CALGARY
ASSESSMENT REVIEW BOARD
DECISION WITH REASONS

In the matter of the complaint against the property assessment as provided by the *Municipal Government Act*, Chapter M-26.1, Section 460(4).

between:

The City Of Calgary, COMPLAINANT

and

Real Equity Centre Inc., *RESPONDENT*

before:

J. Noonan, PRESIDING OFFICER
D. Julien, MEMBER

This is a cost application to the Calgary Assessment Review Board in respect of Property assessment prepared by the Assessor of The City of Calgary and entered in the 2011 Assessment Roll as follows:

ROLL NUMBER:	**044053650**
LOCATION ADDRESS:	**1716 16 Av NW**
HEARING NUMBER:	**61153**
ASSESSMENT:	**$3,540,000**

This complaint was heard on the 5th day of July, 2011 at the office of the Assessment Review Board located at the 4th Floor, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 10.

Appeared on behalf of the Applicant:

- M. Lau, Assessor, M. Jankovic, Policy Analyst, K. Hess, Team Leader, Assessment Tribunal, *The City of Calgary*

Appeared on behalf of the Respondent:

- No Appearance, Written Submission, Altus Group

Hearing Description:

This cost application hearing resulted from assessment complaint hearing number 61153 held June 16 and 17, 2011 relating to property at 1716 16 Av NW, Calgary, roll number 044053650. *The City of Calgary* is seeking costs of $500 in recognition of the preparation of an assessment defense of an issue of tax exempt status for a portion of the above property, that issue not listed on the complaint form, but evidence advanced at the evidence disclosure stage 42 days prior to the assessment complaint hearing.

Jurisdictional or Procedural Issues Heard:

Postponement request:

The Respondent's written submission contained a reconsideration request for a postponement until August, 2011 due to significant and irresolvable scheduling conflicts. The original request for postponement had been made by email June 27, 2011 and denied by the General Chairman of the Assessment Review Board (ARB). The postponement would allow the Respondent to seek legal counsel and further decide if representation were necessary.

The Applicant noted the original postponement request was dated one day prior to the evidence disclosure due date June 28, 2011 and that an email string in the Respondent's evidence showed the involvement of K. Lilly and R. Brazzell, both lawyers and internal legal counsel to Altus Group. In short, there was no reason to postpone.

Decision and Reasons, Postponement Request:

The cost application hearing date and evidence disclosure date were established by oral decision delivered at the merit hearing, June 17, 2011. Subsequently, the ARB sent formal notice and CARB 0952/2011-P was issued. In its oral decision, the CARB emphasized its desire to deal with the cost application expeditiously while the facts were few and fresh, and anticipated the parties would focus on legal argument. It was noted that personal attendance was not required, that written submissions were expected, but that the parties could attend with or without counsel if they so desired.

The Respondent has submitted a brief of just over 7 pages dealing with the relevant legislation and advancing argument bolstered by case history as to why costs ought not be awarded in the case at hand. This submission is precisely what the CARB solicited and expected.

The CARB was satisfied the written submission of the Respondent addressed the question at hand and that postponement "to seek legal counsel and further decide if representation is necessary" would be redundant and an unnecessary consumption of limited CARB resources. It was decided the cost application would proceed.

Further Procedural Matter: Quorum

The CARB reiterated that though a cost application hearing was a non-assessment matter and could be dealt with by a one-member panel as envisioned at s 36(2) of *Matters Relating to Assessment Complaints Regulation 310/2009 (MRAC)*, the oral and written decisions had stated the cost application was expected to be heard by the same three-member panel present at the merit hearing. One of the three original members was unable to attend this hearing, and as allowed by *Municipal Government Act* s 458(2) the hearing proceeded with a quorum of two members, the provincial member and one other member of a composite assessment review board.

