Canadian Property Tax Association, Inc. | Association canadienne de taxe foncière, Inc.

August 2, 2019

BY EMAIL: arb.registrar@ontario.ca/kelly.triantafilou@ontario.ca

Attn: Kelly Triantafilou
Registrar, Senior Case Manager
Assessment Review Board
Tribunal Ontario - Environmental Land Division
655 Bay Street, Suite 1500
Toronto ON M5G 1E5

Dear Madame Registrar:

RE: Feedback to Proposed Rule Changes – Canadian Property Tax Association

This letter details the Canadian Property Tax Association (the "**CPTA**") Ontario Chapter's concerns regarding the Assessment Review Board's July 3, 2019 Memorandum and the July 8, 2019 proposed changes to the *Rules of Practice and Procedure* and certain Board practices (collectively, the "**Proposed Changes**").

The Proposed Changes should not be implemented, and no changes should be made without first holding meaningful consultation with stakeholders. We believe that Ontario's current property assessment and taxation appeals process burdens parties with unnecessary red tape and expense. The Proposed Changes will worsen these problems by creating a chaotic system that includes unfair and needless barriers to correcting assessment errors. They will harm the integrity of municipal property taxation system.

The Canadian Property Tax Association

The CPTA is Canada's largest organization of property tax professionals. We are dedicated to advancing fair and equitable property taxation policies. Our members have a particular focus on commercial, industrial, and multi-residential properties.

CPTA members include professional valuators, property tax consultants, paralegals, and lawyers from across Canada. The Ontario Chapter includes representatives of virtually every property type within the Province.

Devastating to Ontario Businesses and Property Owners

The Proposed Changes, if implemented, will be devastating to Ontario property owners and businesses.

All five million properties in Ontario are valued for taxation using a mass-assessment system. Errors and mistakes are inevitable. They result in incorrect property assessments with owners and businesses paying more than their fair share in tax. These amounts can be significant and disastrous to large property owners, tenants, and small businesses.

Ontario's property assessment and tax regime is mandated by a legislative framework to facilitate the fair and equitable distribution of Ontario's property tax burden.

The Ontario Assessment Review Board (the "**ARB**" or the "**Board**") is the tribunal tasked with adjudicating property tax and assessment disputes and correcting assessment errors. Its effective role is imperative to the integrity of Ontario's municipal revenue scheme.

In 2017, the ARB imposed drastic changes to its Rules and implemented an entirely new procedural process (the "**2017 Changes**"). The 2017 Changes effectively 1) made it more costly and complex to file an appeal; 2) made it easier for the Board dismiss appeals; 3) made it costlier to run existing appeals; and 4) forced appeals through the system as fast as possible in a "one-size-fits-all" manner. The Proposed Changes exacerbate these problems.

We strongly oppose some of the Proposed Changes and believe they will lead to a chaotic and unfair adjudicative process. We outline concerns generally below, we provide greater detail and suggestions in the attached Appendix "A":

1. **Compressed Scheduling**: The Proposed Changes seek to run two different appeals schedules simultaneously. The proposed new schedule provides less than half the time for an appeal than previously allotted. We do not oppose a 40-week schedule *per se*, but a compressed timeline for all appeals, and different schedules running concurrently, will create impossible deadlines for appellants. It will seriously prejudice taxpayers and impair the integrity of the entire adjudicative process. This proposed change will introduce significant inefficiencies, drastically increase costs to taxpayers, and lead to manifest unfairness. Complex appeals dealing with complex issues require a mechanism allowing additional time and flexible schedules. This proposed change makes it impossible for some appeals to receive the time they demand.

2. **Grounds for Appeal Identified at the Outset**: It is impossible, in many appeals, for taxpayers to comprehensibly understand the issues at the initial stages. Many property owners are not experts in complicated valuation methodology – they will be unable to complete this step. This requirement is too onerous and will drastically increase costs to Ontario citizens and businesses launching appeals. It denies access to justice by creating an unnecessary, complicated, and expensive barrier to the process. In many instances, error details are simply not discoverable before a proceeding's disclosure of documents stage. Further, the legislative regime does not contemplate the ARB exercising such a screening function and it is likely beyond the Board's jurisdiction. This proposed change is an unfair gatekeeping mechanism.

