



**Composite Assessment Review Board**

**REGIONAL MUNICIPALITY OF WOOD BUFFALO BOARD ORDER CARB 009-2012-P**

**IN THE MATTER OF A COMPLAINT** filed with the Regional Municipality of Wood Buffalo Composite Assessment Review Board (CARB) pursuant to Part 11 of the *Municipal Government Act*, being Chapter M-26 of the Revised Statutes of Alberta 2000.

**BETWEEN:**

Canadian Natural Resources Limited (CNRL) represented by Wilson Laycraft - Complainant

- and -

Regional Municipality of Wood Buffalo (RMWB) represented by Reynolds Mirth Richards & Farmer LLP - Respondent

**BEFORE:**

Members:

W. Kipp, Presiding Officer

D. Thomas

E. McRae

Board Counsel:

G. Stewart-Palmer, Barrister & Solicitor

Staff:

N. Chouinard, Assessment Review Board Clerk

A preliminary hearing was held on September 24, 2012 in Edmonton to consider several preliminary matters in relation to a complaint about the assessment of the following property tax roll number:

8992004911

Revised Assessment: \$3,438,633,520

RMWB file 11-090

**PART A: BACKGROUND AND DESCRIPTION OF PROPERTY UNDER COMPLAINT**

[1] Construction of the Canadian Natural Resources oilsands project was completed in 2009. The roll number being considered in this preliminary hearing is an amended machinery and equipment (M&E) assessment. The amended assessment of \$3,438,633,520 was sent to the property owner on March 11, 2011. The Complainant has raised the issues in its Reasons for Complaint document.

## **PART B: PROCEDURAL OR JURISDICTIONAL MATTERS**

[2] The CARB derives its authority to make decisions under Part 11 of the *Municipal Government Act*.

[3] The CARB conducted a preliminary hearing on September 24, 2012 to deal with several preliminary matters:

- a) The Respondent's application for direction from the Board regarding hearing procedure;
- b) The schedule of hearing days following the identification of certain dates the parties and the CARB cannot sit;
- c) The Respondent's application to exclude pages 45-51 from the written evidence of Mr. Shaw;
- d) The Respondent's application for direction in relation to hearing procedure relating to an explanation of the legislative provisions and whether that should be done by witnesses or counsel;
- e) The Respondent's application for direction in relation to the evidence of Mr. Minter and possible duplication of evidence;
- f) The Complainant's application in relation to the change of position on excluded costs put forward in response to the Complainant's section 299 request;
- g) The Complainant's argument in relation to the admissibility of the Respondent's third party consultant reports and qualifications of those consultants as experts;
- h) The Complainant's application for the CARB to compel the attendance of Mr. Schmidt as a witness; and
- i) The Complainant's application in relation to the disclosure of third party evidence in regard to the Respondent's section 300 disclosure and equity.

### **Position of the Parties**

#### **Complainant**

[4] The Complainant indicated that it did not see any reason for the procedure of this hearing to vary from the traditional method of the complainant entering its evidence, followed by the Respondent, then the Complainant entering its rebuttal. An issue by issue basis hearing would require the witnesses to come back a number of times during the hearing and would raise concerns about when a witness was under cross-examination. The Complainant requested that the CARB not sit on October 19 to accommodate a witness. The Complainant disputed the need to eliminate portions of the Shaw Report and indicted that the witnesses could go through the legislation and there was no need for a direction of the CARB. The Complainant indicated that it has been waiting for a long time to tell its story and Mr. Minter brings the background of the matter. He is not a long witness. The Complainant shared a schedule that it had prepared, which showed it taking 16 of the days for its primary case.

[5] The Complainant stated that it was not appropriate for the Respondent to change its position following the disclosure of information in response to the Complainant's s. 299 request. The Respondent can concede positions, but cannot increase them. The Complainant is not

currently bringing applications for the CARB to compel Mr. Schmidt or to compel third party information, but was giving notice that it might be doing so during the hearing.

### **Municipality**

[6] The Respondent urged the CARB to direct an issue by issue hearing, and failing that to have the Complainant provide all of its evidence during its submissions, including rebuttal, and then the Respondent providing its information. The Respondent asked for the CARB not to sit on November 9, and noted that the office in which the hearing will be conducted will be closed November 12. The Respondent argued that pages 46-51 of Mr. Shaw's evidence should be struck on the basis that it is not appropriate for a witness to make comments that the actions of the Respondent's assessor were illegal. The Respondent indicated that Mr. Minter has given evidence already and, due to the hearing constraints, should not give evidence again. The Respondent had concerns with the distribution of time in the proposed schedule prepared by the Complainant.