Background:

The complaint form did not mention tax exemption as an issue, nor was box 10 at Section 4 of the form checked off, such box indicating a matter for a complaint – whether the property or business is exempt from taxation. The evidence disclosure package for the subject property at 1716 16 Av NW referred to a Calgary Health Region lease for some 5000 sf., the space now occupied by Calgary Foothills Primary Care Network, and raised the issue of property tax exemption. The evidence disclosure from the City in regard to the assessment complaint contained no documentation in regard to the exemption matter other than notice the City would ask the CARB not to consider this issue as it had not been identified on the complaint form. When the exemption matter was raised as a preliminary matter at the June 16 proceeding, the issue was withdrawn by the agent, Altus Group, recognizing that the complaint form had indeed not mentioned an exemption issue.

The City applied for $500 in costs as allowed by *MRAC Schedule 3*, not that such an award would compensate for the time spent on this matter, but rather on principle and the sending of a message to the agent, Altus, who had been party to a near-identical situation the previous year. The City's witness, Mr. Jankovic, had spent some 8-10 hours researching legislation and had been in contact with Alberta Health establishing the relationship between the department and this primary care network, all in the event the CARB should decide to hear the exemption issue. Although *MRAC* s 9(1) clearly states that a CARB must not hear an issue not identified on the complaint form, the City had been sometimes surprised that its interpretation of legislation had not been upheld at the tribunal level, and so felt compelled to prepare a defense of the assessment on the tax exemption issue.

Altus Group was surprised by the cost application and requested an opportunity to consult counsel and prepare a defense. The request was granted, thus the proceedings at this hearing.

Issue:

Was the hearing process abused by the conduct of the Respondent in advancing an issue at the evidence disclosure stage that was not identified on the complaint form?

Legislation:

Municipal Government Act

468.1 A composite assessment review board may, or in the circumstances set out in the regulations must, order that costs of and incidental to any hearing before it be paid by one or more of the parties in the amount specified in the regulations.

362(1) The following are exempt from taxation under this Division:

(g.1) property used in connection with health region purposes and held by a health region under the *Regional Health Authorities Act* that receives financial assistance from the Crown under any Act;

Matters Relating to Assessment Complaints Regulation 310/2009 (MRAC)

9(1) A composite assessment review board must not hear any matter in support of an issue that is not identified on the complaint form.

36(2) A one-member composite assessment review board may hear and decide one or more of the following matters:

(a) a complaint about a matter shown on an assessment notice, other than an assessment;
(b) a procedural matter, including, without limitation, the scheduling of a hearing, the granting or refusal of a postponement or adjournment, an expansion of time and an issue involving the disclosure of evidence;
(c) an administrative matter, including, without limitation, an invalid complaint;

38 If a complaint is to be heard before a one-member composite assessment review board, the clerk must, after a copy of the complaint has been provided to the municipality, notify the municipality, the complainant and any assessed person other than the complainant who is affected by the complaint of the date, time and location of the hearing not less than 15 days before the date of the hearing is scheduled.

39(2) If a complaint is to be heard by a one-member composite assessment review board, the following rules apply with respect to the disclosure of evidence:

(a) the complainant must, at least 7 days before the hearing date,
  (i) disclose to the respondent and the one-member composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the complainant intends to present at the hearing in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing, and
  (ii) provide to the respondent and the one-member composite assessment review board an estimate of the amount of time necessary to present the complainant's evidence;

(b) the respondent must, at least 7 days before the hearing date,
  (i) disclose to the complainant and the one-member composite assessment review board the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that the respondent intends to present at the hearing in sufficient detail to allow the complainant to respond to or rebut the evidence at the hearing, and
  (ii) provide to the complainant and the one-member composite assessment review board an estimate of the amount of time necessary to present the complainant's evidence.

52(1) Any party to a hearing before a composite assessment review board or the Municipal Government Board may make an application to the composite assessment review board or the Municipal Government Board, as the case may be, at any time, but no later than 30 days after the conclusion of the hearing, for an award of costs in an amount set out in Schedule 3 that are directly and primarily related to matters contained in the complaint and the preparation of the party's submission.

(2) In deciding whether to grant an application for the award of costs, in whole or in part, the composite assessment review board or the Municipal Government Board may consider the following:

(a) whether there was an abuse of the complaint process;
(b) whether the party applying for costs incurred additional or unnecessary expenses as a result of an abuse of the complaint process.

(4) Any costs that the composite assessment review board or the Municipal Government Board award are those set out in Schedule 3.