3. **Mandatory Electronic Hearings**: Mandating electronic hearings is an unwise "one-size-fits-all" approach. Complex appeals will suffer and appellants will be deprived of their rights under the principles of natural justice. There must be a reasonably available in-person hearing option.

4. **Expedited Process for Dismissing Appeals**: This proposed change risks the denial of natural justice. Dismissing an appeal is an extreme remedy and should not be undertaken lightly. The Board's process must align with the *Assessment Review Board Act* and the *Statutory Powers and Procedures Act*.

The overall tone of the Proposed Changes appears to continue the trend of eliminating as many appeals as possible at the expense of a fair and correct adjudicative process.

The recent 2017 Changes created the appearance that the ARB prioritised low appeal metrics over the successful adjudication of legitimate disputes – it created many unfair and arbitrary procedural barriers for all parties. Appellants incurred significantly higher costs at early stages of appeals and the imposed "one-size-fits-all" approach for all appeals prejudiced complex matters.

The current Proposed Changes exacerbate, not fix, these problems. They will further increase costs to appellants, lessen the quality of adjudication before the ARB, and make the Ontario assessment and tax appeals process chaotic and unmanageable. Ontario citizens and businesses will be harmed if they are implemented.

The worst of these effects is borne by small business property owners. Their appeals often involve complex issues, but their potential tax recovery is limited relative to the escalating costs of bringing an appeal. Appellants are not compensated for a successful appeal or for fixing an incorrect assessment.

With all due respect to the ARB's need for efficiency, the Proposed Changes come at the cost of natural justice and the integrity of Ontario's assessment system. The right of Ontario property owners to receive correct assessments, and fair and full hearings of assessment appeals on the merits, should be the overarching goal of the process.

Inadequate and Missing Consultation

Municipal, business, and citizen stakeholders all seek the opportunity to create a more efficient and clear system in Ontario. This is not achieved by hastily implementing changes to the process, mid-cycle, without proper review and consultation.

The 2017 Changes created a completely new assessment appeals process. The first matters are only now arriving at the hearing stage. The effects are not yet understood and have not yet been analysed with stakeholders.

The ARB initially, before the advent of Tribunals Ontario, set up limited stakeholder committees for ongoing consultation. They were abruptly cancelled without warning. The Board then proceeded with the Proposed Changes without appropriate input from those most affected. We are unaware of any sustained ARB attempt to consider the impact of the Proposed Changes upon Ontario businesses and property owners.

We suggest forming new committees and performing meaningful consultation with stakeholders before any changes are implemented.

The Proposed Changes Should not be Implemented – Premature & Ill-Advised

The Proposed Changes should not be implemented because they will make existing problems worse. Incorrect assessments are mistakes to be corrected. The Proposed Changes do not further the goals of providing a fair and effective adjudicative or correcting

process. Rather, they aim to discourage appeals and direct proceedings through the system at an unreasonable pace.

Hasty and ineffective adjudication will negatively impact the economy, hurt businesses, and deter investment in the Province. Fair and efficient adjudication benefits everyone.

The CPTA would be pleased to meet with the drafters of the proposed Rules to fully explore resolutions to problem areas. We look forward to hearing from you with respect to our input.

Yours sincerely,

THE ONTARIO CHAPTER of the CANADIAN PROPERTY TAX ASSOCIATION

Per:

ARB Processes Committee

Canadian Property Tax Association

Encl: Appendix "A": Detailed Concerns

CC: Linda Lamoureux - Executive Chair of Tribunals Ontario
Paul Muldoon – Associate Chair, Assessment Review Board
Doug Downey - Attorney General of Ontario
Rod Phillips - Minister of Finance of Ontario
Giles Gherson - Deputy Minister, Red Tape and Regulatory Burden Reduction

APPENDIX "A"
DETAILED CONCERNS

Ontario's property assessment and tax regime is intended to establish a fair and equitable distribution of the property tax burden. Integral to that purpose is the legislative framework of the ARB, mandated as a quasi-judicial and unbiased tribunal to determine assessment appeals:

1. on their merits, in accordance with the principles of natural justice;

2. to ensure the just, most expeditious and least expensive determination of every proceeding; and

3. to ensure public confidence in the integrity of the property assessment and tax regime.

