



Tribunals Ontario

Assessment
Review Board

Tribunaux décisionnels Ontario

Commission de révision de
l'évaluation foncière

ISSUE DATE: January 08, 2021

FILE NO.: DM 167593

Assessed Person(s): General Motors of Canada Company
Appellant(s): General Motors of Canada Company
Respondent(s): Municipal Assessment Property Corporation Region 19
Respondent(s): City of St. Catharines
Property Location(s): 570 Glendale Avenue
Municipality(ies): City of St. Catharines
Roll Number(s): 2629-010-011-20800-0000
Appeal Number(s): 2024803, 2339422, 2687806, 2893487, 2893488,
2917708, 2949272, 2974000, 3023580, 3088595,
3155834, 3237798, 3309277, 3335049, 3363172, 3381990
and 3408073
Taxation Year(s): 2009 to 2020
Hearing Event No.: 735978
Legislative Authority: Rule 61 of the Assessment Review Board's *Rules of Practice
and Procedure*

Parties

Counsel

General Motors of Canada Company	Stephen Longo
Municipal Property Assessment Corporation	David Cowling Mattison Chinneck
City of St. Catharines	John O'Kane

REQUEST FOR: Strike Appellant's Amended Statement of Issues and Reply
HEARD: November 03, 2020, in writing
ADJUDICATOR(S): Dirk VanderBent, Vice-Chair

MOTION DECISION

OVERVIEW

[1] General Motors of Canada Company, the Appellant, is the assessed owner of 570 Glendale Avenue, in the City of St. Catharines (“Subject Property”) and has filed appeals for the taxation years spanning 3 assessment cycles.

[2] Under the Board’s *Rules of Practice and Procedure* (“Rules”), appeal proceedings are governed by a Schedule of Events (“SOE”). The appeal proceedings for the previous assessment cycles are governed by one SOE (“Legacy Proceeding SOE”), while current cycle appeals are governed by a different SOE (“Current SOE”).

[3] As will be explained in greater detail, the Appellant has served a document described as an amended Statement of Issues and Reply (“Amended SOI/Reply”). Although this has been described as one document, the Board’s Rules provide that the Appellant’s Amended Statement of Issues and Amended Reply are, functionally, two separate documents.

[4] The Municipal Assessment Property Corporation (“MPAC”) is a Respondent in these appeal proceedings and has brought a Motion requesting that the Board “strike” the Amended SOI/Reply on the basis that it has not been served by the required due date set out in the Current SOE. The City of St. Catharines (the “City”) is a Respondent in these appeal proceedings and has also brought a Motion requesting the same relief. The Appellant opposes their request.

Result

[5] For the reasons described below, the Board finds:

- (a) The Rules do not provide that the Board may “strike” an Amended SOI or Amended Reply;

- (b) The Appellant has not served its Amended SOI by the required due date set out in the Current SOE, and, consequently, cannot raise at a hearing any issues that are not raised in its original Statement of Issues or its Amended Reply;
- (c) The Appellant has served its Amended Reply by the required due date. Consequently, the Appellant may rely on its Amended Reply, provided that the Amended Reply may only respond to new issues that have been raised in the Amended Statements of Response served by either MPAC or the City.

ANALYSIS

Applicable Requirements under the Board's Rules

[6] Rule 33 confirms that the Board will assign a day ("Commencement Date") on which the applicable schedule of events for an appeal proceeding will commence. Rule 34 provides for a standard Schedule of Events for appeals heard by way of General Proceeding, which is attached to Rules as Schedule A ("SOE"). This SOE sets out the due dates for completion of all pre-hearing steps ("Events"). These Events include the preparation of a Statement of Issues, Statement of Response and Reply, which are collectively described as pleadings. The Events also include the exchange of disclosure, obtaining expert reports, and serving amended pleadings. The Events and their associated completion due dates, which pertain to the issue raised in this Motion, are:

If the appeal is not resolved, and any of the parties intend to obtain any additional expert reports:

Weeks 63 to 78	1. Each Appellant must serve on all other parties any expert reports on which the Appellant intends to rely at the hearing, as well as any amendment to the Appellant's Statement of Issues to address any	August 15, 2019
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additional evidence or issues raised in an expert's report;

- | | | | |
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| Weeks 79 to 94 | 2. | Each Responding Party must then serve on all other parties any expert reports on which the Responding Party intends to rely at the hearing, as well as any amendment to the Responding Party's Statement of Response to address any additional evidence or issues raised in an expert's report; | July 02, 2020
(amended date) |
| Weeks 95 to 100 | 3. | Each Appellant must then serve any supplementary reports by its experts in reply to any expert reports served by a Responding Party. | July 30, 2020
(amended date) |
| Weeks 101 to 104 | 4. | If, after the completion of the additional exchange of expert reports, the Parties are still unable to resolve the appeal, each party shall file with the Board: <ul style="list-style-type: none"> i. its amended SOI, SOR, and Reply
(as the case may be); ii. ... | |

[emphasis added]

[7] As noted in the above excerpt, the Board has earlier amended the original due dates for serving responding expert reports. The reasons giving rise to this amendment do not have any bearing on the issue to be addressed in this Motion.

[8] Rule 41 states:

Amendment of Documents

Statements of issues or responses cannot be amended after the filing date set out in the schedule of events unless all parties consent, or as provided in these Rules, unless the Board directs otherwise.

[9] Rule 49 states:

No New Issues

An issue can only be raised at a hearing event if it has been set out in the statements of issue and response **which have been served, and filed with the Board in accordance with these Rules**, unless the Board determines that there are exceptional circumstances. [emphasis added]

[10] Rule 82 states:

Dates Fixed

After the day set in Rule 33 as the start of a proceeding the Board will not alter any timeline set out in the schedule of events, other than in exceptional circumstances.

[11] The Rules do not include a provision to “strike” a Statement of Issues or Response or a Reply, or an amended pleading. However, under Rule 41, a Statement of Issues or Response cannot be amended after the due date for filing it with the Board. Furthermore, a party cannot raise an issue at a hearing unless it is set out in Statement of Issues or Response and the Statement of Issues or Response has been served and filed by the applicable due dates set out in the SOE, unless there are exceptional circumstances.

Background and Issue

[12] In this Motion, the facts are not in dispute. The parties exchanged Statements of Issue and Response, and then opted to obtain expert reports. Although the Current SOE requires that the Appellant serve its expert reports and Amended SOI by August 15, 2019, the parties agreed among themselves that the Appellant could serve its expert report(s) by November 29, 2019. The Motion submissions do not assert that the Appellant failed to serve its expert report(s) by November 29, 2019 due date. However, the Motion submissions also indicate that there is no agreement that the Appellant could serve its Amended SOI later than November 29, 2019. The Appellant acknowledges that it did not serve an Amended SOI by this date. Instead, the Appellant served the Amended SOI/Reply on July 29, 2020.

[13] In light of the regulatory regime provided in the Rules, as described above, the issue is not whether the Board should “strike” the Amended SOI/Reply. Instead, it is whether the Appellant has established any exceptional circumstances which would warrant extending the due date for serving an Amended SOI from November 29, 2019 to July 29, 2020.

Submissions

[14] The parties provided extensive submissions on the question of whether the Board should “strike” the Appellants Amended SOI/Reply. The parties appear to assume that the Board’s Rules apply a procedure similar to a procedure found in rules of practice governing court procedures in civil proceedings. However, as the Board has already noted above, there is no provision in the Rules to strike a Statement of Issues or Response. Furthermore, it is not disputed that the Appellant has served its original Statement of Issues by the required due date, so the Appellant can rely on the issues it has raised in its original Statement of Issues.

[15] For these reasons, the submissions provided by the parties as to whether the Board should strike the Amended SOI/Reply are of little assistance. Consequently, although the Board has reviewed these submissions in detail and has considered them in light of the issue the Board must address in this Motion hearing, the Board has not summarized these submissions in this Motion Decision.