Schedule 3

Table of Costs

Where the conduct of the offending party warrants it, a composite assessment review board or the Municipal Government Board may award costs up to the amounts specified in the appropriate column in Part 1.

Where a composite assessment review board or the Municipal Government Board determines that a hearing was required to determine a matter that did not have a reasonable chance of success, it may award costs, up to the amounts specified in the appropriate column in Part 2 or 3, against the party that unreasonably caused the hearing to proceed.

	Assessed Value

Category	Up to and including $5 million	Over $5 million up to and including $15 million	Over $15 million up to and including $50 million	Over $50 million
Part 1 — Action committed by a party				
Disclosure of irrelevant evidence that has resulted in a delay of the hearing process.	$500	$1000	$2000	$5000
A party attempts to present new issues not identified on the complaint form or evidence in support of those issues.	$500	$1000	$2000	$5000
A party attempts to introduce evidence that was not disclosed within the prescribed timelines.	$500	$1000	$2000	$5000
A party causes unreasonable delays or postponements.	$500	$1000	$2000	$5000
At the request of a party, a board expands the time period for disclosure of evidence that results in prejudice to the other party.	$500	$1000	$2000	$5000
Part 2 — Merit Hearing				
Preparation for hearing	$1000	$4000	$8000	$10 000
For first 1/2 day of hearing or portion thereof.	$1000	$1500	$1750	$2000
For each additional 1/2 day of hearing.	$500	$750	$875	$1000
Second counsel fee for each 1/2 day or portion thereof (when allowed by a board).	$250	$500	$750	$1000
Part 3 — Procedural Applications				
Contested hearings before a one-member board (for first 1/2 day or portion thereof).(i.e. request for adjournment)	$1000	$1500	$1750	$2000
Contested hearings before a one-member board (for each additional 1/2 day or portion thereof).	$500	$750	$875	$1000

Applicant's Position:

The Complainant City submits the legislation (*MRAC*) is written in a manner permissive of cost applications, gives latitude in determining costs that are awarded up to the limits set at Schedule 3, but directs to consider whether there was an abuse of the complaint process and whether the aggrieved party incurred additional or unnecessary expenses as a result of that abuse.

The City is required to exercise due diligence before granting an exemption under the criteria set out in the *MGA*, the *Community Organizations Property Tax Exemption Regulation (COPTER)*, and City bylaws to ensure fairness in the exemption process, and the consequences for similar properties and the rest of the taxpaying public. The City uses a standardized application form for exemption requests, allowing it to keep up-to-date records of property uses and spaces occupied so that where a change occurs and a property no longer qualifies, that property should no longer benefit from an exemption at the expense of the rest of the tax base. "While there is no explicit requirement for application or notification in the Municipal Government Act, the law simply cannot be implemented in the way it was intended without some form of information sharing by the organizations seeking an exemption." Several instances were cited where Altus acting as agent had advanced claims of exempt status for non-profit organizations at complaint hearings, and if such efforts were not necessarily an abuse of the complaint process, they were certainly an abuse of the exemption process.

While some exemptions are clear and uncomplicated such as charitable organizations where the City can rely upon the judgement of Revenue Canada, when dealing with health care there is quite a maze of regulation and terms laden with meaning. For instance, "hospital". Great care must be taken in dealing with structure and funding relationships before a proper decision can be made about property tax exemption, and such research was required here. Mr Jankovic estimates he spent some 8-10 hours in preparation for the merit hearing and a colleague at Alberta Health Services an hour or two. Ms. Lau also spent an hour or two, though most of the work fell to Mr. Jankovic. Although the City's representatives were fairly confident the issue of exemption would not be heard, background research needed to be conducted in case that confidence was misplaced. To establish whether or not Calgary Foothills Primary Care Network qualified for an exemption, and if not, the basis for denial, is not a simple task. The City is pursuing $500 in costs not that this amount would compensate for expenses or opportunity cost, but rather to sanction behaviour that is an abuse of process.