[7] The Respondent indicated that it was not changing its position in relation to what it had assessed the property and was not asking for an increase. It submitted Preliminary Exhibit 5 which confirmed it had made that position clear a year ago. It had concerns about an application to compel Mr. Schmidt to testify. The Complainant had not shared what they expected Mr. Schmidt to say, how it would affect the hearing timing and further, that the disclosure deadline had passed and since June, it was clear that Mr. Schmidt was no longer under contract with the municipality and there is no property in a witness. The Respondent expressed concern about an application to compel third party information – the Complainant had not indicated when it would bring the application, what would be sought, provided no indication of notice to the third parties, nor how it would affect the hearing process.

### **Decision:**

#### **Hearing Procedure**

[8] The hearing shall start on October 15, 2012 at 1 pm in the MGB offices. The CARB will not conduct the hearing on the following dates:

- a) October 19, 2012
- b) November 9, 2012
- c) November 12, 2012
- d) November 23, 2012.

[9] Although it is the Board's intention that this hearing be concluded on November 22, 2012, the CARB asks both parties to reserve the dates of November 26 and 27, 2012 in the event that the hearing does not conclude on November 22.

[10] The CARB has granted the days off requested by the parties, but is concerned that the matter concludes in time. In order to ensure sufficient hearing time, the CARB has set the following hearing times:

- |                                                      |               |
|------------------------------------------------------|---------------|
| a) Mondays (except October 15 and November 12, 2012) | 10 am to 5 pm |
| b) Tuesdays                                          | 9 am to 5 pm  |

- |                                                                                |                 |
|--------------------------------------------------------------------------------|-----------------|
| c) Wednesdays<br>(with appropriate supper break)                               | 9 am to 9 pm    |
| d) Thursdays                                                                   | 9 am to 5 pm    |
| e) Fridays (except October 19 and November 23, 2012)<br>convenient break time. | 9 am to 1 pm or |

[11] The CARB will assess periodically how the hearing is proceeding. If it determines necessary, the CARB may direct that the hearing be extended to 4 pm on Fridays. If it is not necessary to sit late on Wednesdays, the CARB may adjourn the hearing at 5 pm those days.

[12] The CARB directs that the parties ensure that for Wednesdays the Court Reporter will have coverage in the event that the day is too long for one reporter.

[13] On the afternoon of October 15, 2012, each party will present its opening statement to the CARB.

[14] The order of presentation after opening statements will be the Complainant will present its case in chief. The Respondent will then present its case in chief. The Complainant will then be permitted to present its rebuttal case. The Complainant is reminded that rebuttal is to address only issues arising from the Respondent's case and is not an opportunity to revisit the merits of its case.

[15] The Complainant must present the entirety of its primary case no later than 5 pm on November 1, 2012.

[16] The Respondent must present the entirety of its case no later than November 16, 2012.

[17] The Complainant has up to 5 pm, November 20, 2012 to present its rebuttal case, if required.

[18] November 21 and 22, 2012 are reserved for argument.

[19] Should any party have completed their case before the dates set out above, the hearing will move to the other party to present its case.

[20] The CARB urges both parties to be vigilant about avoiding duplication of evidence given the amount of evidence to be covered within the time set out.

#### **Exclusion of Evidence from Mr. Shaw's report**

[21] The CARB is not prepared to strike pages 46-51 from the report of Mr. Shaw prior to the hearing. The CARB notes the concerns of the Respondent, and will weigh the evidence.

#### **Legislative Provisions**

[22] The CARB does not believe that it is appropriate to prevent witnesses (Mr. Shaw and Mr. Elzinga and Dr. Thompson) who must interpret and apply the provisions of the *Municipal Government Act* and the regulations from setting out the legislative framework. However, the

CARB is aware of the legislation and cautions both parties that it does not need the witnesses to read out sections from the legislation. The CARB directs both counsel to caution their witnesses to avoid this. The CARB directs the parties to have their witnesses focus on the interpretation and application of the legislation, if that be the direction of their evidence.

**Evidence of Mr. Minter**

[23] The CARB will not prevent the Complainant from calling Mr. Minter as a witness, leaving the decision to call Mr. Minter with the Complainant. However, the CARB notes that Mr. Minter has already given evidence on his report to the CARB in the June 2012 preliminary hearing and the CARB has transcripts of that evidence. The CARB notes that the deadlines for disclosure have long passed and no new evidence will be permitted.

