

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 Amended Statutes of Alberta 2000 (Act).

BETWEEN:

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

- a n d -

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

BEFORE:

Members:

D. Marchand, Presiding Officer

E. McRae, Member

S. Odemuyiwa, Member

Board Counsel:

G. Stewart-Palmer, Barrister & Solicitor

Staff:

N. MacDonald, Assessment Review Board Clerk

A hearing was held on December 6 and 7, 2010, in Fort McMurray in the Province of Alberta to consider further preliminary issues related to complaints about the assessment of the following property tax roll number:

8992004911 Amended Assessment: \$3,222,500,860 RMWB file 10-004

These issues were raised by the parties

PART A: BACKGROUND AND DESCRIPTION OF PROPERTY UNDER COMPLAINT

The roll number is an amended machinery and equipment (M&E) assessment. The original assessment notice with an assessment amount of \$2,413,340,490 was mailed to the property owner on March 1, 2010 and the amended assessment notice with the revised assessment amount of \$3,222,500,860 was sent to the property owner on March 5, 2010. The Complainant questions not only the quantum, but the legality of the amended assessment.

On October 7, 2010, the CARB issued its decision in Board Order CARB 007/2010-P in relation to certain preliminary and jurisdictional issues raised by CNRL. Shortly after the issuance of the decision, counsel for CNRL requested a further preliminary hearing. On November 4, 2010, the

Clerk of the Assessment Review Board notified the parties that a second preliminary hearing would be held on November 12, 2010 to deal with the following issues:

1. The legality of the amendment
2. The status of the original assessment
3. Onus
4. Equity
5. Delegation of the assessor's responsibility
6. Disclosure requirement
7. Timing
8. Cogeneration
9. Particulars on Schedule A items
10. Dates

On November 8, 2010, CNRL served the CARB and the Regional Municipality of Wood Buffalo ("RMWB") with an Originating Application returnable November 30, 2010 seeking relief in relation to decision Board Order CARB 007/2010-P, including a stay of further proceedings. On November 10, 2010, the CARB notified the parties that the CARB was taking the request by CNRL in the Originating Application for a stay of proceedings as CNRL's request to the CARB for an adjournment and asked the parties to come prepared to present their arguments on the adjournment request on November 12, 2010.

On November 25, 2010, the CARB issued decision Board Order CARB 023/2010-P addressing CNRL's request for an adjournment and the timing for disclosure and the hearing on the merits.

On December 6 and 7, 2010, the CARB heard argument from the parties in relation to the balance of the items set out above.

PART B: PRELIMINARY MATTERS

The CARB derives its authority to make decisions under Part 11 of the Act. The parties addressed the CARB on several preliminary issues. This decision will address the following preliminary issues:

1. Status of the Amended Assessment (Issues 1 and 2 referenced in Part A above);
2. Equity (Issue 4 referenced in Part A above);
3. Co-Generation (Issue 8 referenced in Part A above);
4. Onus (Issue 3 referenced in Part A above)
5. Disclosure (Issues 6 and 9 referenced in Part A above)
6. Delegation of Assessor's Responsibility (Issue 5 referenced in Part A above); and
7. Hearing dates and times (Issues 7 and 10 referenced in Part A above).

ISSUE #1 – Status of Amended Assessment

Summary of Complainant's Position – Issue #1

CNRL argued that, in the course of the previous hearings, the CARB had not heard from CNRL regarding the status of the amended assessment. CNRL suggested that the Board did not permit CNRL to complete its argument in relation to nullity during the September preliminary hearing, instead focusing on whether it had the jurisdiction to make a determination of legality.

CNRL's position is that the nature of the error made by the assessor is one outside the jurisdiction of the assessor, thereby rendering the assessment a nullity. CNRL urged the CARB to declare the amended assessment a nullity, which would mean that the CARB would have no jurisdiction to conduct a line by line review of the amended assessment.

In CNRL's view, an error, if within the jurisdiction of the assessor, must be appealed within time. If appealed in time, the CARB would have jurisdiction to hear an appeal. However, if the amended assessment was outside the jurisdiction of the assessor, then the assessment would be a nullity. The definition of nullity was referenced at paragraph 2 of Exhibit C41 as:

"Nullity" is defined as follows:

Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect.

(citing from Black's Law Dictionary, 6th ed, (St. Paul; West Publishing Co, 1990)

The question of nullity was not addressed in the September hearing. Based upon an obligation of fairness, there must be an argument on the point of nullity before there is a line by line review of the assessment.

CNRL referred to Exhibit C2, its legal argument filed in September, 2010, including the cases contained therein. The basis of the amended assessment was the Oil Sands Developers Group (OSDG) Report. Since there is no reference in the legislation regarding the assessor's ability to use the OSDG Report as a basis to amend the assessment, the actions of the assessor were outside of the legislation and therefore outside his jurisdiction. In CNRL's view, the inquiry is then at an end. If the CARB granted a declaration of nullity, there would be no need for a line by line review of the assessment.

In CNRL's view, the amended assessment was outside the jurisdiction of the assessor for two reasons:

1. The amendment was done at the behest of the municipality; and
2. The amendment was made outside the statutorily mandated process.

In relation to the first reason, CNRL reviewed excerpts of evidence from the September, 2010 hearing as referenced in Exhibit C41. Based upon those excerpts, CNRL suggested that the conclusion to be drawn was that the municipal council had directed the change to the assessment.

In relation to the second reason, CNRL indicated that section 293 of the *Municipal Government Act* mandates that the assessor must follow the procedures set out in the Regulations in a fair and equitable manner. Section 9 of Alberta Regulation 220/2004 sets out in mandatory language that for machinery and equipment assessments, the assessor must follow the procedures set out in the Alberta Machinery and Equipment Assessment Minister's Guidelines. Those Guidelines include the 2005 Construction Cost Reporting Guide established by the Minister. However, CNRL submitted that the evidence from the September 2010 hearing showed that the amended assessment was based upon the OSDG Report, which was not part of the Regulations. In CNRL's view, this resulted in the amended assessment being outside the jurisdiction of the assessor, thus rendering it a nullity. The effect of the nullity was to render the amended assessment void. If the amended assessment is void, the CARB does not have jurisdiction to deal with the amended assessment or to cure the illegal amendment.

