

AAA Fall Symposium: Case Update

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ENTERPRISE PROPERTIES

- This judicial review decision concerns the new provisions regarding the Assessment Date and Complaint Date in the MGA which came into effect in 2018.
- On a preliminary application, the Assessment Review Board determined that the Complaint was filed late, and dismissed the complaint on that basis.



ENTERPRISE PROPERTIES

FACTS

- The assessed person's address on file with the municipality was out of province (in Manitoba).
- Combined tax and assessment notice mailed on May 31, 2018.
- The Notice of Assessment Date was June 8, 2018 (indicated in the assessment notice).
- The Complaint Deadline was August 7, 2018 (indicated in the assessment notice).
- The Complaint was received on August 20, 2018.

ENTERPRISE PROPERTIES

LEGISLATIVE SECTIONS CONSIDERED

- Under the revised MGA, passed in 2018, the assessment notice must be sent at least 7 days prior to the Notice of Assessment Date indicated in the Notice (s. 310(3)).
- The “Complaint Deadline” must be 60 days after the Notice of Assessment Date (section 284(4)).
- The ARB must dismiss a complaint if it is filed after the Complaint Deadline (section 467(2)).

ENTERPRISE PROPERTIES

- The Complainant argued that, since the assessed person resided out of Province, the Notice should have been sent at least 14 days before the Notice of Assessment Date.
- This was based on section 23(1)(b) of the Interpretation Act, which indicates there is a presumption that something sent by mail to an address located elsewhere in Canada is received 14 days from the date of mailing.

ENTERPRISE PROPERTIES

- The Board found that the presumption of service in the Interpretation Act does not require municipalities to send assessment notices at least 14 days before the Notice of Assessment Date when the assessed person is located outside of Alberta.
- Rather, the Board found that the clear wording of sections 310(3) and 284(4) of the MGA prevail over the “presumption of service” sections in the *Interpretation Act*.
- The Court upheld this interpretation as reasonable.

ENTERPRISE PROPERTIES

- The municipality failed to have a designated officer certify the date of mailing (as is required under s. 310(4) and 311 of the MGA).
- The Board found that, as a consequence, the Board had to lead evidence to independently prove when the Notice was sent. It accepted the evidence led by the municipality to prove the date of sending.
- The Court found this interpretation was reasonable, and found that the municipality's failure to adhere to the requirement to certify the date of sending should not otherwise affect the Complaint Deadline (unless the municipality cannot prove when the Notice was sent).



ENTERPRISE PROPERTIES

KEY TAKEAWAYS

- The requirement to send the Notice of Assessment at least seven days before the Notice of Assessment Date is the same regardless of whether the assessed person's address is within Alberta, or elsewhere.
- If a municipality fails to have a designated officer certify the date of sending, the municipality may be required to adduce other evidence to prove the date of sending if that becomes an issue at a hearing.

WHEATLAND COUNTY ABCA

- This Court of Appeal decision has a long history.
- Decision concerns whether certain improvements at a fuel blending and storage facility should be classified as “machinery and equipment” or “buildings and structures”.
- In 2016, the Board found that the test for determining whether an improvement is involved in “processing” (such that it could be considered “machinery and equipment” under MRAT) is whether the improvement is involved in changing the nature or form of a product.

WHEATLAND COUNTY ABCA

- The Board found that the facility could be divided into different “operational units”, and the only operational units that could meet the definition of machinery and equipment would be those that are integrally connected to an operation which changes the nature or form of something.
- The Board concluded that fuel storage tanks were not integral to a processing operation, and therefore could not be classified as “machinery and equipment”.

WHEATLAND COUNTY ABCA

- In 2018, the Court of Queen's Bench overturned the Board's decision on judicial review.
- The ABQB found that the definition of "processing" adopted by the Board was reasonable, but that the Board's analysis of the "operational units" at the site was unreasonable, and was overly reliant on expert evidence adduced by the municipality.