Section 9(1) of MRAC states "A composite assessment review board must not hear any matter in support of an issue that is not identified on the complaint form" but then the legislation goes further, and offers specific cost guidance at Schedule 3. When "A party attempts to present new issues not identified on the complaint form or evidence in support of those issues", the CARB may award up to $500 when the property has an assessed value up to $5million. In a case very similar to the current circumstances, Altus in 2010 raised an exemption issue under *MGA* s 362 (1)(g.1), that case dealt with by decision CARB 0841/2010-P where the issue was not heard as per *MRAC* s 9(1). The City did not pursue costs on this matter last year, recognizing the changes to the complaint process, but now calls for the Board to mete out some consequences for this abuse of process to prevent future occurrences.

Respondent's Position:

The Respondent noted that previous versions of the *Act* gave the Municipal Government Board significant leeway and little-used authority to award costs. Examples were shown of very moderate cost awards, or no award at all, in response to applications for amounts in the mid-five digits. The new wording of sections 501 and 468.1 of the *MGA* suggest a much more limited jurisdiction to award costs, and the quantum and circumstances are listed at *MRAC* s 52 and Schedule 3. The preamble to Schedule 3 clearly states that awards may be up to the maximum amounts specified in the appropriate columns. The practice of the MGB was to make awards of costs consistent with the nature of the conduct complained. Costs of the order of magnitude sought by the Applicant are entirely out of proportion to the conduct at issue, and should not be awarded at all.

A quote from the MacAulay and Sprague text, *Practice and Procedure Before Administrative Tribunals*, was noted: "subject to some contrary legislative intent, the courts take the position that the principle underlying an award of costs is indemnification – not punishment." Two CARB decisions from 2010 illustrated this principle, both in agreement that costs are intended to sanction abusive or disruptive behaviour that hinders the complaint process.

The Respondent does not concede that the right to present evidence on the exemption issue was lost, but in the interest of administrative efficiency agreed to withdraw evidence on this point. The dropping of an issue cannot be construed as an abuse of process. Further, the Applicant claims that this is repetitive behaviour on the part of Altus, but cited only one other instance involving a different agent. The Applicant has failed to show an abuse of process, and failed to show that it incurred significant costs or expenditure of resources in relation to the Respondent's actions. The Respondent has spent considerable time and resources in preparation for an unwarranted hearing relating to an application that did not have a reasonable chance of success and which hearing the Applicant unreasonably caused to proceed. The CARB should deny the application.

Board's Findings and Reasons:

The CARB is reminded of the difficulties that may arise when simultaneous disclosure of evidence is called for, as at MRAC s 39(2). Here, the Applicant calls for sanction of introduction of an issue not identified on the complaint form and the Respondent has understood the impugned behaviour differently – the dropping of an issue and the withdrawal of the associated evidence as abuse of process. The Applicant cited a previous instance of circumstances very similar to the merit hearing for this roll number, and quoted from CARB 0841/2010-P which ruled the exemption issue dead on arrival as per *MRAC* s 9(1). The Respondent understood the allegation of repetitive behaviour originated with another decision, CARB 0972/2010-P, and a short quote from that decision refers to *MRAC* s 8(2). The CARB ordered the compressed notice and disclosure times associated with an administrative matter in a desire to deal with the cost application while the facts were fresh and few. If a CARB hearing can be likened to a naval battle, the Board did not create the conditions necessary for direct hits, blood, guts and gore, but neither can it be said that two ships passed gently in the night. The panel was present at the merit hearing, well aware of the circumstances that led to the application, has considered the presentations and legislation, and reached a decision.

The legislation is not entirely clear about cost awards: s 468.1 of the *Act* imperatively commands a CARB must order costs in the circumstances set out in the regulations; *MRAC* then advises a CARB may consider whether there was an abuse of the complaint process; the Schedule 3 preamble equivocates the CARB may award costs up to the amounts specified, where the conduct of the offending party warrants it. In comparison, section 501 of the previous *Act* stated, "The Board may determine the costs of and incidental to any hearing before it and decide by whom and to whom the costs are to be paid." Not mentioned previously in the party positions, the Respondent observed the jurisdiction to award costs has been narrowed, if one presumes that legislative change is purposeful as per the Sullivan and Driedger text. This Board observes that what was explicitly vague is now vaguely explicit.