In relation to the effect of nullity, CNRL cited the *Master Craft Homes Ltd. v. Calgary (City)*, [1987] A.J. 1010.159 (Q.B.) at page 7 Q.L. ("Mastercraft") [Tab 3] and *Barron v. Foothills (Municipal District No. 31)*, [1984] A.J. No. 750 (C.A.) at para. 24-26. [Tab 4] ("Barron") decisions for the proposition that once a matter is declared a nullity, no line by line review is required because it is as if the action never occurred. CNRL also referenced *Bennett & White (Calgary) Ltd. v. Sugar City (District No.5)*, [1951] J.C.J. No. 2 [Tab 7] and *Herman Sawmill Ltd. v British Columbia (Minister of Finance)*, [1972] B.C.J.No. 69 [Tab 12].

In response to argument made by counsel for the RMWB that CNRL was seeking a rehearing of this matter, counsel for CNRL indicated that this was not a rehearing of an issue decided by the CARB in September in Board Order CARB 007/2010-P. This matter had not been fully argued before the CARB at that time. If this was a rehearing, due to reasons of procedural fairness, the CARB should hear this argument.

Summary of Respondent's Position – Issue #1

The RMWB objected to the CARB hearing argument on the issue of the legality or illegality of the amended assessment and its resulting status on the basis that this issue had been determined by the CARB in its decision Board Order CARB 007/2010-P and was, therefore, a rehearing of this matter.

The RMWB argued that because it was a rehearing, the onus was on the Complainant to establish the jurisdiction of the CARB to rehear the matter. There were no materials presented by CNRL in its written submissions which supported the jurisdiction of the CARB to rehear a matter it had previously decided. The onus to establish the jurisdiction of the CARB lies upon CNRL as the party seeking to have the CARB rehear the matter. The RMWB does not bear the onus to establish the lack of jurisdiction of the CARB just because the RMWB has raised the issue of the jurisdiction of the CARB. Despite that comment, counsel for the RMWB presented her argument and authorities that the CARB does not have the jurisdiction to rehear a matter.

CARB's Jurisdiction to Hold a Rehearing

There is no express authority in the *Municipal Government Act* for a rehearing. The scope of the rehearing urged by CNRL is not to correct a typographical error. It is a much broader request to rehear the merits of the decision. Although counsel for CNRL has suggested to the Board that there has been a breach of natural justice, no specific allegations of a breach of natural justice in the September hearing have been presented to the CARB for its consideration.

To determine whether there is implied authority for the CARB to reconsider matters previously decided by it, the CARB can and should look at the *Municipal Government Act*, the Regulations (Matters Relating to Assessment Complaints Regulation 310/2009), as well as the Hansard. The excerpts from the Hansard reveal that the reasons for the changes to the *Municipal Government Act* were that:

- appeals were taking too long,
- there was a duplication in process,
- there were inconsistent decisions; and
- there was a concern about the qualifications of the decision makers.

The RMWB suggested that none of these reasons supported an implied power for rehearing. Further, the fact that the CARB must provide its reasons within 30 days – thereby providing the accountability for efficiency of the Board – also suggests that there is no implied power to rehear. In *Karbalaeiali v. British Columbia (Human Rights Tribunal)*, [2010] BCJ No. 1594 (BCSC), the panel had investigative powers, which the court examined as evidence of an implied power to rehear. The CARB has no investigative powers, suggesting no implied power to rehear.

The position of the RMWB is that there is no implied power by the CARB to rehear. However, even if the CARB finds that it has such a power, it is a discretionary remedy and the circumstances do not justify a rehearing. There are sound policy reasons for finality of decisions. CNRL does not like the decision made by the CARB and therefore is seeking to have the CARB rehear and decide the issue.

The materials put forward by CNRL are not new. There is no new rationale to overturn the decision in Board Order CARB 007/2010-P. Moreover, during the September 2010 hearing, the CARB provided to the parties a list of issues it had identified and asked the parties if that list of issues was complete. At the time, both parties advised that the list was adequate. There was no unfairness to CNRL in the September 2010 hearings. The RMWB suggested the motivation behind CNRL's application was clear. CNRL wishes CARB to change its decision in regard to section 467 and is seeking to avoid any examination of the cost report (Exhibit R21).

The RMWB submitted that should the CARB decide that:

- there is the implied authority to rehear, and
- the circumstances justify the rehearing of the matter

and it does rehear the matter, the CARB can come to the same conclusion it reached the first time that it heard the matter.

In response to the argument on nullity, counsel for CNRL indicated that the response by the RMWB was hampered by the fact that the evidence of Mr. Schmidt and Mr. Van Waas was to be only in relation to CNRL's application regarding section 299. The cross-examination went further abroad than that question, and the RMWB did not have the opportunity to bring further evidence in relation to this question.

Counsel for the RMWB suggested that the authorities referred to and relied upon by CNRL are in relation to the powers of the Court to determine questions of legality and to make declarations of nullity. None of the cases cited by CNRL are in relation to the powers of a composite assessment review board, or any assessment review board, to make declarations of nullity. In all of the cases cited, the applicant went to the Court for a declaration of status. For example, in *Barron*, the property owner went to Court and the Court made a statement about its powers. Other cases are not in relation to property taxes. For example, the *Continental Bank of Canada v Canada*, [1998] 2 S.C.R. 358 (Tab 2 of Exhibit C41) ("Continental Bank") is in relation to income tax. Although the word "reassessment" is used in that case, it is not the same as property tax. Counsel for the RMWB argued that the cases relied upon by CNRL in Exhibits C2 and C41 did not relate to assessment appeals and those that did were not to an assessment appeal board, but where the property owner went straight to Court for a determination of his rights. Counsel for CNRL urged the CARB to examine carefully the cases to determine their relevance and whether the cases support the summary contained within Exhibit C41.