The Proposed Changes do nothing to further these goals.

1. Compressed Scheduling:

Implementing new shorter timelines to run concurrently with the existing timelines, after the Board has previously induced parties to allocate resources differently, will create chaos. Shortening timelines in the middle of an assessment cycle, from 104 weeks to merely 40 weeks for some appeals will burden municipalities, taxpayers, and the assessing authority with unmanageable workloads.

Stakeholders are already experiencing difficulties meeting the current Schedule of Events for General Proceedings. A mid-cycle addition of a new schedule of events running concurrently with the old schedule will significantly worsen this problem.

Complex appeals before the ARB, similar to other complex litigation, require more time to proceed than general matters. While some appeals will benefit from a shorter schedule, a "one-size-fits-all" approach is unfeasible. A compressed schedule of events removes any ability for parties to run complex appeals sensibly. Compressing the timelines will force complex appeals to move along at an unrealistic pace risking the unfair dismissals of appeals, abuse of the system, and assessments that may not reflect a property's correct current value.

In reliance upon the significant 2017 Changes, property taxpayers, MPAC, and municipalities have restructured their resources to accommodate the ARB's preferences. This has resulted in enormous costs. It appears that parties have relied to their detriment upon the ARB.

The Proposed Changes will strain the resources of all parties and lead to a more flawed system.

The Proposed Schedule - Specific Areas of Concern

A mere two weeks for inspections and additional disclosure is simply impossible. This change assumes that parties are able to dedicate all their time to one file while, in reality, multiple files have the same commencement date.
Certain assessed properties in Ontario, including mining properties, for example, could require more than two weeks to inspect in their entirety. The failure of the schedule to anticipate this type of complexity suggests a failure to understand the realities of complex assessment litigation. It would be incorrect to suggest that a fair hearing could take place if such a change is imposed.

The proposed removal of the extended stream for properties requiring additional time to author expert reports is destructive and contrary to the principles of natural justice. Invariably, these properties - with the most demanding, delicate, and complicated factual, valuation, and legal issues - cannot be adjudicated within 40 weeks. Arbitrary and abbreviated time restrictions do not lead to "more justice", but less.

The new proposed schedule of events is silent on motions. It does not provide adequate time for scheduling motions or a pausing mechanism to insert motions into the timetable. Many motions have historically taken months before the ARB and are an important and necessary part of the litigation process. Although the opportunity to bring a motion at any time in the process is appreciated, without a mechanism to pause the breakneck pace of the schedule of events, a party bringing a motion faces substantial prejudice no matter the merits of the relief sought.

Suggestions:

The ARB should deprioritise resolving *all appeals* in an accelerated manner.

If schedule of events changes occur, they should commence in the context of the next cycle of assessments, for the 2021-2024 taxation years. This will ensure that the substantial investment undertaken by municipalities, taxpayers, and the assessing authority in implementing, tracking and meeting the tens of thousands of deadlines created under the ARB's current schedule of events regime are not wasted, nor that further substantial investment will be required to implement, track, and meet new deadlines.

Although such a change is strongly opposed, in the event a 40-week schedule of events is implemented for all appeals, a drastic change of this nature should be done with accompanying deadline extension options, particularly for complex appeals that require additional time beyond 40 weeks.

The schedule of events approach to assessment appeal management has been controversial. In general, many stakeholders have expressed a preference for permitting litigants in complex appeals to have more control over the appeals process than a rigid and formulaic scheduling system permits. This should be considered.

2. Grounds for Appeal

A requirement to specify grounds for appeal at an early stage is onerous for taxpayers and will drastically increase costs. It is an unnecessary a barrier to appeal.

In many cases, taxpayers must retain experts to fully understand the assessment of their property and formulate grounds for appeal. Front-loading appellants' obligations at the initial stages is premature and disincentives informal resolutions of assessment appeals prior to engaging experts and conducting an in-depth analysis.