WHEATLAND COUNTY ABCA

- This 2019 Court of Appeal decision is an appeal of the ABQB judicial review decision.
- The Court of Appeal overturned the ABQB decision, and restored the Board's decision.
- The Court of Appeal found that Boards are entitled to hear expert evidence to assist in the interpretation of technical terms in statutes (i.e. “processing” and “operational unit”).
- The Court of Appeal also found that courts are to show deference to Boards with respect to how the Board weighs expert evidence it hears.

Wheatland County ABCA

- The Court of Appeal agreed that the “change in nature or form” test for determining “processing” for machinery and equipment is reasonable
- The Court of Appeal also found that the approach the Board took to identify different operational units at the facility was reasonable
- The Court of Appeal was critical of the ABQB decision for not showing sufficient deference to the Board, and emphasized that Courts should only intervene on judicial review if the Board’s decision is unreasonable

WHEATLAND COUNTY ABCA

- KEY TAKEAWAYS

- The “change in nature or form” test for determining whether an improvement is integral to a “processing” operation under MRAT is reasonable
- In identifying “operational units”, the Board may divide the same site into different “operational units” depending on their function
- The Board may hear expert evidence to assist in interpreting technical terms in statutes
- The Courts will only interfere with a Board’s decision on judicial review if the Board’s decision is unreasonable

CANADIAN NATURAL RESOURCES LIMITED V ELIZABETH MÉTIS SETTLEMENT, 2020 ABQB 210

- Facts: Metis Settlements can tax property within the settlements, subject to policies passed by their governing body, the Metis Settlements General Council and the *Metis Settlements Act*.
- In 2019, the Settlement purported to pass a taxation bylaw imposing tax on industrial and linear properties at a rate of 187% of the value of the properties. The taxes claimed from 4 industrial taxpayers increased from \$624,692.44 to \$25,000,733, a 40-fold increase.
- The additional \$24.4 million in tax was allocated to repair or replace virtually all infrastructure at the Elizabeth Settlement, including \$75,000 in repairs and renovations to each and every residence in the community.



TAXPAYER STANDING TO CHALLENGE MUNICIPAL TAXING BYLAW

Standing (par 53-58):

- ... a fundamental tenet of our constitutional order and the rule of law, no statute can immunize legislative or executive acts from judicial review for root illegality. The second is that the Courts will not infer a significant derogation of private rights in the absence of explicit statutory language. In short, there is no such creature as a 'stealth super-privative clause' in our legal system.
- the Superior Courts always retain the constitutional power and obligation to ensure the foundational lawfulness of governmental actions. No legislation can abrogate this authority.
- The Supreme Court of Canada has repeatedly affirmed the common law right of citizens to seek judicial review of municipal bylaws taxing their property. That right is effectively constitutional in nature and supersedes any provincial enactment.

THE LIMITS OF TAXING POWERS

- The Court cited a number of cases where the tax imposed was so extreme as to be indicative of an improper purpose, such as improperly regulating an industry or confiscating property.
- A taxation measure will be quashed as invalid when it is driven by an ulterior motive, even when that motive may, in and of itself, be a legitimate policy aim of the enacting body.
- The impugned decision must be shown to transcend the spectrum of reasonable policy options available in view of the legitimate legislative purpose in play.
- The decision must be so out of range vis-à-vis the power the municipality was purporting to exercise that it is only understandable as an attempt to achieve an improper purpose, an act of raw irrationality, or a bad faith taking.

EXTREME TAXATION AS FUNCTIONAL EXPROPRIATION

- ...the raw quantum of this tax is breathtaking and beyond anything previously known in Canada. It demands that landowners pay almost twice the value of their holdings to the local government as an annual levy. This amount is 47 times higher than the rate over which the Supreme Court deliberated in *Catalyst Paper*. This amount is unreasonable *per se* given the nature and purpose of a property tax.
- Tax at this rate amounted to functional expropriation. Assessments on which this tax is based are meant to reflect the properties' objective market rate. Therefore, it is difficult to comprehend how a tax of this magnitude is anything other than a functional expropriation. A failure to pay property tax will result in the land being seized and sold for the arrears: MSGC *Tax Policy*, s 28.