In CARB Board Order 007/20-10-P, the CARB made a determination regarding the issue of illegality and directed the parties to have the matter heard by the merit panel. There has been no change of circumstances to justify this change of result.

Finding – Issue #1

The CARB finds that it has already made a determination about the CARB's jurisdiction to make a determination on the legality or status of the amended assessment and directed that the issue of the legality of the amended assessment be addressed by a CARB panel which will hear the merits of the appeal. Since the question of the jurisdiction of the Board had been determined in CARB Board Order 007/2010-P, CARB finds that this is a request for a rehearing. CARB is satisfied that it does not have the express or implied authority to rehear a matter upon which it has already decided.

Reasons – Issue #1

Does the CARB have the Jurisdiction to Rehear a matter?

Having examined the *Municipal Government Act*, the regulations and the portions of the Hansard provided, the CARB finds that it does not have an express power to rehear matters.

The CARB finds that it does not have an implied jurisdiction to rehear. The CARB has been given the responsibility to hear and decide assessment appeals in a timely manner, as evidenced by the time limits set out in both the *Act* and the Regulations. The timely hearing and decision of matters may be affected if the parties are able to make rehearing applications. Further, the CARB exercises an adjudicative function, with a right of appeal to the Court of Queen's Bench, which suggests, absent express legislative authority, that the CARB does not have a power to rehear. Further, the need for finality of decisions (again, subject to the right of appeal) weighs in favour of the CARB not having the power to rehear.

Is CNRL's Argument in relation to the Status of the Amended Assessment a Rehearing Request?

In CARB Board Order 007/2010-P at pages 7 and 8, the CARB determined that it had the jurisdiction to consider legal questions arising in the context of its statutory jurisdiction, including questions about the validity of an assessment. However, the CARB has also previously decided that its jurisdiction is found in section 467(1), as limited by subsection 467(4). The CARB decided that the issue about the validity of the amended assessment had to be heard in the context of a merit hearing, where evidence in relation to the matter can be fully heard and examined. In CARB Board Order 007/2010-P, the CARB decided that it had the jurisdiction to embark upon the inquiry and make a determination, but that a CARB panel would need to hear evidence to make a determination as to whether to change the roll. Therefore, the issue of the status of the illegality or legality of the amended assessment and the implications for the roll are to be addressed at the merit hearing.

The CARB has already made a determination that the matter of the status of the amended assessment must be addressed at the merit hearing. Based on the CARB's finding that it does not have the jurisdiction to rehear a matter, the issue of the status of the amended assessment must be heard and decided by the CARB panel hearing the merits of the appeal.

If the CARB does have the Implied Authority to Rehear, should it rehear the issue of the status of the amended assessment?

During the December 2010 hearing, after hearing argument from the parties on the issue of its jurisdiction to rehear, the CARB reserved its decision on this question and heard from the parties on the question of the illegality of the amended assessment. This was done so that if the CARB's conclusion was that it had not heard the argument on nullity before or if it had the jurisdiction to rehear, it would have heard counsel for both parties argue on the issue of the status of the amended assessment.

Although the CARB has found that it does not have the implied authority to rehear matters, it did hear the parties' argument on the status of the amended assessment. If the CARB is wrong in its conclusion about the implied power to rehear, the CARB finds that it would still direct that the status of the amended assessment must be considered by the CARB panel hearing the merits of the appeal on the basis set out below.

As pointed out by counsel for the RMWB, the evidence heard during the hearing in September, 2010 was directed by the CARB to be limited to the issue of CNRL's section 299 disclosure

request, although the cross examination moved beyond that issue. As a result of the CARB's direction, the RMWB limited the evidence which it called to the issue of whether CNRL's disclosure request had been satisfied. It is not clear to the CARB whether the parties may call more evidence on the issue of the validity of the amended assessment, although counsel for the RMWB suggested that it might do so. The CARB is not prepared to make a ruling about the status of the amended assessment in the absence of a full and complete examination of the evidence including direct examination and cross examination by the parties and further argument.

Further, the CARB notes that the argument by CNRL is not that the Board does not have the jurisdiction to embark upon the inquiry of whether the amended assessment is valid. Rather, CNRL requests the CARB to embark upon this road of inquiry and to deliver a decision that would have the effect of cutting off further inquiry before an examination of the merits. As indicated in Board Order CARB 007-2010-P, the CARB has confirmed its position that there is jurisdiction to embark on this inquiry, but that this inquiry is best answered after a full examination of the facts.

If the CARB is incorrect in its assessment as to whether there is the implied power to rehear a matter, the CARB has determined that if it should have the power to rehear, no circumstances have been brought forward to suggest a change to the previous decision of the CARB, nor has CNRL identified any specific procedural unfairness which has arisen or which would arise necessitating the rehearing. The CARB has made a determination that it has the jurisdiction to make a determination of the status of the amended assessment, but as a part of its underlying jurisdiction to make a determination as to whether or not to change the value on the roll. This can only be done through an examination of the evidence, particularly because of questions raised by both parties as to the appropriate value for the roll. CNRL has argued that the original assessed value is correct, while the municipality seeks to have the number increased beyond that in the amended assessment.

ISSUE #2 – Equity

Summary of Complainant's Position – Issue #2

The Complainant suggested that what is unique to property tax issues is that all persons subject to property tax must be treated with equity and that they have a right to be treated equitably with respect to the assessment, regardless of whether that assessment is industrial, residential, etc.