The appeals process should aim to minimized costs to all parties and encourage informal resolutions. Obstructing these goals is a barrier to fixing mistakes and a financial burden to Ontario citizens and businesses. The result will be incorrect assessments left on the roll prejudicing the equity requirement mandated by section 44(3) of the *Assessment Act*. The ARB should be encouraging the correction of incorrect assessments as it is imperative to the integrity of assessment rolls throughout the province.

This proposed change assumes that all appellants are experts in property valuation. This is not the case and creates a significant access to justice issue. Property owners, who know their properties best, should be entitled to launch an appeal without the requirement to hire outside consultants.

Further, the *Assessment Act* and the *Assessment Review Board Act,* provide the legislative framework for launching appeals and the Board's requirement to hear appeals. This proposed change attempts to overlay additional requirement above and beyond that set out in the legislation. Any person is may appeal to the Board, among other reasons, on the basis that *the current value of the person's land or another person's land is incorrect*. The Board cannot legally impose additional requirements without amendments to the applicable statutes.

Suggestions:

The Board should not implement this change.

Providing detailed grounds of appeal should occur in the context of the exchange of pleadings, after MPAC's initial disclosure deadline. It is substantially unfair to impose this obligation on an appellant before they receive disclosure from MPAC.

An alleged incorrect assessment should be sufficient grounds to permit an appeal to proceed. There is no prejudice to the ARB or responding parties if taxpayers provide their grounds for appeal after it receives initial disclosure from MPAC at the pleadings stage.

3. Mandatory Electronic Hearings

Imposing mandatory electronic hearings will create substantial unfairness to parties and violate their rights to a fair hearing. Complex appeals require an adjudication process suited to the varied issues raised. Credibility of fact and expert witnesses must be assessed by the decision maker through examination in chief and cross-examination. The topics canvassed in complex assessment appeals frequently require large-scale graphs and diagrams and an opportunity to ensure that all of the participants to a hearing are "on the same page." Electronic hearings do not let decision makers assess credibility and be guided through exhibits and diagrams as required in many occasions.

It is further disputed that the Board can provide the necessary forum for a full and fair electronic hearing. The Board has run trials of electronic hearing technology in the past, which revealed that parties were not able to call up diagrams in the context of the hearing or run a witness through an exhibit on the hearing screen.

Suggestion:

> The Board should provide more flexibility, a lower threshold than "prejudice" as provided in the *SPPA*, in allowing in-person hearings.

4. Expedited Process for Dismissing Appeals

The ARB proposes expediting the dismissal of appeals, without providing any information as to how this would be accomplished procedurally. This raises significant concerns that appeals will be dismissed due to unfair procedural rules and timelines. Meritorious appeals may be unfairly dismissed.

Dismissing appeals without a hearing is not to be done lightly, and procedures taken must comply with the *Statutory Powers Procedure Act*, the *Assessment Review Board Act,* and the principles of natural justice. The Rules must be clear and consistent in meeting these objectives. There is some dispute as to whether this is accomplished in the current iteration of the Rules. Further changes should not be made without providing specific proposed provisions and an opportunity to comment.

It is unclear why proceedings should be administratively dismissed at all. If appellants fail to further their appeals, they can simply die on their own. A Board ordered dismissal seems unnecessary.

The Board's dismissal powers are governed by the *Assessment Review Board Act*, which sets out the instances the Board may dismiss an appeal. Any new process must align with this legislation. No additional grounds for dismissal can be created without the amendment to the legislation.

We have not been provided the opportunity to review the specific proposed dismissal criteria. We are troubled, generally, that an expedited process for dismissing appeals is

accompanied by a change in the schedule of events requiring proceedings to be completed in half the time with more onerous deadlines.

Suggestions:

> This proposed change in combination with the shortened schedule of events will create chaos. It should not be implemented without first providing the public with more detail and opportunity for consultation.
>
> Existing dismissal procedures should accord with the *SPPA* and *ARBA*.

All of which is respectfully submitted by the ARB Processes Committee: Canadian Property Tax Association Ontario Chapter.