time for filing the issue statement has been provided.

10(1) An assessment review board may at any time, by written order, abridge or expand the time specified in sections 3(1)(c) and 4(1), (2) and (3) for the doing of anything described in those sections in respect of a complaint.

(2) The Municipal Government Board may, by written order, abridge or expand the time specified in section 9(2) for the doing of anything described by that section in respect of an appeal.

Municipal Government Act

The MGB has the authority to hear appeals from decisions of the ARB, and can make any decision that the ARB could have made on the matter before it.

470(1) The decision of an assessment review board may be appealed to the Municipal Government Board.

488(1) The Board has jurisdiction

(c) to hear appeals from decisions of assessment review boards,

499(1) On concluding a hearing, the Board may make any of the following decisions:

(d) make any decision that the assessment review board could have made, if the hearing relates to the decision of an assessment review board;

BACKGROUND

Deloitte & Touche Property Tax Services complained against the assessments of sixteen properties on behalf of the owners. The clerk of the ARB sent Notices of Hearing for all the

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properties setting the hearing date for September 11, 2007. Issue statements were required to be filed on August 20, 2007. The issue statements were not filed until August 21, 2007 and the complaints were deemed invalid by the clerk. The clerk's decision was appealed to the ARB. The ARB denied the appeal. It is from that decision that the Appellant seeks relief from the MGB.

PRELIMINARY MATTERS

Withdrawals

The Appellant withdrew the appeals on Roll Numbers 031024409, 031024508, 031024706, 101013407 and 123189292 at the beginning of the hearing. There was no objection from the Respondent. The panel of the MGB accepted the withdrawals.

Further Submissions

On June 17, 2008, the Alberta Court of Appeal released its decision in Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 220 (Boardwalk). The Appellant requested the opportunity to make written submissions regarding Boardwalk as well as the unreported Court of Queen's Bench decision in Calgary (City) v. Gaspar Szenter Holdings et al., (action number No. 0701-04629) dated December 20, 2007 (Gaspar Szenter). The Respondent was agreeable to written submissions being made with regard to Boardwalk, but objected to submissions being made regarding Gaspar Szenter. In the Respondent's view, the Appellant ought to have been aware of Gaspar Szenter prior to the oral hearing and should have addressed it at the hearing.

The MGB granted the Appellant's request. Boardwalk was not available at the time of the oral hearing and the Appellant may not have been aware of Gaspar Szenter, as it was not reported. The Respondent advised that it would not be responding to the Appellant's written submissions.

ISSUE

1. In the circumstances, is it appropriate for the MGB to exercise its discretion to extend the time for filing the issue statements? In answering this question, the MGB must consider the following:
 - a) Did the Appellant take immediate action to correct the problem of late filing?
 - b) Did the Appellant display mischievous behaviour related to the subject events?
 - c) Is this a repetitive behaviour of the Appellant?
 - d) Would the late filing of the Issue Statements result in the Respondent being confronted with surprise arguments or being unaware of the case they had to respond to?

SUMMARY OF APPELLANT'S POSITION

The Facts:

Sometime before noon on August 20, 2007, Ms. Nancy Gibb, an administrative assistant at Deloitte & Touche LLP, (Deloitte) noticed there were problems faxing to both to the ARB and to the City of Calgary Assessment Department. She contacted Deloitte's I.T. department and notified them of the problem. Allan Spencley, manager of the I.T. department, investigated the problem. He determined that Deloitte's fax server was fully functional and had been sending and receiving faxes all morning. He also determined that the fax attempts to the City of Calgary Assessment Department were generating a "busy signal" error and that the fax attempts to the ARB were generating a "no answer" error. He proceeded to call both numbers from his desk telephone and received the same results. As he had seen faxes being sent and received successfully to other numbers, Mr. Spencley concluded that the problem was not with Deloitte's systems. He e-mailed Ms. Gibb with the results of his investigation and suggested she contact the owners of the fax machines to get the problems resolved. Ms. Gibb took his advice and contacted the ARB about the problem. Approximately half an hour later, she again tried to send an issue statement by fax to the ARB and it started to transmit. She also contacted the Assessment Department and confirmed that their fax machine had been busy, receiving faxes continuously all morning.