Section 293 of the *Act* requires that the assessor act equitably. CNRL stated that there cannot be a standard for one assessed person that is not being applied to all others in that category. CNRL is the only assessed person in the class for whom the assessment was amended based upon the OSDG Report. Dr. Thompson was brought in by the RMWB to assess CNRL's assessment. This did not occur for any other assessed person. CNRL argued that a different standard is being applied to it than to everyone else. CNRL argued that only after the assessment was amended did an expert get brought in by RMWB. CNRL had heard that everything was fine with their preparation of the assessment. Once the expert was brought in, they were presented with a new

standard. They are asking under equity whether it was just CNRL or whether everyone was asked the same questions.

CNRL applied to the CARB for an Order compelling the assessor to produce information with respect to the assessment of comparable facilities in RMWB. This request includes any heavy oil facilities constructed in the last 10 years in the RMWB including:

- Suncor Millennium,
- Suncor Firebag,
- Suncor MCU Project,
- Shell Muskeg River
- Syncrude UE1,
- Nexen Long Lake,
- Devon Jackfish, and
- ESSO Kearn Project

The information requested would be inclusive of the total cost and the following non-assessable information:

1. whether or not the reverse engineering process has been undertaken in any of the remaining reporting projects;
2. whether or not the current standard for "assessable cost engineering process" as applied against CNRL has been applied against the subject renditions and assessments
3. where the CNRL cost allocations are considered "excessive" via R20, what percentages were used for the other projects (i.e. pages 11 and 9 of the Schmidt Thompson Report);
4. information on "predictive modeling" as reference in the Schmidt Thompson Report and whether it was accepted in comparable renditions;
5. confirmation that no such modeling was used on any other facilities including for the following:
 - rework based on percentage
 - camp cost models, whether man day calculation or camp cost contracts
 - non-assessable percentages on "hard dollar" contracts for plant areas where actual costs are not available
 - claims for unproductive labor, confirmation no modeling was used by any other rendition
 - modeling for overtime calculations for shift cycles as well as contained in subcontracts
 - whether or not any models were used for cost differential between Edmonton and Fort McMurray
 - whether or not cost models were used for
 - travel costs
 - contract or subcontract budgets
 - freight costs relating to loading and unloading distance, hauling charges
 - indirect cost allocations to allow for correct total for direct and indirect costs
 - whether factored to each plant area by modeling

- whether or not modeling was allowed for the allocation of soft ware costs and hard ware costs
- whether or not any models were used to determine interference costs;
- whether or not engineering and re-engineering modeling used to determine correct allocations for normal or typical engineering allocations versus actual expenditures
- whether or not modeling was used to determine schedule extension costs or schedule extension premiums
- whether or not modeling was used to determine indirect cost allocations for linear property direct costs and linear property indirect costs
- whether or not allocations for pre-investment has been allowed to any degree for other projects
- percentages of non-assessable costs in the overall rendition

CNRL is prepared to enter a confidentiality agreement in a form acceptable to the Board, including having the information sealed for the parties and the Board only.

Counsel for CNRL argued that the issue of equity had been squarely raised in the original letter of complaint against the amended assessment filed April 28, 2010 in regard to roll number 8992004911. It was not a new issue raised only in November, 2010.

Summary of Respondent's Position – Issue #2

Counsel for the RMWB argued that the equity issue was a new one and this was the first time that the matter had been raised before the CARB. Although there may have been a passing reference to equity in the Complainant's complaint form, this is the first time that the specifics of the request have been made known. The parties are several months into the appeal process. This is the fourth time that the parties have been before the CARB on preliminary or jurisdictional issues. There had been no mention of this issue in the June or September 2010 preliminary hearings.

The RMWB argued that, pursuant to section 9(1) of the Matters Relating to Assessment Complaints Regulation, the CARB is prohibited from hearing any matter in support of an issue that is not identified on the complaint form. Moreover, there is a duty of confidentiality owed by the municipality to assessed persons, which was not recognized by CNRL.

The RMWB objected to the production of information and suggested that if the CARB was contemplating having the RMWB produce confidential information of other people, at a minimum notice must be given to those other people to attend and to be heard on this issue.

The RMWB suggested that CNRL was on a fishing expedition to find proof that it is being treated differently than anyone else. CNRL was trying to find evidence from other assessments in order to make its case.

Finding – Issue # 2

The CARB finds that the equity issue raised by CNRL in its letter of November 1, 2010 as further detailed in its written submissions before the Board, marked as Exhibit C41 paragraphs 40 – 44 is a new issue. Therefore pursuant to section 9(1) of the Matters Relating to Assessment Complaints Regulation 310/2009, the CARB lacks the jurisdiction to hear or grant relief in relation to this issue.

Reasons – Issue # 2

Section 9(1) of the Matters relating the Assessment Complaints Regulation, Alberta Regulation 310/2009 provides:

- (1) *A composite assessment review board must not hear any matter in support of an issue that is not identified on the complaint form.*

The CARB has carefully examined Schedule A to the complaint form filed on April 28, 2010 by counsel for CNRL. The CARB notes that the reasons for complaint of CNRL in regard to roll number 8892004911 – machinery & equipment listed the following under Issue 1:

Can an assessment be arbitrarily increased by a rule of thumb calculation in Alberta?

Is the increase in the assessment of the machinery and equipment by amended notice dated March 5, 2010 based upon any factual circumstances that can be supported by the assessor? Is the amended assessment illegal?

Is the amended assessment beyond the jurisdiction of the assessor?

Does an assessor act in a quasi-judicial capacity and as such is there a duty for the assessor to act impartially and without undue influence by municipal officials?

Is the amended assessment driven by tax motivation or bad faith, and an abusive process?