FAILURE TO FOLLOW MANDATORY BYLAW PASSING PROCEDURES

- The Metis Settlement Act established mandatory procedures for bylaw enactment, which the settlement had not complied with in passing their taxation bylaw, which the court described as “democratic process requirements”.
- “sub-delegated decision-makers...must strictly adhere to their statutory procedural requirements when exercising powers that directly or indirectly strip citizens of property” (par. 64).
- Procedural defects compromised the deference afforded to Metis Settlement Council.
- Failure to notify affected taxpayers and hold public hearing were indicators of bad faith that erode the deference owed.

CANADIAN NATURAL RESOURCES LIMITED V ELIZABETH MÉTIS SETTLEMENT, 2020 ABQB 210, TAKEAWAYS:

- The supervisory powers of the Court as to legality of government action cannot be ousted.
- Procedural requirements must be followed in passing bylaws.
- What is reasonable? In *Catalyst*, a tax rate at 4% survived review. Tax at 180% of assessed value was unreasonable and amounted to constructive expropriation.

VIRTUAL HEARINGS - TIPS AND TRICKS

- Is everyone looking at the same document?
- A virtual hearing is still a public hearing.
- Video Recording the hearing.
- Is there someone in the room with the person being cross examined?
- Technical Issues and what does the record sound like?
- Hearing Etiquette - Where is the friggin unmute button to object.
- Virtual hearings vs Teleconference hearings.

FARMLAND - IS THE 3 ACRE SITE CLASSIFIED AS FARMLAND?

Associated Developers Ltd v Edmonton (City), 2020 ABCA 253

- decision will impact different municipalities in different ways since the classification is used to determine mill rate.
- somewhat absurd result since the valuation of a property is based on one use of the property but the class is a completely different use.
- be careful how you classify properties.

[39] Where a parcel of land is used for farming operations, it is necessarily “farm land” for purposes of classification under s 297 of the *MGA*. Nothing in s 4 of *MRAT* alters that fact or otherwise affects the interpretation to be given to s 297. In the present case, the three acres of land in question are “farm land” and thus cannot, contrary to the decisions of the CARB, come within the “non-residential” assessment class. In concluding that s 4(3) of *MRAT* modified the interpretation of s 297(4)(b) of the *MGA* such that the “market value” standard assigned to the three acres precluded their being classified as “farm land”, the CARB erred in law.

SECTION 299 - WHAT MUST BE PROVIDED

Edmonton (City of) v Ten 201 Jasper Avenue Ltd, 2020 ABCA 60

- Confirms the requirement that significant information must be provided pursuant to Section 299 including information about comparator properties.
- Does not specifically outline the exact requirements of what to provide which means that there will still be differing interpretations.

[52] We observe that if s 299(1) was interpreted in such a way as to require only partial disclosure, insufficient to allow a taxpayer to learn the basis of its assessment and to determine if it had good reason to appeal, disclosure would serve little purpose. The taxpayer cannot make good decisions about whether to appeal a tax assessment if not given all the relevant information used to prepare that assessment. Further, there is no purpose in requiring full disclosure to a taxpayer in a time frame that is too short for it to adequately prepare for the hearing of its complaint.