At approximately 2:00 p.m. Ms. Gibb noticed that her first issue statement fax had gone through, so she continued to send the rest of the issue statements that were due on August 20, 2007. When she left work at approximately 5:15 that afternoon, she anticipated that all the issue statements would be delivered by fax before the end of the day. At about 10:00 p.m. Ms. Gibb checked her e-mail and discovered that only half of the issue statements had been delivered. However, it being 10:00 p.m., she determined that there was nothing she could do to resolve the problem. When she arrived at work at 7:20 a.m., Ms. Gibb found that an issue statement was being transmitted and an additional two issue statements had not yet been sent. The last issue statement was transmitted at 1:42 p.m. on August 21, 2007. The issue statements for the sixteen Roll Numbers being appealed had not been sent until August 21, 2007.

Legal Argument:

In the Appellant's view, every reasonable effort had been made to have the issue statements faxed on the due date. However, nobody is infallible and Deloitte had approximately 3,000 appeals to contend with. Deloitte's practice is to have its agents provide the issue statements to Ms. Gibb one week before the filing date, but this does not always happen. In this case, Ms. Gibb did not receive the issue statements until the final date for filing. As the faxing of issue statements in quantities of this size or more is normally successful, Deloitte did not anticipate problems. Once the faxes started to transmit it was apparent that the ARB fax machine was working and there was no reason to suppose the issue statements would be late.

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The Appellant stressed that there was no prejudice to the Respondent, as the issue statements arrived within a few hours after the deadline. Under the circumstances, denying the appeal right would be a consequence disproportionate to the late filing.

Recent Court Decisions:

The Appellant remarked that the Court of Queen's Bench in Gaspar Szenter stated that the purpose of ACAR is not administrative efficiency but rather "to provide access to the tribunal and procedures that accord with natural justice." The Court also stated that "Broadly speaking, the purpose of ACAR and the relevant provisions of the Municipal Government Act is to provide complainants with a hearing." The Appellant also noted that in Boardwalk, the Court of Appeal made it very clear that taxpayers should not lose their appeal rights for minor technical deficiencies. In the Appellant's view, the present case involved a minor technical deficiency where at least some measure of the deficiency was beyond the taxpayer's control, making this a situation in which the loss of the appeal right would be particularly inappropriate.

SUMMARY OF RESPONDENT'S POSITION

The Respondent stressed that these appeals concern the late filing of the issue statements at the ARB office, not at the office of the City of Calgary Assessment Business Unit. Citing MGB decision MGB 025/08 in support, the Respondent argued that there was no compelling reason for the ARB, or the MGB on appeal, to exercise their discretion to extend the time for filing the issue statements. In the Respondent's view, there must have been some extenuating circumstance such as a natural disaster, power failure or explosion that prevented the Appellant from physically delivering the issue statements within time. The fact that the agents were too busy to have the issue statements ready before the second to last day for their filing is not a compelling circumstance. Neither is it compelling that, having left the filing of the issue statements until the second to last day, fax machine problems prevented their being filed on time. The Appellant is a professional tax agents who is well aware of the legislative requirements. Upon realizing that the issue statements had not yet been sent on the day before the due date, the prudent thing to have done would have been to send them by courier to make sure of their arrival at their destinations within time. However, this was not done. Nor was it done when, on the morning of the due date, a faxing problem was identified.

In the Respondent's view, the ARB was correct in refusing to exercise its discretion under the circumstances as to allow these appeals under ACAR ss. 10(1) would be to render ss. 3(4) meaningless.

FINDING

1. This is an appropriate circumstance for the MGB to exercise its discretion to extend the time for filing the issue statements.
 - a) The Appellant took immediate action to correct the problem of late filing.
 - b) The Appellant displayed no mischievous behaviour related to the subject events.
 - c) There was no evidence that this is a repetitive behaviour of the Appellant.

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- d) The late filing of the Issue Statements would not result in the Respondent being confronted with surprise arguments or being unaware of the case they had to respond to.

DECISION

The appeals are allowed with the following terms and conditions.

1. The matters are remitted to the ARB to hear and decide the quantum of the assessments on the subject roll numbers.
2. If the ARB fails to hear and decide these matters within 90 days of the date of this Decision, any party may apply to the MGB, pursuant to section 504 of the Act, to review its decision not to deal with the quantum of the assessments.
3. The MGB may then deem that no action by the ARB is a decision to deny the complaint(s), and proceed to deal with the quantum of the assessment(s).