[16] Turning to the probative submissions made by the parties, MPAC maintains that the Amended SOI/Reply contains numerous changes “in relation to the earlier expert reports”. MPAC utilized computer software (Adobe PDF’s comparison program) which identifies that a total of 1,125 replacements, insertions and deletions were made to the Appellant’s original SOI. MPAC emphasizes that the Amended SOI/Reply was served 244 days “after the expert reports”. MPAC submits that the Appellant has not complied with the Current SOE, and that allowing the Appellant to rely on its Amended SOI/ Reply would be an abuse of process. Alternatively, if the Board finds that the Appellant can

rely on its Amended SOI, the Respondents submit that they should be given the opportunity to respond to the additional issues raised in the Appellant's Amended SOI.

[17] MPAC further submits that the SOE specifically compels the Appellant to modify its SOI with respect to the expert reports. MPAC asserts that the language of Rule 41 restricting amendment of pleadings after the filing date, does not imply that the Appellant is at liberty to discard the due dates set out in the SOE.

[18] The City's submissions mirror those of MPAC. Regarding Rule 41, the City submits the policy underpinning the Board's process is described in *NAV Canada v. Municipal Property Assessment Corporation, Region 15 and 23*, 2017 CanLII 70657 (ON ARB) ("*Nav Canada*"), at paragraph 13, which states:

[13] ... Rule 41 is explicit that pleadings cannot be amended after filing without the consent of all parties. There is a clear policy rationale behind the Rule. It is fundamentally unfair to the other parties to permit the issues to change late in the process. The purpose of pleadings is to let all parties know the case to be met and to avoid ambush. Pleadings lock the issues in place and ground all further work on appeals. They should only be amended late in the process in special circumstances.

[19] In response, the Appellant submits that, although it did not formally amend its original SOI at the time of service of its expert reports in November 2019, there are good reasons why it opted not to do so, in that there were substantial delays in the service of the responding materials of MPAC and the City and ongoing exchanges as to revisions to the procedural timeline.

[20] The Appellant also maintains that the right to submit its Reply was granted by the Board in response to MPAC requiring additional time for it to submit a new expert report, after its previously retained expert was forced to withdraw his retainer on direction of his employer. The Appellant submits that, the Respondent's request to strike its Reply is, in these circumstances, is an abuse of process, as well as a waste of time and resources.

[21] The Appellant further submits that relevant jurisprudence clearly indicates that mere non-compliance with a procedural deadline is not grounds for a drastic step such as striking pleadings or dismissing appeals. The Appellant argues that the Board should not endorse an “absolute liability” approach to non-compliance with procedural events, submitting that, instead, the correct approach in considering a request to strike, which is a harsh and rarely taken step, is for the Board to determine whether there is any actual prejudice to the parties that cannot be cured. In this regard, the Appellant maintains that neither MPAC nor the City have adduced any evidence whatsoever to establish that they would be prejudiced. The Appellant submits that, in the absence of evidence of prejudice, the Board lacks the jurisdiction to grant the harsh and draconian relief sought by the Respondents.

[22] The Appellant asserts that both MPAC and the City had effective notice of its position well before they served their Statement of Response. Therefore, the Appellant submits that, in this case, the amended pleadings merely formalize a position that the Appellant had already expressed to them. The Appellant maintains, therefore, that there has been no “ambush” as referenced in the above quoted paragraph in *Nav Canada*.

Findings

Rule Requirements

[23] The Board first addresses the requirements of the Rules as it pertains to the exchange of pleadings and any amendments to these pleadings.

[24] The Board notes that an SOE includes specific due dates for serving an SOI, SOR, and Reply, and separate due dates for serving amendments to these pleadings. The purpose of the SOE is to provide for the orderly exchange of these documents. Parties are expected to provide full and comprehensive statements of issues or

response and reply before expert valuation reports are obtained. This is confirmed by Rule 38 which prescribes in detail what statements of issues and response must contain. The Board's Rules do not provide for exchange of draft or preliminary statements of issues and response, or the inclusion of clauses in a pleading that states that a party reserves a right to amend its pleading at any time. To allow otherwise, would mean that parties could get caught up in a loop of repeated exchange of amended pleadings and related disclosure, with the result that the issues are not finally identified and confirmed on a timely basis.

