

A successful seminar is always an onerous task to organize and the Education Seminar Team did another outstanding job! On behalf of the Western Chapter, I would like to thank the following individuals for their great ideas and hard work: Rhine Olyniuk – Chair, Ben Matthews, Monica Keller, Kirk Wasylik, Ian Magdiak, Danielle Bielecki and Joanne Manning.

KENNETH G. LOVE, Q.C. - APPOINTMENT

One of our long time members, Ken Love, of MacLean Keith in Regina was recently appointed Chair of the Saskatchewan Labour Commission. Congratulations, Ken!

UPCOMING MEETING DATES

- **Wednesday, April 23rd** (Calgary Carriage House Inn)
- **May 20th & June 17th** (Calgary International Hotel)
- **Friday, August 22**
Annual Golf Tournament
(Sundre Golf Club)



PAY ATTENTION TO FILING DEADLINES

*Submitted by Judson E. Virtue, Partner,
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A recent decision of the Alberta Municipal Government Board ("MGB") is a cautionary reminder that filing deadlines must be complied with strictly and that an extension of the time to file may not be granted in the absence of extraordinary circumstances.

In *419039 Alberta Ltd v. Calgary* (MGB 025/08) released February 27th, 2008, the issue statement was required to be filed on August 15, 2007. The issue statement was filed at 1:34 a.m. August 16, 2007, a mere 94 minutes past the filing deadline. The applicant applied to the assessment review board for an extension of the filing deadline, which was denied. The appeal to the MGB was

also denied. As a result, the property owner lost its right to challenge the assessment.

Section 3(1)(c) of the *Alberta Assessment Complaints and Appeals Regulation* AR 238/2000 (ACAR) requires that a complainant file an issue statement not later than 21 days prior to the hearing date. Failure to comply results in the complaint being invalid under Section 3(4), and the assessment review board loses its jurisdiction to hear the complaint. Other filing deadlines are contained in Sections 4 and 9 of ACAR.

However, discretion to expand or abridge the time for filing is provided in Section 10 of ACAR. An assessment review board and the MGB may, either before or after the filing deadline, abridge or expand the time for filing of issue statements, exchange of evidence and new evidence on appeal.

Beginning in 2002, the MGB began developing guidelines to be applied when considering whether to exercise discretion to abridge or expand filing deadlines under Section 10 of ACAR. In *Strathcona Hotel v. Edmonton* (121/02), the MGB proposed the following guidelines:

- 1) Did the Complainant take immediate action to correct the problem?
- 2) Was the late filing by the complainant mischievous or for an improper reason?
- 3) Is this a repetitive behaviour by the complainant?
- 4) Would the late filing cause surprise or prejudice to the Respondent?

These guidelines proposed a "no-fault" approach. An extension would be granted even if the complainant had no excuse for the delay, as long as there was no evidence of improper purpose by the complainant or a pattern of abuse, and no evidence of prejudice to the Respondent.

However, also in 2002, the MGB released its decision in *MacTavish Holdings v. Calgary* (093/02), in which the complainant plead ignorance of the requirement of Section 3 of ACAR. In refusing to expand the time for filing, the MGB stated at page 7:

In the absence of flawed notification or any question of competence or capacity of the complainant to deal with the requirement of ACAR, the inequity (the

loss of right of appeal) arises not from the process or procedure, but from the complainant himself. Section 10 was not intended, nor can it be used, to grant relief for such failure.

In 2002, the MGB also released its decision in *Wendy's Restaurant v. Calgary* (MGB 105/02), in which the complainant was a "first time filer" and failed to file the issue statement in time due to an oversight. In refusing to expand the time for filing, the MGB stated at page 8:

The exercise of discretion under ACAR Section 10 is intended for factual situations where an apparent injustice would arise from the requirements of ACAR Section 3(4). A failure to file by oversight alone does not amount to an apparent injustice. In this case, the loss of rights to complain does not arise by documentary or service flaws or from circumstances or capacity that would impede the complainant meeting the requirement to file. The loss arises out of the complainant's inaction alone."

Accordingly, commencing in 2002, there was a clear trend towards the development of a threshold requirement of a valid excuse or extenuating circumstances, as a pre-requisite to exercise of discretion under Section 10 of ACAR. In 2005, this trend received further support from the MGB in *Colliers International v. Calgary* (MGB 063/05). In this case, the complainant admitted that the failure to meet the filing deadline was due to clerical oversight. However, the complainant submitted that the *Strathcona* guidelines (MGB 121/02) had been met and that an extension should therefore be granted. The MGB rejected the request and stated at page 7:

Although the MGB agrees that [the *Strathcona* guidelines] are important considerations..., it is the MGB's considered opinion that a threshold test must be met prior to considering the above factors. The threshold test ... is whether there is some sort of compelling reason or extenuating circumstances in existence, which would necessitate consideration of the above factors. The MGB believes that absent flawed notification or confusion resulting from questionable competence or other factors

surrounding the complaint process, a compelling reason or extenuating circumstance will not likely be found.

The MGB's decision in 419039 (MGB 025/08) confirms that the test set out in *Colliers* amounts to a "guideline" that the MGB will follow. In that decision, the MGB states at page 5:

As a result, a number of guidelines have been developed. While the MGB is not bound by previous decisions, the MGB finds merit in using these guidelines to weigh the circumstances in this matter. The first question that the MGB asks ... is whether there is a compelling reason or extenuating circumstance that would warrant an exercise of discretion (see *Colliers*). If this threshold question is answered in the affirmative, the MGB then considers a number of other factors. (See *Strathcona*).

The threshold requirement appears to be well entrenched in Alberta jurisprudence at this point and anyone bringing a complaint before an assessment review board or the MGB must pay particular attention to the filing deadlines. Failure to strictly comply without valid excuse, may result in the loss of the property owner's right of complaint, even for a seemingly insignificant delay.

PIPELINE ASSESSABILITY

Submitted by Jerritt R. Pawlyk, Bishop & McKenzie LLP, Edmonton, AB

ALBERTA (MINISTER OF MUNICIPAL AFFAIRS) V. ALBERTA OIL SANDS PIPELINE LTD., 2007 ABQB 652

Section 291(2)(a) of the Municipal Government Act, R.S.A 2000 c. M-26 states:

- (2) No assessment for linear property is to be prepared
 - (a) for linear property that is under construction but not completed on or before October 31, unless it is capable of being used for the transmission of gas, oil or electricity.

This case is a judicial review of the Municipal Government Board's (the "MGB") decision not to assess two pipeline loops because they were