Under the grounds of appeal, CARB notes the following is the sole reference to equity in Schedule A in relation to roll number 8892004911:

The Assessor has had total disregard for the legislative process and places into the assessment an arbitrary adjustment factor. The Assessor did so without any consultation with CNRL. The third party Report upon which the factor is based is founded on estimates only and proxy calculations. There is no relationship between the third party Report and CNRL's costs, CNRL's management of its project, or the business philosophy and strategies employed by CNRL in the investment of its facilities. The third party Report cautions that actual assessments are to done in accordance with Regulations and are based on a specific characteristics of each individual project. They are a point in time estimate. The third party Report recognizes actual construction schedules and costs will differ between projects and that the CapitalEx to assessment ratios in the Report are only a quick approximation of assessed value on an oilsands

project based on capital cost estimates. The amended assessment is solely based upon a hunch by the Assessor and not with empirical data. The amended assessment introduces non-assessable costs and non-assessable property into the assessment contrary to, and inequitable with, established cost reporting for industrial facilities. To CNRL's knowledge, the assessor has not used this rule of thumb method to adjust the assessments of any other industrial facilities. CARB notes that although a second issue has been raised on the complaint form, there is no relevance to the issue at hand.

CARB notes that the complaint form was filed by counsel for CNRL and that the counsel is experienced in assessment matters. Although the word "inequitable" was used in Schedule "A" and although CNRL alleged that the Assessor has not used this rule of thumb to adjust the assessments of any other industrial facilities, the list of issues which have been identified in Schedule "A" do not raise "equity" as an issue. The issues identified deal with the ability of the assessor to alter the assessment, but do not raise this specific matter of "equity" as a separate issue identified by CNRL.

CARB notes that although the parties were directed in the June, 2010 decision of CARB (Board Order CARB 001/2010-P) to file their materials for the merit hearing that was scheduled to start November 29, 2010, CNRL's materials contain no argument in relation to this issue. Exhibit C2 – the legal brief of CNRL- sets out arguments in relation to the CCRG, the circumstances under which an assessor can amend the assessment, arbitrary actions, sections 299 and 300 requests, the burden of proof and the scope of the hearing, but makes no mention of any complaint in relation to equity. The first time the equity argument was raised was in the November correspondence (Exhibit R46) which was argued before the CARB on December 6 and 7, 2010.

Pursuant to section 9(1) of the Matters Relating to Assessment Complaints Regulation, the CARB is precluded from hearing a matter in support of an issue not identified on the complaint form. The CARB finds that the matter was not identified on the complaint form and that this is a new issue which the CARB lacks the jurisdiction to hear.

ISSUE #3 – Co-generation

Summary of Complainant's Position Issue #3

The Complainant indicated that the issue in relation to co-generation is that those costs were already included in the rendition numbers for the RMWB assessment. Since the assessment is under appeal, the assessor cannot take out those amounts or reduce the assessment.

This issue will need to be addressed as it concerns an element of double counting. Counsel for CNRL suggested that this might be addressed by the parties during an upcoming meeting. Counsel for CNRL noted that the parties were meeting on December 16, 2010 to address questions arising from the use of the spreadsheet. He suggested that this matter might be added to the agenda and addressed at that time.

Summary of Respondent's Position – Issue #3

Counsel for the RMWB acknowledged that the issue of co-generation must be resolved. The simplest way would be for the linear assessor, the municipal assessor and CNRL to meet to address these issues. However, the municipality has been disallowed from the meetings. Therefore, CNRL must take the lead in reaching a resolution on this matter.

Finding – Issue #3

The parties will report to the CARB by no later than December 17, 2010 advising as to the results of their discussion about an amendment addressing the element of double counting arising from the co-generation issue.

Reasons – Issue #3

The CARB notes that counsel for both CNRL and the RMWB recognize that there is an element of double counting arising from the co-generation issue. However, the CARB finds that the power of the assessor to amend the assessment in light of CNRL's appeal is eliminated and therefore, the municipal assessor has no ability to independently resolve this issue.

The most effective way in which the parties can resolve this issue is to share information. Therefore, the CARB directs that after the parties meet, they provide a status report to the CARB to address the results of those discussions. In the event that resolution is not reached on December 16, 2010, this matter will remain an issue for the merit hearing currently scheduled to commence May 2, 2011.

On December 17, 2010, the CARB received an update from the parties outlining the steps to be taken to address the co-generation issue.

Issue #4 - Onus

Summary of Complainant's position – Issue #4

CNRL argued that the onus is on the RMWB as the taxing authority to gather evidence to change its assessment. CNRL relied upon the *Sommers v City of Edmonton and Scott*, [1976] A.J. No. 547 [Tab 12 of Exhibit C2] ("Sommers") case as authority for the proposition that when the RMWB sends out an amended assessment, the onus is on the municipality to establish an error in the original assessment.

In the September 2010 preliminary hearing, CNRL indicated that if it was unsuccessful in its section 299 application, the RMWB would have to file its evidentiary materials to establish the error and, further, to identify it with sufficient detail so that CNRL could respond to it. Counsel for CNRL referenced authorities in its written submissions in which the assessor went beyond his jurisdiction and the court reviewed the matter of nullity and onus in the face of the amended assessment (see Exhibit C2 at paragraphs 24, 29 and 33).

Counsel for CNRL argued that in Board Order CARB 007/2010P, the CARB did not rule on the issue of onus. This was not a re-hearing on this issue. In correspondence from CNRL to the CARB, CNRL requested direction on the issue of onus. CNRL suggested that the City should file first, perhaps by February 28, 2010 with CNRL responding on April 15, 2011 for the May 2, 2011 merit hearing.

CNRL argued that the RMWB must explain why it took issue with the original rendition and what values should be included. CNRL argued that once the assessment was amended, the focus should be on making the case with the greatest amount of clarity. Once the Board decides onus, CNRL can spend time on what they have filed and why it was correct in the original form.

Counsel for CNRL argued that if there are residual issues following the CARB's decision on onus, that they can be addressed at that time.

Summary of Respondent's Position – Issue #4

The RMWB argued that onus ought not to be confused with disclosure. The RMWB argued that the party who wants something from the panel has the onus of proving it. Since each side wants the CARB to amend the roll to their number, both sides will have the job of proving their numbers to the CARB.

