

The View From Behind the Tribunal Table

Alberta Assessor's Association – Legal Panel

April 2023, Edmonton, Alberta

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Legal Panel Members

- Sheila McNaughtan, K.C.
- Gwendolyn Stewart-Palmer, K.C.
- Michael Swanberg
- Carol Zukiwski

There will be time for questions at the end.

Outline of Discussion Topics

- What the Courts expect from Tribunal reasons;
- The Advocate's view from in front of the Tribunal Table;
- Legal Counsel's view from the side of the Tribunal Table;
- The Decision Maker's View from Behind the Tribunal Table.

The views and opinions are the personal views of the presenters, and do not reflect the views of the presenter's clients or the views of the Tribunals the presenter's are a member of.

What the Courts Expect

- ARB decisions can be judicially reviewed by ABKB
- Supreme Court's decision in *Vavilov* (2019 SCC 65) confirms tribunal decisions:
 - Must be intelligible and justified
 - Must be internally coherent
 - Must be reasonable

What the Courts Expect

- In general, a reviewing court is to show deference to tribunal decisions
- *Vavilov* confirms that boards must justify decisions with adequate reasons
- *MGA*, s 468 – ARB decisions must be in writing

What the Courts Expect

- Decision needs to show “rational chain of analysis”
- Must answer the question “why?”

What the Courts Expect

- Must address all issues before the Board
 - *Cavendish Farms Corporation v. Lethbridge (City)*, 2022 ABCA 312
- Stating conclusions is insufficient
 - *Cavendish*
 - *Costco Wholesale Canada Ltd. v. Medicine Hat (City)*, 2022 ABQB 129

What the Courts Expect

- Not necessarily about how long the decision is
 - *Source Energy Services Canadian Logistics LP GP Ltd. v. Wembley (Town)*, 2020 ABCA 128
- Don't necessarily need to address every argument or piece of evidence
 - *Governors of the University of Alberta v. Edmonton (City)*, 2022 ABCA 290

What the Courts Expect

- Internally coherent decisions = logical chain of analysis
- How do you get from the parties' evidence to the conclusion?
- How does the conclusion meet the statutory test?

What the Courts Expect

- Decisions must be substantively reasonable
- Court will generally not intervene if the decision is logical, grounded in the evidence, and constitutes a possible outcome based on the law

What the Courts Expect

- ***Altus Group Ltd v Alberta (City of Edmonton Composite Assessment Review Board)*, 2023 ABCA 35**
 - Conclusion that the sale of the subject did not reflect market value was unexplained, and unsupported by the evidence
 - Board's reasons for rejecting a portfolio sale comparable not fully justified

The Advocate's View

- Handling Preliminary Matters
- Closing Argument
- Weighing Evidence

The Advocate's View – Handling Preliminary Matters

- “Will Say Statement”;
- introduction of evidence not previously disclosed;
- introduction of new case law;
- improper rebuttal – case splitting;
- MRAC s. 9(2)(c);

“Will Say Statement”

- The witness will:
 - (a) describe the comparables;
 - (b) describe the vacancy rate;
 - (c) describe the typical rental rate; and
 - (d) describe why equity has not been met.

Introduction of New Evidence / New Cases

- MRAC s. 10(b)
- new cases are not evidence
- right to know the case to be met and to have a reasonable opportunity to respond

Improper Rebuttal

- obligation to disclose the entirety of your case as a Complainant
- include an Appendix to your argument on this point in case you need it
- timing of the application

MRAC s. 9(2)(c)

s.9(2)(c) the complainant must, at least 7 days before the hearing date, disclose to the respondent and the composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in rebuttal to the disclosure made under clause (b) **in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing.**

Closing Argument

- List the questions to be decided
- Give the Board a roadmap
- Ask for the findings of fact you want

Weighing Evidence

Poll Question



- **Is this the procedure that you have seen used in your hearings?**
 - (a) Yes, we basically follow that procedure
 - (b) We, usually reserve our decision on qualifications and deal with it in our reasons
 - (c) We follow a different procedure

Best practices when presenting your case to the Tribunal The View from the Side – Counsel to the Tribunal

Gwendolyn Stewart-Palmer, K.C.
Shores Jardine LLP

April 19, 2023

Note:

In making these comments, I am not speaking on behalf of any ARB or any specific ARB member.

The comments that follow are based on my observations over many years of providing independent advice to tribunals, including ARBs.

PART 1

Disclosure

Disclosure – Best Practices

- Include only relevant information
- Include information in the order it will be referred to
- Ensure your documents are page numbered from one to the end.
 - Do not have multiple page 1's!

Disclosure – Worst Practices

- Repetitive information
- Do not include irrelevant information
 - Bigger is not necessarily better
- Be aware of the electronic size of the documents

Disclosure – Worst Practices

- Do not password lock documents, unless absolutely required
 - If required, offer to provide non-password locked documents in the event of a court challenge

PART 2

Oral Advocacy



Hearing Advocacy – Best Practices

- Give the Board a “road map” to follow
 - If you have five points to make, start with point one
 - Mention each point by number
- Be respectful to the Board and to opposing parties
- Answer the hard questions – do not attempt to evade them
- Allow your expert to tell the “story”

Hearing Advocacy – Worst Practices

- Do not read your submissions



Hearing Advocacy – Worst Practices

- Do not have Artificial Intelligence read your submissions
- If you are not comfortable presenting submissions, write out key points and read those
- Overstating your qualifications

Hearing Advocacy
– Worst Practices

“Carry over”
evidence



Hearing Advocacy – Worst Practices

- Interrupting
 - Your own witness
 - The other side
 - The Board
- The “scribbles” on the whiteboard at the hearing

Task of the parties

- Persuade
- Provide path for decision maker to get to the result desired
- Provide foundation for cogent reasons

Adjustments to Comparables

- Dispelling the “black box”
- Providing the coefficients together with support
- Difficulty making adjustments in the absence of comparable properties

Requests to exclude documents from the public record

- When to request
- Reasons

Legal Interpretations

- As a Board member, receptive to assistance in reaching conclusions as to the proper interpretation

**THANK YOU FOR YOUR ATTENTION AND
TO THE ASSOCIATION FOR HAVING US**

QUESTIONS ARE WELCOME