[25] Regarding amendment of pleadings, the Board first notes that an expert who prepares a valuation report for a party, must be independent. As such, the expert may address any matters that the expert feels are necessary to formulate his/her opinions. Consequently, in some cases, an expert may address an issue that a party or parties have not addressed in their statements of issues or response and reply. For this reason, the SOE expressly allows for amendments to these pleadings where the parties choose to obtain expert reports. However, the SOE also expressly provides that the only amendments permitted are amendments to address any additional evidence or issues raised in an expert's report. A party cannot include its own additional "new" issues in its amended pleading.

[26] The SOE provides for a "staggered" exchange of both the original pleadings and amended pleadings, i.e. the appellant provides its statement of issues first, the respondents file their responses to these issues, and the Appellant then files its reply. The SOE also applies the same staggered approach to the exchange of expert valuation reports, and any amendments to their pleadings. This staggered approach ensures that each party is given a fair opportunity to understand the case it has to meet and to comprehensively prepare its case for presentation at a hearing. As noted in *Nav Canada*, pleadings lock the issues in place and ground all further work on appeals.

[27] To give effect to these purposes, the SOE requires that an Appellant, when serving its expert report(s), is also required to serve an Amended Statement of Issues at

the same time, in order to identify any additional issues and evidence on which the Appellant intends to rely at the hearing. The purpose of this requirement is to inform the responding parties of the specific additional issues to which they and their experts are required to respond. The responding parties, in turn, are similarly required to provide their amended statement of response, in order to inform the Appellant of the additional issues to which an appellant and its experts are required to reply.

[28] Rule 41 provides that statements of issues or response cannot be amended after the due date for *filing* these documents with the Board. This Rule does not refer to the effect of non-compliance with the due dates to *serve* a statement of issues, statement of response or reply, or amendments to these pleadings. Instead, it is Rule 49 and the SOE that govern. The SOE sets out the due dates for both serving and filing the pleadings, and Rule 49 provides that there will be no extension of these due dates, other than in exceptional circumstances.

[29] Parties are expected to comply with the due dates set out in Schedule of Events. However, it is important to observe, that where the parties have not agreed among themselves to adjust a due date, the required due date remains the date set out in the SOE. If a party requires an adjustment to a due date, the party must apply to the Board to request a formal amendment to the SOE. This is confirmed by Rule 82 which provides that the Board will not alter any timeline set out in the SOE, other than in exceptional circumstances. The underlying purpose of this Rule is to ensure that appeal proceedings are completed within the amount of time specified in the SOE, in order to ensure the timely resolution of all appeal proceedings.

Findings respecting the Appellant's Amended Statement of Issues

[30] The Board now turns to the application of the Rules to the specific circumstances of this case. The Board has already noted that, under the SOE, the SOI and Reply are functionally different documents. Therefore, the Board will address them separately, beginning the with Amended SOI.

[31] The Board first notes that the parties voluntarily agreed to adjust some of the due dates set out in the SOE without requesting a Board order to amend the Current SOE. The Board has issued a Guideline on the Interpretation of the Schedule of Events which indicates that the parties may do so, subject to the proviso that they cannot extend the due date for filing the Mandatory Meeting Form with the Board. For this reason, the Board accepts that the required due date for the Appellant to serve its expert reports and file its Amended Statement of Issues is the date agreed upon by the parties, namely, November 29, 2019.

[32] In this case, if the Appellant failed to serve an Amended Statement of Issues by the required November 29, 2019 due date. Consequently, the Appellant can only rely on its Amended SOI if the Board extends the due date for serving the Amended SOI. Pursuant to Rule 82, such an extension will only be granted in exceptional circumstances. The question, therefore, is whether the Appellant has established any exceptional circumstances to warrant an extension.