Alternatively, considering the amount of time that has passed, the parties may wish to apply to the ARB for a direction that the MGB deal with the merits of this complaint at first instance, pursuant to section 11 of ACAR.

It is so ordered.

REASONS

In Board Order MGB 121/02, the MGB developed a four point test for determining whether or not a situation was one in which the exercise of the discretion provided by section 10 of ACAR to expand the time for filing an issue statement would be appropriate:

In order to determine whether or not the MGB should exercise its discretion the MGB needs to address the following sub-issues:

- a) Did the Appellant take immediate action to correct the problem of late filing?
- b) Did the Appellant display mischievous behaviour related to the subject events?
- c) Is this a repetitive behaviour of the Appellant?
- d) Would the late filing of the Issue Statements result in the Respondent being confronted with surprise arguments or being unaware of the case they had to respond to?

MGB 121/02 was followed by other decisions in which the MGB found that there must be an extenuating circumstance or other compelling reason for the MGB to exercise its discretion. Extenuating circumstances generally involve some unforeseeable event or other obstacle beyond the control of the complainant, such as serious illness. Other compelling reasons have included situations where the complainant has made an honest effort to resolve the complaint without a

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hearing but has been unable to contact the assessor due to circumstances beyond his or her control (e.g., MGB 193/02, MGB 024/08), where a number of factors contributed to confusion with the process (DL 014/04, MGB 065/05, MGB 056/06, MGB 072/07), where the issue statement was filed within time but was not in the proper form (e.g., MGB 013/05, MGB 079/06) or where the assessing authority, through discussions or other communication with the complainant, was already aware of the issues involved in the complaint (e.g., MGB 121/02, MGB 067/04, MGB 043/03, MGB 022/01 and MGB 175/00).

The Respondent urged the MGB to follow one of the later decisions, MGB 063/05, in which the MGB stated:

Although the MGB agrees that [the four tests established in MGB 121/02] are important considerations in determining whether or not to exercise the discretion under section 10 of ACAR, it is the MGB's considered opinion that a threshold test must be met prior to considering [the four tests]. The threshold test in determining whether section 10 can be brought into play is whether there is some sort of compelling reason or extenuating circumstance in existence which would necessitate consideration of [the four tests]. The MGB believes that absent flawed notification or confusion resulting from questionable competence or other factors surrounding the complaint process, a compelling reason will not likely be found.

In the Respondent's view, a decision to allow the complaints to proceed absent some compelling circumstance, such as a natural disaster, would render section 3(4) meaningless. The Respondent found support for that position in MGB 063/05 where the MGB stated:

The MGB is of the belief that this threshold requirement is necessary to ensure that section 10 of ACAR has meaning and maintains its intended effect. As stated in Board Order MGB105/02 "To treat a failure to file without a problem (other than oversight or omission) as a basis for the use of discretion for the extension for filing under ACAR Section 10, reduces the importance of issue statements to the orderly and expeditious resolution of complaints that taxpayers require. For ACAR section 3(4) to have meaning, it must have effect.

In response to the Appellant's contention that the delay in faxing the issue statements did not prejudice the Respondent in any way, the Respondent stressed that the issue of prejudice to the Respondent should not be a consideration under the circumstances, as no compelling reason justifying the delay had been established. Again, the Respondent referred to MGB 063/05:

... the MGB is of the opinion that whether or not there is prejudice to the Respondent is not the test for the exercise of discretion under section 10 of ACAR. Rather, it is merely one factor to consider once the Appellant has demonstrated that the threshold requirement of a compelling reason or extenuating circumstance exists.

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However, in the unreported decision of the Court of Queen's Bench in Gaspar Szenter, the MGB has received judicial guidance regarding section 3 of ACAR. The recent decision of the Court of Appeal in Boardwalk offers general guidance regarding the kinds of circumstances in which it would be appropriate to deny taxpayers their right to complain against the assessments of their property. As a result of these two judicial decisions, MGB 063/05 no longer reflects the MGB's thinking regarding the circumstances in which an exercise of its discretion under ACAR section 10 would be appropriate.