CITATION OF CASES

1. Land at Wellsites (appeal to Court of Appeal withdrawn)

- *Canadian Natural Resources Limited v Red Deer County*, 2016 ABQB 558

2. Procedural Fairness, equity for linear property

- *Alberta (Minister of Municipal Affairs) v Ember Resources Inc.*, 2018 ABQB 971 (2016 tax year)
- *Ember Resources Inc. and Encana Corporation v Alberta*, MGB 075/16 (2016 tax year)
- *Ember Resources Inc. v Designated Linear Assessor for the Province of Alberta*, 2017 ABMGB 40 (2017 tax year)

CITATION OF CASES

3. MRAT definition of M&E – meaning of ‘processing’

- *Federated Co-operatives Limited v Wheatland County*, CARB 0349 001/2016 (2016 tax year)
- *Federated Co-Operatives Limited v Wheatland County*, 2018 ABQB 637 (appealed to Court of Appeal) (2016 tax year)
- *Wheatland County v Federated Co-Operatives Limited*, 2019 ABCA 513
- *PepsiCo Canada ULC v City of Lethbridge*, CARB – 0203-0008/2017 (judicial review filed then withdrawn)
- *Hut 8 Holdings Inc. v City of Medicine Hat*, CARB 0217-055/2018

CITATION OF CASES

4. Agricultural Operations

- *Quattro Farms Ltd. v County of Forty Mile No. 8*, 2019 ABQB 135 (2017 tax year)
- *Lynn Thacker Ag. Corp v County of Forty Mile No. 8*, 0118 CARB 003-2017
- *Quattro Farms Ltd. v County of Forty Mile No. 8*, 0118 CARB 004-2017
- *Airdrie (City) v 803969 Alberta Ltd.*, 2020 ABQB 114

CITATION OF CASES

5. Priority for linear taxes under s. 348

- *Northern Sunrise County v. Virginia Hills Oil Corp*, 2019 ABCA 61
- *Northern Sunrise County, et al. v. Bank of Nova Scotia, et al*, 2019 CanLII 79915 (SCC) (Leave to SCC denied)
- *Bank of Nova Scotia et al v. Virginia Hills Oil Corp. et al*, Court of Queen's Bench Action No. 1701 02184

CITATION OF CASES

6. Priority for property taxes under s. 348 (appeal to the Court of Appeal)

- *Royal Bank of Canada v Reid-Built Homes Ltd.*, 2018 ABQB 124

7. Zoning can affect market value; Must assess annually; Must provide evidence that prior year's assessment still appropriate or if adjustment applied in prior years is removed

- *Concord Pacific Alberta Properties Inc. v Calgary (City)*, 2017 ABQB 138 (leave granted)

8. Methodology not legislated; Sublease vacancy not included in calculation of typical vacancy rate

- *ARI 5AP GP Inc. v Calgary (City)*, 2018 ABQB 42 (leave denied)

CITATION OF CASES

9. Contamination; Owner is considered a potential purchaser

- *Victory Motors (Abbotsford) Ltd. v Assessor of Area No 15-Fraser Valley*, 2017 BCCA 295

10. Zoning can affect value; Don't speculate in the absence of evidence; Get procedural issues on the Record

- *City of Calgary v Albari Holdings Ltd.*, 2018 ABQB 210 (leave denied)

CITATION OF CASES

11. Classification of Farm Land under s. 297/MRAT s. 4(3)

- *Baramy Investments Ltd v Edmonton (City)*, 2017 ABQB 450 (leave granted) (appeal argued Oct/18)
- *Associated Developers Ltd. v Edmonton (City)*, 2017 ABQB 578 (leave granted) (appeal argued Oct/18)
- *Associated Developers Ltd. v Edmonton (City)*, 2019 ABQB 262 (appealed to Court of Appeal)
- *Associated Developers Ltd. v Edmonton (City)*, 2020 ABCA 253

CITATION OF CASES

12. Post facto evidence; Sale of the subject property; Arm's length v Open market sale; Inferences from no evidence
- *Beta Management Inc. v Edmonton (City)*, 2017 ABQB 571 (leave denied)
 - *Altus Group Ltd. v Edmonton Composite Assessment Review Board*, 2019 ABQB 295
13. Affordable housing and below market rents required by agreement; Weight afforded to appraisals
- *St. Albert Housing Society v St. Albert (Composite Assessment Review Board)*, 2017 ABCA 129