**Identification of portions of the Elzinga/Thompson Report**

[24] The CARB notes the Respondent's agreement to identify which portions of the joint report of Mr. Elzinga and Dr. Thompson in relation to the 46 accounts (found at Exhibit R47, Tab 10.4) will be spoken to by each of those two witnesses. The CARB confirms that the Respondent should provide this to the Complainant as soon as possible.

**Expert qualifications**

[25] For every witness presented by a party, prior to that witness giving any evidence, including in relation to his or her qualifications, counsel for the party is to advise the CARB whether the party is seeking to have the witness qualified as an expert and, if so, in what area. Counsel for the other party must advise if that party has any objection to the ability of the witness to give opinion evidence (not the weight to be given to the evidence).

[26] If there is no objection to a witness giving opinion evidence, counsel are directed to keep the witness's review of his or her CV to what is directly related to their testimony. Extensive review of a witness's CV will be curtailed.

[27] If there is an objection to the qualifications, the CARB shall hear the application in relation to qualifying the witness.

**Respondent's Change of Position in response to the Complainant's s. 299 request**

[28] The Respondent has confirmed that it is not asking the CARB to increase the Schedule A included costs. As a result, there is no need for the CARB to make a ruling on this issue of an alleged change of position by the Respondent in response to the Complainant's s. 299 request.

**Request for Mr. Schmidt to testify**

[29] The Complainant indicated that it was not making an application for the CARB to direct Mr. Schmidt to give evidence at the hearing, merely giving notice of a possible intention to make this application in the future. Therefore the CARB makes no order in this regard.

**Request for Third party information**

[30] The Complainant indicated that it was not making an application for the CARB to direct the disclosure of third party information at the hearing, but was giving notice that it might make that application in the future. Therefore the CARB makes no order in this regard.



## **Reasons for Decision:**

### **Hearing Procedure**

[31] The CARB heard the arguments of both parties in relation to the hearing procedure and, in particular, to directing that the witnesses give evidence on an issue by issue basis. The CARB noted that the Complainant did not agree to a changed procedure. In the absence of agreement, the CARB must be convinced that such a change would be a better way to conduct the hearing. The CARB was not convinced by the Respondent's arguments that the hearing would be run more effectively with the issue by issue determination.

[32] The CARB has granted the parties' request for the hearing not to be conducted on certain days. However, the CARB notes that there is a great deal of evidence to hear within the time allotted for the hearing. The CARB is committed to having this hearing conclude on November 22, 2012. Therefore, the CARB has implemented the above hearing schedule and procedures to provide the parties time to present their evidence. The CARB noted the concerns expressed by the Respondent in relation to the distribution of hearing time. The direction about the completion of the respective party's cases by the time limits set out should assist the parties in focussing their witnesses and having an effective hearing.

[33] The CARB is prepared to change the hours as required. If it is not required to sit in the evening, it will not do so. Conversely, if more time is required the CARB is prepared to extend its sitting time on Fridays to 4 pm to give the parties more time.

### **Evidence of Mr. Shaw**

[34] The CARB has reviewed the impugned pages of Mr. Shaw's report and notes the Respondent's concern in relation to the comments made by the witness. The CARB is not prepared to remove portions of a witness report prior to the merit hearing, but is prepared to hear the evidence and accord it what weight the CARB feels appropriate. The CARB is aware that it is the decider of the ultimate question, but it is not uncommon for a witness to express a position that favours his/her client in hopes that such an expression might sway the CARB one way or another. The CARB is experienced in sorting opinions from facts.

### **Legislative Provisions**

[35] The CARB heard the Respondent's argument for streamlining the procedure by having counsel for the parties review the legislative provisions, rather than the witnesses. The witnesses may make reference to the legislation but, as stated above, are directed not to read it to the CARB. The CARB is of the opinion that the witnesses must refer to the legislation, particularly if they are providing comment on the actions of the assessor or commenting on the assessor. The CARB is aware of the legislation, so the witnesses should spare any recitation of the section, unless absolutely necessary, focussing on the assessment of its impact.