In Gaspar Szenter, Madam Justice Nation clarified the purpose of section 3:

I do not accept the City's characterization of the purpose of ACAR. Obviously procedural regulations such as those found at Section 3 of ACAR are intended in part to provide an efficient mechanism for resolving complaints, but the primary purpose of such legislation is to provide access to the tribunal and procedures that accord with natural justice. Broadly speaking, the purpose of ACAR and the relevant provisions of the MGA is to provide complainants with a hearing. The narrow purpose of Section 3 of ACAR is **to ensure that the ARB does not proceed with a hearing in the absence of adequate disclosure.**

[MGB emphasis]

In Boardwalk, the Court of Appeal remarked at paragraph 109 that the loss of the right to complain about one's assessment is an extremely harsh penalty:

... allowing irrevocable unilateral assessments with no recourse to any tribunal is the largest possible penalty in a taxation statute. Even the Income Tax Act has no general penalty so draconian.

At paragraph 78 of the decision, the Court commented that:

Where an Act can be construed more than one way, courts must reject any alternative which is manifestly absurd, or extremely harsh, unjust, or capricious.... The harsher the result of one interpretation, the stronger the presumption against it.

The MGB now adopts the reasoning of the Court of Appeal in deciding this issue. Although Boardwalk dealt with a different part of the Act, the penalty imposed under section 295(4) in that case was effectively the same as that urged by the Respondent in this case. In the Court's view:

... such penalties are not an end in themselves; they are (at least initially) disproportionate to the gravity of the fault of the defaulter and to the degree of harm to the opposing party. The penalties are a means to an end: getting the discovery.

The wording of ACAR section 3(4) is mandatory. The ARB "*must not hear the matter*" if no issue statement has been filed. The intended effect of this section is "*to ensure that the ARB does*

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not proceed with a hearing in the absence of adequate disclosure". Denial of the right to complain against the assessment is not always necessary to ensure that section 3(4) "*has meaning and maintains its intended effect*". What is necessary is to make sure the assessor is not prejudiced because a complainant has failed to identify the complaint issues sufficiently in advance of a hearing to allow the assessor to know the substance of the complaint. In section 10, ACAR provides the ARB and the MGB with a means to achieve the intended effect of section 3(4) while preserving the right of complaint. Looked at this way, it is apparent that prejudice to the Respondent is an issue of primary importance in determining the appropriate circumstances for exercising the discretion granted by ACAR section 10. If no prejudice to the Respondent has resulted from the Appellant's action, the right of complain should not be denied unless there has been some misbehaviour on the part of the Appellant that would justify a denial. A single instance of administrative oversight does not amount to misbehaviour.

In the present case, the Respondent stressed that the only issue before the MGB was the late filing of the issue statements at the ARB, and that there was no issue with respect to the filing of the issue statements at the Assessment Business Unit. No evidence regarding the status of the ARB fax machine was presented by the Respondent. There was no argument to the effect that the filing of the issue statements at the ARB one day after the deadline date resulted in prejudice to the Respondent. Rather, the Respondent focussed its efforts on convincing the MGB that ACAR section 3(4) should be interpreted in as strict a manner as possible. When offered the opportunity to make submissions regarding Gaspar Szenter and Boardwalk, the Respondent declined to do so.

The filing of the issue statements at the ARB one day after the deadline caused no harm to the Respondent. The MGB is convinced by the Appellant's testimony, argument and judicial authorities that in these circumstances, a denial of the right to complain against the assessments would be disproportionate to the gravity of the Appellant's error.

No costs to either party.

Dated at the City of Edmonton, in the Province of Alberta, this 14th day of October 2008.

MUNICIPAL GOVERNMENT BOARD

(SGD.) W. Gagnon, Presiding Officer

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APPENDIX "A"

APPEARANCES

NAME	CAPACITY
B. Brazzell	Solicitor for the Appellant
N. Gibb	Witness for the Appellant
A. Cunningham	Solicitor for the Respondent

APPENDIX "B"

DOCUMENTS RECEIVED AT THE HEARING AND CONSIDERED BY THE MGB:

NO.	ITEM
1A	Appellant's written submission and evidence
2R	Respondent's written submission and evidence
3A	Appellant's Supplementary Submission