Although CNRL had suggested that onus and disclosure are linked, the RMWB argued that it is not. The RMWB argued that Board Order CARB 007/2010-P indicated that in regard to the issue of illegality, if the Board finds that the amended assessment was not prepared in accordance with the regulations, then it will require a review of the cost rendition. On that basis, the RMWB argued that the finding in Board Order CARB 007/2010-P in relation to jurisdiction has determined the issue of onus and that the onus is on each side.

The RMWB argued that each side must show whether the claims for excluded costs are in accordance with the legislation. Although the issue of onus was determined, the further question was with regard to disclosure and who presents their evidence first.

Finding – Issue #4

The CARB finds that the issue of onus was not decided the CARB during the September 2010 preliminary hearing, despite the fact that the parties had filed argument in this regard. The CARB finds that since each party is suggesting a different number for the assessment roll, in the face of section 467 (1) of the Act, each party bears an onus to provide sufficient proof for the CARB to decide to make a change to the assessment roll or tax roll or decide that no change is required.

Reasons – Issue #4

Section 467 (1) of the Act provides:

An assessment review board may, with respect to any matter referred to in section 460 (5), make a change to an assessment roll or tax roll or decide that no change is required.

The CARB is aware that CNRL has appealed the amended assessment filed by the RMWB. The position of CNRL, as advanced at the hearing, is that the assessed value as included on the original assessment roll should be reinstated.

However, the CARB is aware that the RMWB is not supporting the amended assessment, instead seeking an increase from the amended assessment value. It is clear that neither party is supporting the assessed value as contained on the amended assessment roll 8992004911.

The CARB has reviewed carefully its decision Board Order CARB 007/2010-P relating to its jurisdiction to hear and make a determination as to the status of the amended assessment. The CARB notes that its previous decision indicated that even if it were to make a declaration regarding invalidity, that the scope of its jurisdiction under section 467(1) is to make a determination as to whether to change the assessment roll, and if so, to what amount. However, it did not state directly who has the onus.

Since each party is seeking to have the CARB amend the assessment roll to a different number, each bears the onus of establishing the value which it is seeking to have the CARB find as the correct assessed value for the roll.

Issue #5 - Disclosure

Summary of Complainant's Position – Issue #5

Counsel for CNRL argued that onus and disclosure should be resolved together.

Given CNRL's position regarding onus (that the onus lies solely on the RMWB), CNRL argued that the CARB should direct the RMWB to provide disclosure for February 28, 2011 with CNRL responding by April 15, 2011. If the RMWB provided adequate disclosure as to how they came to the numbers, then CNRL could properly challenge it. The RMWB would identify which of the lines within the reporting it disagrees with and CNRL could then respond.

The position of CNRL was that it would be fair for CNRL to respond to the municipality. The tax payer has a right to know the basis of their assessment and that onus and disclosure are required at the same time.

In response to the argument by counsel for the RMWB, counsel for CNRL argued that the RMWB is asking the Board to create a discovery process which is not part of their jurisdiction. The documents that counsel for the RMWB suggested were not produced had previously been disclosed electronically to the RMWB.

Summary of Respondent's Position – Issue #5

The RMWB argued that onus and disclosure are not linked and that each side must produce evidence for the excluded costs and whether they are excluded in accordance with the legislation.

The difficulty will be to determine who should produce first. Counsel for the RMWB suggested that there has been approximately 10 % disclosure or discussion in relation to the items which are in dispute.

Counsel for the RMWB went through Exhibits R45A and R45B, which are derivatives of PR1-PR4 (arising from the cost rendition (R21)) which were entered at the November hearing by counsel for the RMWB. Exhibit R45A is a continuation of Exhibit PR1. Exhibit R45B was a printout from the electronic copy of Exhibit R21. This information was produced as an illustration of the level of detail that will be required by the Board in order to go through the evidence.

Counsel for the RMWB indicated that the cost rendition (Exhibit R21) sets out factors and numbers without any explanations as to where they came from and that the answers required are not in Exhibit R21. There was a volume of data and unanswered questions which need to be directed by the Board. Counsel for the RMWB indicated that there is no functioning electronic copy of the tables set out in Exhibit R21 and that the numbers are hard coded. The first request to resolve the math errors came in June 2010. In light of the errors indicated by Mr. Schmidt in relation to the master sheet of Exhibit R21, unless aggressive dates for disclosure are ordered by the CARB, the hearing will take much longer than currently scheduled. The RMWB submitted that if there are mathematical errors in Exhibit R21, those must be dealt with first by CNRL.

Counsel for the RMWB suggested meetings every two weeks, or if not every three weeks whereby the parties are directed to produce materials for the Board. This would be necessary to ensure that the matter progresses in an expeditious way. Counsel argued for a closely monitored approach to disclosure.

Alternatively, the RMWB argued that there should be the equivalent of case management meetings where a Board member and a staff person would sit with the parties and each side would be directed to answer questions with tasks for the next meeting. Since time is of the essence, the only way to get things organized for May would be to have the witnesses work on it every week. Counsel for the RMWB urged the CARB to provide a clear and strong direction that information and communication must continue to evolve.

If the CARB agreed with a closely monitored approach, it would not be effective for the municipality to go first. The RMWB's witnesses would be guessing what CNRL did in its cost rendition. She urged the CARB to have CNRL explain the cost rendition.

An alternate suggestion made was to have CNRL explain its cost rendition and then the municipality would then explain its numbers and questions of clarification could be answered.

A final alternative suggested by counsel for the RMWB was simultaneous disclosure. The RMWB is attempting to break through the issue of both parties not understanding what the other side is saying. Counsel argued for creative suggestions to allow the parties to obtain sufficient information in order to respond to the case of the side.

Counsel for the RMWB indicated that for the RMWB's assessors the months of January and February are 100% devoted to assessment. There will be insufficient time for the RMWB to provide evidence first given the workload by Mr. Schmidt and Dr. Thompson

Finding - Issue #5

The CARB directs the parties to provide the Board with an update by December 17, 2010 with regard to the meeting on December 16, 2010. Specifically, the CARB requests an update regarding:

- (i) mathematical errors in the Cost Report (Exhibit R21);
- (ii) a functioning electronic copy of R21; and
- (iii) the costs associated with the co-generation equipment which has received a linear assessment.