[33] The Appellant acknowledges that it did not serve its Amended SOI until July 29, 2020, but maintains that it is justified in doing so because “there were substantial delays in the service of the responding materials of MPAC and the City and ongoing exchanges as to revisions to the procedural timeline.” The affidavit evidence provided by the Appellant in support this assertion indicates that there were adjustments to the due dates for serving the original pleadings. However, the Board observes that the adjustments to the due dates to serve the original pleadings occurred before the Appellant obtained its expert report.

[34] As noted earlier, MPAC also requested and obtained a Board order extending the due dates for serving its expert reports. However, service of the Respondent’s expert reports occurs after the date the Appellant is required to serve its Amended SOI. In this regard, the Board re-iterates that amendments to the SOI are to address new issues raised by the *Appellant’s* expert report(s). There is no reason to delay serving the Amended SOI until the Respondents serve their experts reports, as the Appellant

can address any new issues raised by the Respondents in its subsequent Amended Reply.

[35] For these reasons, the Board does not accept that any delays in serving responding materials and revisions to the procedural timeline would in any way impact the Appellant's ability to prepare and serve its Amended SOI on November 29, 2019 together with its expert reports. The Appellant has not submitted any other grounds on which the Board could conclude that an exceptional circumstance exists.

[36] In summary, the Board finds that the Appellant has not established that there are any exceptional circumstances to warrant an extension of the due date to serve its Amended SOI. Consequently, pursuant to Rule 49, the Appellant cannot raise at a hearing any issues that are not raised in its original Statement of Issues or its Amended Reply (discussed below).

[37] In making the above finding, the Board has considered the Appellant's argument that the Board should not endorse an "absolute liability" approach to non-compliance with procedural events, submitting, instead, that the correct approach is for the Board to determine whether there is any actual prejudice to the parties that cannot be cured. In this regard, the Appellant asserts there is no prejudice to the Respondents because they had effective notice of its position well before they served their Statements of Response. The Appellant further submits that, in the absence of evidence of prejudice, the Board lacks the jurisdiction to grant the relief sought by the Respondents.

[38] In addressing these submissions, the Board first notes that, if the Respondents agreed that they had received effective notice of the Appellant's position, they would not have found it necessary to bring these motions. Therefore, there is a dispute regarding whether effective notice was provided.

[39] The Board notes that the Appellant's submission does not describe what this

effective notice was, whether it was conveyed orally, or when it was provided. Therefore, the Board finds that the Appellant has provided insufficient evidence to establish that “effective notice” was provided. Furthermore, the Board observes that Rule 38 sets out the requirements for Statements of Issues and Response. This Rule and the SOE do not provide that a party may substitute service of a written pleading, with some other form of notice. This dispute demonstrates the problem that can occur when a party does not follow the events set out in the SOE. The Board should not be required to adjudicate whether a party has properly pleaded its case. This dispute would not have arisen had the Appellant complied with the requirements of the SOE.

[40] For the above reasons, the Board finds does not accept the Appellant’s submission that there can be no prejudice to the Respondents on the grounds that they have received “effective notice”.

[41] The Board now turns to the Appellant’s submission that, in the absence of evidence of prejudice, the Board does not have jurisdiction to deny a request to extend the due date for serving its Amended SOI. For the following reasons, the Board does not accept this submission.

[42] As noted earlier, the purpose of the SOE is to provide for the orderly exchange of pleadings to ensure that each party is given a fair opportunity to understand the case it has to meet and to comprehensively prepare its own case for a hearing, and to ensure that appeal proceedings are completed on a timely basis. To allow parties to unilaterally determine when they will comply with the SOE, would result in chaos in the management of the appeal proceedings before the Board. This is the systemic prejudice that would result from such an approach. In order to avoid this systemic prejudice, Rules 48 and 49 implement consequences for non-compliance with the SOE.