### **Evidence of Mr. Minter**

[36] The CARB notes that the Complainant is able to call its case in the manner it wishes. Therefore, although it has heard from Mr. Minter previously, it will not prevent the Complainant from calling Mr. Minter as a witness. Nevertheless, the CARB has heard at least some of the evidence before and does have transcripts of that evidence. The CARB notes that the time estimate for Mr. Minter's evidence is 2 hours in direct. While his evidence may take that long,

the CARB directs the witness to avoid repetition of previously presented portions of his evidence.

#### **Identification of portions of the Elzinga/Thompson Report**

[37] The CARB notes that the majority of the joint report of Mr. Elzinga and Dr. Thompson identifies on a paragraph by paragraph basis which witness will be speaking to that portion of the report. However, that portion that relates to the 46 accounts (found at Exhibit R47, Tab 10.4) does not have a similar attribution. In order to assist the Complainant in preparation for the hearing, similar identification is necessary. The Respondent has indicated it will identify those portions each witness will speak to, and the CARB confirms that the Respondent should provide this to the Complainant as soon as possible.

#### **Expert qualifications**

[38] The CARB notes that the parties were directed in CARB Board Order 006-2012-P to identify if they had any concerns with the areas of qualification of the expert witnesses. Neither party made representations on this point during this preliminary hearing. To avoid extensive argument about qualifications, the CARB is implementing the above procedure.

#### **Respondent's Change of Position in response to the Complainant's s. 299 request**

[39] The Complainant had initially sought direction from the CARB in relation to what it believed to be a change in position of the Respondent from the information it provided in response to the Complainant's section 299 request. It stated that the Respondent Municipality could concede amounts, but could not seek to increase them. The Respondent re-presented Preliminary Exhibit 5, which had previously been sent to the CARB. Following an examination of that letter, the Complainant indicated that it did not need a ruling on this point, therefore, none was made.

#### **Request for Mr. Schmidt to testify**

[40] The Complainant indicated that it was not making an application for the CARB to compel Mr. Schmidt, the Respondent's former contract assessor, to give evidence in front on the CARB, although it indicated that it was giving notice that it may do so, at some point in the hearing. The Complainant indicated that it was always open for the CARB to make this order on its own volition. As the Complainant did not request a ruling, the CARB need not make one. Should an application be made, the CARB will determine the application on its merits. However, the CARB notes that the disclosure deadlines have passed and shares the concerns of the Respondent in terms of the scope of the evidence, the possibility of negatively affecting the timelines for the completion of the hearing and, most importantly, the fact that the Complainant has known since June 2012 that Mr. Schmidt is no longer under contract with the Municipality. The Complainant could have sought to make an application of this nature earlier.

#### **Request for Third party information**

[41] The Complainant indicated that it was not making an application for the CARB to compel the production of third party information, although it indicated that it was giving notice that it may do so, at some point in the hearing. As the Complainant did not request a ruling, the CARB need not make one. Should an application be made, the CARB will determine the application on its merits at the time it is made.

[42] It is so ordered.

Dated at the Regional Municipality of Wood Buffalo in the Province of Alberta, this 3<sup>rd</sup> day of October 2012.

FOR: Made J. Chouinard  
W. Kipp, Presiding Officer



**APPENDIX "A"**

DOCUMENTS RECEIVED AND CONSIDERED BY THE CARB:

**NO.                      ITEM**

Prelim 1	Respondent's Preliminary Submissions	September 13, 2012
Prelim 2	Submission of Complainant	September 13, 2012
Prelim 3	Response Submission of Complainant	September 20, 2012
Prelim 4	Letter of Reynolds Mirth Richards & Farmer LLP to CARB	September 20, 2012
Prelim 5	Letter of Reynolds Mirth Richards & Farmer LLP to CARB	September 6, 2011

**APPENDIX "B"**

REPRESENTATIONS

**PERSON APPEARING      CAPACITY**

1.	G. Ludwig	Counsel for the Complainant
2.	J. Laycraft	Counsel for the Complainant
3.	K. Minter	Supervisor of Operations Accounting, CNRL
4.	M. Celis	Business Analyst, CNRL
5.	B. Balog	Manager, Legal Corporate Operations, Legal Counsel, CNRL
6.	C. M. Zukiwski	Counsel for the Respondent
7.	C. Killick-Dzenick	Counsel for the Respondent
8.	B. Moore	Regional Assessor, Regional Municipality of Wood Buffalo
9.	R. Baron	Assistant Chief Assessor, Regional Municipality of Wood Buffalo

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Subject	Type	Sub-type	Issue	Sub-issue
CARB				