CITATION OF CASES

14. Statistical testing does not determine comparability

- *Harvard Property Management Inc. v Saskatoon (City)*, 2017 SKCA 34

15. Tenant improvements

- *Veteran's Way Project Ltd v City of Calgary*, CARB 93990P-2016 (leave to appeal argued)

16. Contamination adjustment

- *Pasutto's Hotels (1984) Ltd. v City of Calgary*, 2018 ABQB 1030
- *Pasutto's Hotels (1984) Ltd v City of Calgary*, CARB 97083P-2016

CITATION OF CASES

17. Complaint dismissed under s. 295; Boardwalk Part 2?

- *City of Calgary v Pepsico Canada ULC*, CARB 120374J-2017

18. Exclusion of evidence due to insufficient testimonial statement/know the case to be met

- *Jaroc Holdings Ltd. v Calgary (City)*, 2018 ABQB 969
- *Jaroc Holdings Ltd. City of Calgary*, CARB 114458P-2017
- *Hanson Ranch Plaza Inc. v City of Calgary*, CARB 114612P-2017

CITATION OF CASES

19. Classification under s. 297 based on Non-conforming use

- *HV Developments Ltd v City of Edmonton*, 2017 ECARB 01195 (judicial review filed)

20. Taxable status of residence portion of a religious facility

- *Ottewell Congregation of Jehovah's Witness v the City of Edmonton*, 2017 ECARB 01376 (judicial review filed)
- *Maryland Heights Congregation of Jehovah's Witnesses (Calgary) v Assessment Review Board (Calgary)*, 2019 ABQB 213

CITATION OF CASES

21. Contamination; board award costs on own initiative; Bias; Procedural issues; Ministerial extensions)

- *Slawsky v. Edmonton (City)*, 2019 ABQB 77
- *Aaron Slawsky, 82 Avenue Development Inc. v The City of Edmonton*, 2015 ECARB 01696
- *82 Avenue Developments Inc. v The City of Edmonton*, 2017 ECARB 01341(judicial review filed)
- *Aaron Slawsky, Baron Real Estate Investments Ltd. v The City of Edmonton*, 2015 ECARB 01849 (leave to appeal filed)
- *Baron Real Estate Investments Ltd. v Edmonton (City)*, 2019 ABQB 63 (appealed to Court of Appeal)
- *Baron Real Estate Investments Ltd. v The City of Edmonton*, 2017 ECARB 01391

CITATION OF CASES

22. Value of improvements under cost approach to exclude GST

- *Calgary (City) v Lehigh Hanson Materials Limited et al*, 2018 ABQB 639 (CanLII)
- *1542921 Alberta Ltd v Calgary (City)*, 2018 ABQB 607 (CanLII)

CITATION OF CASES

23. S. 299 response include information about other properties

- *Ten 201 Jasper Avenue Ltd as represented by Altus Group v The City of Edmonton*, 2016 ECARB 00519
- *Edmonton (City) v Edmonton (Assessment Review Board)*, 2018 ABQB 501, June 29, 2018 (appealed to the Court of Appeal – to be heard by Court of Appeal October 2019)
- *Edmonton (City of) v Ten 201 Jasper Avenue Ltd.*, 2020 ABCA 60
- *Canapen Phipps McKinnon Ltd as represented by Altus group v The City of Edmonton*, 2016 ECARB 00959
- *1602 157 Alberta Ltd as represented by Altus Group v The City of Edmonton*, 2016 ECARB 00958 (appeal argued March 22)

CITATION OF CASES

24. Board fettering its discretion (breach of procedural fairness) by following a City of Calgary zoning policy – leave to appeal granted

- Cidex Developments Ltd. v. Calgary (City), 2018 ABQB 519, July 9, 2018

25. Unreasonable for a CARB to fail to take into account zoning bylaw restrictions even if not raised as an issue.

- Condominium Corporation No 0211484 v The Town of Canmore, 2018 ABQB 649 (CanLII)

Court considered the impact of the Land Use Bylaw on the value of the stalls despite this issue not having been raised before the CARB. Said that it was unreasonable to not consider this issue that was not raised. The case was remitted back to the CARB to consider this issue.