The CARB directs that the parties jointly provide to the CARB by January 28, 2011 an updated statement as directed in Board Order CARB 007/2010-P regarding

- Which of the included costs items are in dispute and the dollar figures each is attributing to them;
- Which of the schedules A through D are in dispute and
- What the particular issue is with respect to each line item that is in dispute.
For example, the parties should indicate whether it is the inclusion/exclusion of the line item that is in dispute, the value of the line item, the depreciation rate, etcetera.

In relation to the disclosure required for the merit hearing scheduled to start May 2, 2011, the CARB directs that each party provide its disclosure to the other party and to the CARB by February 28, 2011. Each party will then have the ability to provide rebuttal to the other party and to the CARB by April 15, 2011.

Reasons – Issue #5

The CARB was advised that the parties were meeting on December 16, 2010 regarding a number of matters. The CARB is of the view that the parties should be able to resolve some of the issues raised regarding Exhibit R21 during their meeting. Having the parties discuss this issue is a more effective method of resolving the issues raised than through a hearing process.

Subsequent to the hearing, but before the issuance of this decision, the CARB has heard from counsel for the RMWB setting out an update from the parties in relation to the above matter.

In Board Order CARB 007/2010-P, the CARB indicated that it was directing a joint statement from the parties regarding what is at issue in order to make the most efficient use of the time which has been set aside for the hearing of the merits of the complaint and to ensure that the items in contention are identified prior to the hearing to avoid delay in commencing the hearing. The CARB continues to see merit in this direction. Given the meeting set for December 16, 2010 between the parties at which issues relating to math errors, etc. in Exhibit R21 will be addressed, there is merit in having an updated statement. The CARB is not directing the parties to produce this information in any particular format, although the CARB did find the formatting of Exhibits PR3 and PR4 did give a summary of the line items at issue. The CARB wishes to be provided with those matters in dispute and the values attributed to them by each party. The CARB believes that such an exercise is required for the merit panel to assist it in effectively managing the hearing. In light of the update from counsel for the RMWB, there may be a change to PR3 and PR4 as previously provided to the CARB.

Given the CARB's finding in relation to onus (that each party bears an onus to present information in relation to the value it is seeking), the CARB believes that each party should file on the same date. Each party will then have an equal opportunity to review the materials of the other party and to provide their rebuttal. Each party has equal time to both prepare and review materials.

Issue #6 - Delegation of Assessor's Responsibility

Summary of Complainant's Position – Issue #6

Although not raised in oral submissions, counsel for CNRL argued at page 19, paragraph 55 and 56 of C41 that the scope of Exhibit R20 in terms of who will defend the report remains unanswered.

CNRL requested new filing requirements for the assessor to file a separate report.

CNRL argued that the municipality is able to change the assessment and provide a joint report defending that change to assessment with no avenue to test the opinions of the assessor or experts in the context of proper rules.

Summary of Respondent's Position – Issue #6

Counsel for the RMWB argued that this matter had been dealt with in Board Order CARB 007/2010-P as Issue #3. Moreover, the RMWB has complied with the direction of CARB in Issue #3 that the RMWB advise CNRL as to which parts of the Schmidt/Thompson joint report will be addressed by each witness by November 1, 2010. The RMWB referred the CARB to the October 18, 2010 letter from counsel for the RMWB setting out those portions to be addressed by each witness.

Counsel for the RMWB argued that as this matter had been dealt with previously, the Board does not have the jurisdiction to address this issue on the basis of the rehearing arguments articulated above.

Finding – Issue #6 Delegation of Assessor’s Responsibility

The CARB finds that in its decision Board Order CARB 007/2010-P, it made a direct ruling in relation to the delegation of the assessor’s responsibility. The summary of evidence and argument and the findings in reasons of the CARB are found at pages 18 – 20 of 24 Board Order CARB 007/2010-P.

Reasons – Issue #6 Delegation of Assessor’s Responsibility

As this issue has been decided in Board Order CARB 007/2010-P, for the reasons relating to rehearing above, the CARB will not be rehearing this matter.

Issue #7 Hearing Times

Summary of Complainant’s Position – Issue #7

CNRL suggested that the merit hearing may take more than the 3 weeks currently set for hearing, perhaps 4 – 5 weeks. If the whole rendition must be reviewed, it will not be possible to complete the hearing, even if 5 weeks are allotted. Counsel for CNRL indicated that he does not wish to split his case.

Summary of Respondent’s Position – Issue #7

The CARB previously heard from counsel for the RMWB that 3 weeks should be sufficient, if the parties are in discussions in an effort to resolve the matter.

Finding – Issue #7

The hearing is set to commence May 2, 2011 for 3 weeks.

Reasons– Issue #7

The Board previously decided in Board Order CARB 0233/2010-P that there would be three weeks set to commence May 2, 2011. In the correspondence between counsel in June, counsel estimated that they would need 8 days for the hearing. This was expanded to 2 weeks by Board Order CARB 001/2010-P, then expanded to 3 weeks during the September 2010 hearing. The CARB notes that both parties have suggested that disclosure must be resolved prior to the issue of the timing and hopes that the joint document may reveal fewer items in dispute.

DECISION

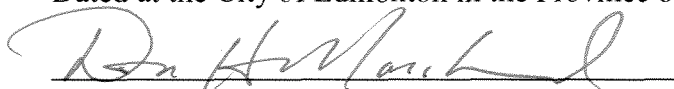
1. The issue of legality or status of the amended assessment is to be addressed by a CARB panel which will hear the merits of the appeal.