To address the central question of whether a cost award is appropriate here, several ancillary questions arise:

1. Did the City incur additional expense?

    1 a) Should it have done so?

2. Was there an abuse of process?

1. The oral evidence of the Complainant answers the first question affirmatively. The time spent in investigating or researching the eligibility for exemption or lack thereof carries a cost of its own, but also opportunity cost – time that could have spent on other tasks.

1 a). The CARB frequently sees on the complaint form issues of a very general nature, oftentimes called boilerplate. The merit hearing of this assessment complaint was one of a group of 10 suburban offices whose hearings consumed a week. In approximately half of those cases, the complaint form listed as an issue the assessor had failed to account for some portion of the property being tax exempt, or words to the same effect, and in virtually all those cases the listed issue was not pursued at the evidence disclosure stage. In this case, had the standard boilerplate issue been listed on the complaint form there would have been no cause for the City to pursue this cost application; or, could have advanced an argument that the complaint form did not address "what the correct information is."

Resisting the temptation to detour on a discussion of the complaint form, its construction and unintended consequences, the CARB sees in this instance a cut-and-dried example of no issue, no problem. *MRAC* s 9(1) prohibits a CARB hearing any matter in support of an issue that is not identified on the complaint form. That the issue was probably overlooked in the cut-and-paste preparation of the form does not matter. Armed with clearly worded legislation, *MRAC* s 9(1), and a previous decision from 2010 where a CARB refused to hear the exemption issue under very similar circumstances, why did the City prepare a defense? It should not have done so. The City voiced the concern that its interpretation of legislation was not always the same as the views adopted by Boards, and thus felt compelled to prepare for this issue in case the CARB decided to hear it. In a clear situation such as this case, if the City were to be truly surprised by a ruling that permitted an undisclosed issue to proceed, the appropriate action would be to call for an adjournment to allow it time to prepare a response.

2. Was there an abuse of the complaint process?

Abuse of process – The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.

- Black's Law Dictionary

At the original hearing the Respondent, (then Complainant), withdrew the evidence and the exemption issue as soon as the City objected. Although the written submission "does not concede that it did not have the right to present the evidence...", in the Board's view the issue is dead. Had the proceedings been prolonged with argument that had no reasonable chance of success, the City might well have a stronger case. At the CARB level, abuse of process has been seen as behaviour that disrupted the orderly disposition of a complaint, through negligence, the callous disregard for consequences, repetitive behaviour that has been previously sanctioned, amongst other things. Although the City was sorely inconvenienced in investigating an exemption issue, it chose to invest the unnecessary resources it did. The CARB cannot find the Respondent's actions in this case rose to the level that would clearly call for an award of costs.

The CARB is also well aware that Altus Group annually represents a large number of complainants. The City's view, that Altus is engaging in the repetitive introduction of issues not identified on the complaint form, is not borne out by the example of one occurrence last year and one this year, so far. On this topic though, the Board does not agree with the Altus view that two different agents were involved. The agent was Altus in both cases, represented by different employees.

The dictionary definition of abuse of process has about it the strong sniff of fraud, which would also qualify for the CARB's list of transgressions. Although a very strict reading of the definition might lead another panel to arrive at a different conclusion, this CARB does not see intent to deceive in the actions of the Respondent.

Board Decision on the Issue:

The Board denies the application for costs.

DATED AT THE CITY OF CALGARY THIS 9th **DAY OF** AUGUST **2011.**

for **Presiding Officer**

An appeal may be made to the Court of Queen's Bench on a question of law or jurisdiction with respect to a decision of an assessment review board.

Any of the following may appeal the decision of an assessment review board:

(a) the complainant;

(b) an assessed person, other than the complainant, who is affected by the decision;

(c) the municipality, if the decision being appealed relates to property that is within the boundaries of that municipality;

(d) the assessor for a municipality referred to in clause (c).

An application for leave to appeal must be filed with the Court of Queen's Bench within 30 days after the persons notified of the hearing receive the decision, and notice of the application for leave to appeal must be given to

(a) the assessment review board, and

(b) any other persons as the judge directs.