

## The Court of Queen's Bench Interprets ACAR – Part II

Prepared by Carol Zukiwski  
Reynolds Mirth Richards & Farmer LLP

The Court of Queen's Bench resolved the debate over whether the Clerk of the ARB has the authority under section 3(4) to declare a complaint invalid for failing to file the issue statement, and dismiss the complaint without the complainant appearing before the ARB or the MGB. The Court did not accept the argument that the Clerk's decision under this section could not be appealed to either the ARB or the MGB. The Court reasoned that the Clerk of the ARB has the authority to declare a complaint invalid for failing to file an issue statement, but when that power is exercised, a complainant must have an avenue whereby that decision can be reviewed or reconsidered. In this situation the ARB held that it did not have jurisdiction to review the Clerk's decision under s. 3(4), and so the Court agreed with the MGB's characterization of the Clerk's decision under s.3(4) as being a decision of the ARB under s. 470 and thereby a decision that can be appealed to the MGB. The Court commented that the MGB did not have the authority to direct the ARB with regard to the procedure that the ARB should have followed. The Court went on to say that the ARB should have heard the appeal from the Clerk's decision to review the Clerk's determination that the issue statement had not been filed within 21 days, and to decide whether or not the ARB was going to exercise its discretion under s. 10 to expand the time for filing the issue statement. Madam Justice Nation was of the view that it was an adequate procedure to require the complainant to apply for a jurisdictional hearing before the ARB in circumstances where the Clerk has determined that the complaint is invalid under s. 3(4). She considered this procedure to be mindful both of the efficient resolution of complaints and the scope of the powers of the ARB.

Another issue before the Court on this judicial review application was whether the MGB has jurisdiction under s. 10 to expand the time for filing an issue statement, or whether the MGB's jurisdiction was limited to s. 9(2). The Court upheld the MGB's reasoning that the two tiered board decision making system is apparent on a review of the MGA, and that there is no limitation in s. 499(1)(d) regarding the types of decisions the MGB can make. Justice Nation was clear that under s. 499(1)(d) the MGB can make any decision the ARB can make, and that includes exercising discretion under s. 10 of ACAR to abridge or expand the time to file an issue statement.

The Court was also called upon to determine the issue of whether the MGB erred in determining that the ARB hearing notices were not issued in sufficient time so that the property owners could file the issue statements in time pursuant to s. 3(1)(c) ACAR. Section 3(3) ACAR provided that if the ARB clerk failed to send the notice of hearing on a date that is less than 45 days before the hearing date, the complaint is not required to comply with s. 3(1)(c), which is to file the issue statement within 21 days. The MGB held that issue statements were not required because the notice of the ARB hearing was not received within 45 days of the hearing date. Using provisions of the *Interpretation Act*, the Board held that the ARB gave only 44 days notice. The particular rules used were s. 23(1)(a), which states that service presumed to be effective 7 days from the date of mailing if sent to an address in Alberta. Section 22(3) set out the rules to compute time, which include the rule that the days on which events happen are not counted – which means the

hearing date is not counted or the day the notice is mailed out. Having found that the hearing notice was not sent out in time, the Board held that s. 3(3) ACAR applied and that the property owners were not required to file an issue statement within 21 days. The City challenged the Board's interpretation of the 21 days, but the Court found that the Board's findings were reasonable and declined to interfere.

Underlying the Court's interpretation of the provisions of ACAR, was its statement of the purpose of the regulation. The Court held:

“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 propose 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 MGB 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.”

This article is intended to provide comments on recent legal developments and is not intended to give legal advice.  
You should seek legal advice on matters of concern to you

~~~~~

**Who Can File an Assessment Complaint?**  
***Hudsons Bay and the City of Calgary - Court of Appeal***

Prepared by Bill Barclay  
Reynolds Mirth Richards and Farmer LLP

The Alberta Court of Appeal has just released a decision dealing with the question of who can file an assessment complaint. This case involved a major anchor tenant in a shopping mall, who filed a complaint regarding the assessment of their leased premises. The important point was that they were not the owners of the property, and the municipality had successfully argued before the Court of Queen's Bench of Alberta, that the only person who could file a complaint was the party actually assessed for that property, which in this case, was the owner.

Typically, through a lease agreement, a landlord will pass on to the tenant, any taxes or other costs. That was the case here. However, in this case, the *Municipal Government Act*, R.S.A. 2000, c. M-26 (“MGA”) provides that the owner is the actual assessed person. As the owner did not file a complaint, the municipality argued that the tenant did not have a right to do so.

Although the municipality was successful before the Court of Queen's Bench, the Alberta Court of Appeal disagreed with the municipality's interpretation. They pointed out that s. 460(3) of the MGA provides that “a complaint may be made only by an assessed person or a taxpayer”, but it does not say that the complainant had to be the party assessed for the particular property in issue.

In other words, if a person is assessed by virtue of another property they own within the municipality, they are entitled to file a complaint related to any other assessed property in the municipality. Here, the tenant did own other property within the municipality which was assessed. The Court of Appeal also pointed out that, as one person's assessment might affect another person's assessment, there is a certain logic to this interpretation.

While this decision may not open the floodgates, it does mean that there are likely to be more assessment complaints than would otherwise be the case. Many municipalities in the Province are already labouring under the volume of assessment complaints they face, and for that reason, this decision will be of concern.

This decision also dealt with a practice issue related to the procedure before the Municipal Government Board ("MGB"). The Court of Appeal left open the question of whether or not an appeal before the MGB is an appeal on the record, or a completely *de novo* hearing, or whether the MGB has the authority to return an assessment to the Assessment Review Board for a decision.

This article is intended to provide comments on recent legal developments and is not intended to give legal advice.  
You should seek legal advice on matters of concern to you

---

### **Association of Canadian Assessors' Counsel (ACAC)**

Prepared by Kathryn Durkin  
Reynolds Mirth Richards and Farmer LLP

As counsel for both municipal and provincial assessing authorities, we were invited to speak at the inaugural conference of the Association of Canadian Assessors' Counsel (ACAC), which was held in Ottawa on May 9<sup>th</sup> and 10<sup>th</sup>. Similar to other national assessment associations, ACAC's primary goal is to foster communication and sharing of ideas between lawyers from across Canada who specialize in providing legal services to Assessors. It will come as no surprise to Assessors that while assessment legislation varies between the provinces, the commonalities in experience far outweigh our differences. The inaugural conference started that communication process and we came away with new perspectives on some ongoing challenges.

For example, we were interested to learn about the pre-hearing procedures available for non-strip commercial, industrial and multi-residential at the Ontario Assessment Review Board. In addition to voluntary disclosure and other types of disclosure obtained through pre-hearing discussions, the Board on application by a party can make a number of orders relating to the disclosing of one's case before a hearing. Rule 30 of the Ontario's Assessment Review Board provides that a Board can order any form of discovery, including an examination for discovery of a witness in advance of a hearing. If an order for discovery is obtained the Ontario Court Rules of Civil Procedure apply to the Board, unless the Board orders otherwise. An examination for discovery provides the Assessor with the opportunity to question the opposing party on the facts

that are being brought forward to support their complaint prior to the hearing. While this formalized procedure may not be necessary for routine appeals, it could be a useful tool for complex appeals. It is something to consider during the upcoming Tribunal Review that was discussed at the Alberta Assessors' Association Spring Conference. A copy of the Ontario Assessment Review Board Rules are available online at [www.arb.gov.on.ca](http://www.arb.gov.on.ca).

This article is intended to provide comments on recent legal developments and is not intended to give legal advice.  
You should seek legal advice on matters of concern to you