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2. The CARB lacks the jurisdiction to hear or grant relief in relation to the issue of equity as it is a new matter.
3. The parties will report to the CARB by no later than December 17, 2010 advising as to the results of their discussion about an amendment addressing the element of double counting arising from the co-generation issue.
4. The parties will report to the CARB by no later than December 17, 2010 advising as to the status of the co-generation issue.
5. The parties will report to the CARB by no later than December 17, 2010 advising as to an update regarding:
 - a. mathematical errors in the Cost Report (Exhibit R21);
 - b. a functioning electronic copy of R21; and
 - c. the costs associated with the co-generation equipment which has received a linear assessment.
6. The parties will jointly report to the CARB by no later than January 28, 2011 an updated statement as directed in Board Order CARB 007/2010-P regarding
 - a. Which of the included costs items are in dispute and the dollar figures each is attributing to them;
 - b. Which of the schedules A through D are in dispute and
 - c. What the particular issue is with respect to each line item that is in dispute.For example, the parties should indicate whether it is the inclusion/exclusion of the line item that is in dispute, the value of the line item, the depreciation rate, etcetera.
7. Each party bears an onus to prove the assessed value that it is seeking to have the CARB enter on the roll.
8. The parties will provide their disclosure required for the merit hearing scheduled to start May 2, 2011 to the other party and to the CARB by February 28, 2011.
9. Each party will then have the ability to provide rebuttal to the other party and to the CARB by April 15, 2011.
10. The hearing is set to commence May 2, 2011 for 3 weeks.

It is so ordered.

Dated at the City of Edmonton in the Province of Alberta, this 4th day of January, 2010.


Presiding Officer

APPENDIX "A"

DOCUMENTS RECEIVED AND CONSIDERED BY THE CARB:

NO.	ITEM
C1	Evidentiary Report – Amended Assessment (K. Minter/M. Celis)
C2	Legal Brief of the Complainant Amended Assessment Roll #8992004911
C3	Report of Ken C. Shaw
C4	Analysis of the Application of OSDG CAP-EX Assessment Ratios to Site Specific Projects (Fumio Otsu)
C5	Overview of the Horizon Oil Sands (Peter Janson)
C6	Evidentiary Report – Secondary Crushers (Joy P. Romero)
C7	Legal Brief of the Complainant Roll #8992004911 (Secondary Crushers) and Roll #8992004910 (Camps)
C8	Evidentiary Reports – Camps (L. Zeidler, K. Minter, M. Celis)
C9	Property Tax Report, June 13, 2007
C10	Property Tax Report, March 4, 2008
C11	Property Tax Report, September 10, 2008
C12	Property Tax Report, November 10, 2008
R13	Respondent's Legal Argument Roll #8992004910 (Camps)
R14	Respondent's Legal Argument Roll #8992004911 (Crushers)
R15	Respondent's Volume of Authorities (Crushers)
R16	Respondent's Volume of Documents
R17	Respondent's Volume of Legislation
R18	CNRL – Camp Assessment Roll #8992004910 (G. Towns/H. Schmidt)
R19	Evidence Summary of Henk van Waas
R20	Synopsis – Review of Project Costs (H. Schmidt/E. Thompson)
R21	CNRL December 1, 2009 Cost Report (Note: Binder and Compact Disk)
R22	Respondent's Legal Argument
R23	Respondent's Volume of Authorities (Jurisdiction)
C24	Rebuttal Brief of the Complainant Amended Assessment Roll #8992004911

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C25	Summary of Testimony (L. Zeidler)
C26	Summary of Testimony (T. Stowell)
C27	Response to the Evidence of H. van Waas (K. Minter)
C28	Response to the August 23, 2010 Report of RMWB (F. Otsu)
C29	Rebuttal on the Issue of Crushers (K. Minter)
C30	Rebuttal Report of CNRL to the Report of Dr. E. Thompson and H. Schmidt (M. Celis)
C31	Rebuttal to Respondent's Evidence Submission (K. Shaw)
C32	Curriculum Vitae (K. Minter)
R33	Letter from Respondent to the Board and Complainant Re: Hearing Arrangements
R34	Email from Respondent to the Board and Complainant Re: Jurisdictional and Preliminary Issues (enclosing Authorities re: Scope of Rebuttal Evidence)
R35	Authorities Re: Scope of Rebuttal Evidence
C36	Mersey v. Paper
C37	Meeting Minutes tab 5
C38	Spreadsheet tab 6
C39	Missing page from P. Janson report (page 4)
PR1	CNRL/RMWB Joint Report
PR2	CNRL/RMWB Joint Report
PR3	RMWB Horizon Oil Sands Project
PR4	CNRL Horizon Oil Sands Project
C40	Letter from the Complainant to the Board Re: R.M. of Wood Buffalo – CARB Decision 007/2010-P
C41	Legal Brief of the Complainant Re: Preliminary Issues
C42	Letter from the Complainant to the Board Re: R.M. of Wood Buffalo – CARB Decision 007/2010-P
C43	Rebuttal Report of CNRL to the Report of Dr. E. Thompson and H. Schmidt (M. Celis)
R44	Volume of Authorities for Dec 6-8 th Preliminary
R45	PR1-PR4 Revisions For Board
R46	List of letters

	<p>October 18, 2010 – Wilson Laycraft</p> <p>October 21, 2010 – Wilson Laycraft</p> <p>October 22, 2010 – RMRF</p> <p>October 28, WL</p> <p>Nov 1, 2010 WL</p> <p>Nov 1 RMRF</p>
R47	Respondent's legal brief
R48	1 Page table RMRF
R49	RMWB Schmidt Report
CARB 50	List of Issues presented by Board to parties on September 9, 2010

APPENDIX 'B'

ORAL REPRESENTATIONS

PERSON APPEARING CAPACITY

- | | | |
|----|----------------|-----------------------------|
| 1. | G. Ludwig | Counsel for the Complainant |
| 2. | J. Laycraft | Counsel for the Complainant |
| 3. | C. M. Zukiwski | Counsel for the Respondent |
| 4. | Nayha Acharya | Counsel for the Respondent |