CITATION OF CASES

26. Issues Surrounding Lease Rates and Capitalization Rates not questions of law to which an appeal should be granted.

- *Dundeeal Summer 2011 Collection (GP) Inc. v. Calgary*, 2018 ABQB 219

Leave to appeal dismissed on issues surrounding rental rates and capitalization rates as raising no questions of law and having no chance of success.

- *HOOPP Realty Inc. v Edmonton (City)*, 2018 ABQB 404 (CanLII)

Application on leave to appeal was denied. Issues related to the use of evidence on rental rate and the classification of the property as well as the onus of proof in assessment cases. Court recognized that this was a case about the application of evidence that was attempting to get around the expertise of the CARB.

- *J-9 Capital Corp et al. v. City of Calgary et al* (unreported) (Nov 1, 2017)

Similar issues to above two cases.

CITATION OF CASES

27. Special Lien in 348 only applies to the land for which the tax was imposed.

- *Regent Resources Ltd (Re)*, 2018 ABQB 669 (CanLII)

28. Limitation to file for judicial review (s. 470) interpretation of “Date of Decision”

- *Special Areas Board v ATCO Power Canada Ltd.*, 2018 ABQB 1035

29. Late Complaints

- *Enterprise Properties Ltd. v Flagstaff County*, 0110 CARB 2018-02 (judicial review argued February 2020)
- *Enterprise Properties Ltd. v Flagstaff County*, 2020 ABQB 313

CITATION OF CASES

30. Business Tax Bylaw

- *Airstate Ltd. v Calgary (City)*, 2019 ABQB 10

31. Bylaw (Ag Society) s. 362(2) and Exemption s. 362(1)(n)(ii) and COPTER

- *Donalda and District Ag Society and Village of Donalda*, CARB 0089 1154 2018 Central AB CARB

32. Adjusting Sales

- *Altus Group Ltd. v. Edmonton Composite Assessment Review Board*, 2019 ABQB 295

CITATION OF CASES

33. Know the case to be met/opportunity to respond

- *Calgary (City) v Renfrew Chrysler Inc.*, 2017 ABQB 197
- *Alberta (Minister of Municipal Affairs) v Ember Resources Inc.*, 2018 ABQB 971
- *Jaroc Holdings Ltd. v Calgary (City)*, 2018 ABQB 969
- *Cal-Ed 5th Avenue Holdings v City of Calgary*, QB action # 1801-16372 argued October 2019
- *Pepsico Canada ULC, Kanco 44th Street Calgary Ltd. And Hamptons Golf Course Ltd. v The City of Calgary and the Calgary Assessment Review Board*, Oral Decision of Justice deWit Rendered September 13, 2018 QB action # 1701-09870
- *654189 Alberta Inc. (as represented by Assessment Advisory Group Inc.) v The City of Calgary and the Calgary Assessment Review Board*, Oral Decision of Justice Nixon Rendered January 19, 2018 QB action # 1601-15719

CITATION OF CASES

34. Jurisdiction of the MGB to rule on the validity of the Minister's Guidelines s. 322.1 and s. 488.1

- *TransAlta Generation et al v. Designated Linear Assessor*, DL 011/19 (Judicial Review argued September 2020)

35. Reasonableness Standard of Review – SCC

- *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

CITATION OF CASES

36. Reasonableness Standard of Review (failure to account for relevant evidence, adequacy of reasons)

- *Calgary (City) v Bradie Building Ltd.*, 2019 ABQB 846

37. Tax Rate Challenge

- *Canadian Natural Resources Limited v. Elizabeth Metis Settlement*, 2020 ABQB 210

THANK YOU FOR YOUR PARTICIPATION

WE WELCOME YOUR QUESTIONS

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