[43] In addition to this systemic prejudice, the Board observes that non-compliance does result in prejudice to other parties. This appeal proceeding is a case in point. When an appellant receives its expert report(s), it must interpret whether and how the

report's analysis and conclusions may alter the issues, facts and legal grounds stated the appellant's original Statement of Issues. The respondents cannot be left to guess what such amendments to SOI will be. They require written confirmation of such amendments, so that they can fully prepare their response to the Appellant's amended case.

[44] In summary, prejudice results whenever a party fails to comply with the chronological order of events set out in the SOE. Therefore, the Board does not accept the Appellant's submission that it does not have jurisdiction to deny a request to extend the due date for serving its Amended SOI. The Board has found that the Appellant has not established any exceptional circumstances to warrant an extension to the due date to serve the Amended SOI. Therefore, as the Appellant has not served its Amended SOI by the required due date, the Appellant cannot raise at a hearing any issues that are not raised in its original Statement of Issues.

Findings respecting the Appellant's Amended Reply

[45] The Board now turns to the Appellant's Amended Reply. As noted above, the SOE provides a due date for serving an Amended Reply. While it appears that the Amended Reply must also be served by the same due date, the SOE does not expressly state this. However, the next event in the SOE, which provides for filing documents with the Board, expressly refers to an amended reply. In light of this ambiguity, the Board accepts that the Appellant may serve its Amended Reply after the due date for serving its Reply Expert Report(s), but before the due date for filing the Amended Reply, which in this case is July 30, 2020. This approach does not result in prejudice to the Respondents, as filing the Amended Reply is the last pleading to be exchanged among the parties.

[46] As the Appellant has served its Amended Reply on July 29, 2020, the Appellant has complied with the Current SOE, and, consequently, may rely on its Amended Reply. As an appellant's amended reply can respond only new issues raised in the amended

statements of response, an appellant cannot introduce additional new issues in its amended reply.

[47] The Board now turns to a brief discussion of the Amended SOI/Reply. While it may have been preferable that the Board address specific issues which the Respondents assert cannot be raised at the hearing, the Board is unable to do so because the Respondents did not indicate what these issues were. As noted earlier, MPAC's evidence only provides a summary of the number of edits made in the Amended SOI/Reply without identifying what the edits were. Therefore, this evidence is of little assistance to the Board.

[48] The Amended SOI/Reply was not filed by any party as evidence in this Motion hearing. Consequently, it is also unclear whether this document includes separate sections for the Amended SOI and the Amended Reply. If it does not, the Board directs that the Appellant should prepare, serve and file a separate Amended Reply within 7 business days of the issuance of this Motion Decision.

CONCLUSION

[49] In conclusion, the Board re-iterates that the SOE provides for the orderly exchange of pleadings to ensure that each party is given a fair opportunity to understand the case it has to meet and to comprehensively prepare its case for presentation at a hearing, and to ensure that appeal proceedings are completed on a timely basis. The consequences for failing to comply with the SOE are clearly set out in Rules 48 and 49. Subject to the exception that a minor adjustment to a due date may be made where all parties agree, the due dates in the SOE remain in force and must be observed. A party cannot otherwise unilaterally change a due date in a SOE, but, instead, must apply to the Board to request an order to amend the due date. Strict compliance with the due dates in the Schedule of Events is required.

ORDER

[50] The Board orders that:

- (a) As the Appellant has not served its Amended SOI by the required due date set out in the Current SOE, the Appellant cannot raise at a hearing any issues that are not raised in its original Statement of Issues or its Amended Reply;
- (b) As the Appellant has served its Amended Reply by the required due date, the Appellant may rely on its Amended Reply, provided that the Amended Reply may only respond to new issues that have been raised in the Amended Statements of Response served by either MPAC or the City.
- (c) If the Appellant's Amended SOI/Reply document does not include a separate section for its Amended Reply, the Appellant is directed to prepare, serve and file a separate Amended Reply within seven business days of the issuance of this Motion Decision.

"Dirk VanderBent"

DIRK VANDERBENT
VICE-CHAIR