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, Section 460, Revised Statutes of Alberta 2000 (the *Act*).

between:

DUNDEAL CANADA (GP) INC., COMPLAINANT,
as represented by ALTUS GROUP LIMITED

and

The City Of Calgary, RESPONDENT

before:

T. Helgeson, PRESIDING OFFICER
Y. Nesry, MEMBER
R. Cochrane, MEMBER

This is a complaint to the Calgary Assessment Review Board in respect of a property assessment prepared by the Assessor of The City of Calgary and entered in the 2012 Assessment Roll as follows:

ROLL NUMBER: 067046508

LOCATION ADDRESS: 840 6th Avenue SW

HEARING NUMBER: 67889

ASSESSMENT: $19,280,000

Background

The merits of this complaint were to be heard on the 25th day of June, 2012 at the office of the Assessment Review Board located at Floor Number 4, 1212 – 31 Avenue NE, Calgary, Alberta, Boardroom 2. Instead, preliminary issues raised by counsel for the Respondent were heard throughout June 25th and during the morning of June 26th. In the result, the hearing was adjourned to August 7, 2012, and the Composite Assessment Review Board ("the Board") wrote a decision dated July 18, 2012, dealing with two of the preliminary issues. That decision is found in CARB 0916/2012-P.

The two preliminary issues dealt with in the decision of July 18 were (1), whether Mr. Brazell will be acting in the capacity of a lawyer during the merit hearing, and (2), whether there was disclosure pursuant to sections 299 and 300 of the *Act*. In the decision of July 18, deadlines for submissions with respect to the remaining, unresolved issues were specified. The unresolved issues arose from the submissions of counsel for the Respondent, as stated in CARB 0916/2012-P:

> [17] As to the Complainant's rebuttal, it is not a rebuttal at all. There is nothing to rebut. What was put into the rebuttal was insufficient – see page 31 of the *Wood Buffalo* decision. Furthermore, paragraph 33 on page 13 of the of the rebuttal is misleading; the *Nortel Networks* case was decided in 2008, before Bill 23 came into effect. How could it have anything to do with the present case?

and the submissions of Altus for the Complainant, as stated by Mr. Brazell:

> [18] We should have had notice of Ms. Gosselin's remarks. Ms. Gosselin has sprung this on us. My integrity has been impugned. We request an adjournment. Ms. Gosselin has suggested our submissions have been deliberately designed to mislead the Board. That is an insult to me personally, and to Altus group. I will have to consult third-party counsel. We request that this matter be put over for some weeks, to August, or perhaps September.

This decision deals with issues that were not resolved.

Appeared on behalf of the Complainant:

- *B. Brazzell, S. Meiklejohn*

Appeared on behalf of the Respondent:

- *L. Gosselin, D. Grandbois*

Summary of the Submissions of the Parties Regarding the Unresolved Issues

Altus Group Limited's Submissions of July 23, 2012:

[1] On June 26, 2012, the Respondent made an application to the Board to have part of the Complainant's rebuttal submission struck out. Grounds for the application include the allegation that Mr. Brazzell for Complainant made a deliberate misrepresentation to the Board with respect to the state of the law. The Respondent gave no advance notice of its intention to allege deliberate misrepresentation, nor did it give advance notice of its request to have a portion of

the rebuttal excluded.

[2] There is no basis or precedent for the Board to strike out submissions filed in advance on the basis of mere conjecture. The Board is entitled to receive the disclosure submissions of the parties and consider them with the benefit of all evidence and submissions in the course of the merit hearing. That will allow the parties full opportunity to make argument to the Board as to what affect and weight should be given to the materials submitted. It would be a breach of natural justice and an error of jurisdiction were the Board to accept the Respondent's application to strike out portions of the Complainant's submission on the basis put forward by the Respondent.

[3] In advancing its argument of deliberate misrepresentation, or lying, the Respondent again turns to its theme that Mr. Brazzell is unethical, and acting in breach of the Code of Conduct of the Law Society of Alberta. The repetitiveness of this argument demonstrates a strategy bent on denigrating Mr. Brazzell without justification, this for the purpose of restricting his role and discounting or dismissing the position advanced by the Altus Group Limited on behalf of the Complainant. This strategy has been dealt with by the Board in its ruling of June 25, found at page 28 of the transcript of the hearing. The Respondent should be precluded from repeating arguments that the Board has already heard and dealt with. It is inappropriate to ask the Board to interpret and make a declaration with respect to whether Mr. Brazzell has acted in breach of the Code of Conduct. The Respondent can pursue such issues with the Law Society of Alberta, which has already addressed the ability of Mr. Brazzell to appear on assessment complaints as a tax consultant.

[4] The Respondent asserts that part of the Complainant's rebuttal should be struck out prior to the commencement of the merit hearing. The Respondent says it is not proper rebuttal. In a typical hearing, the complainant presents its case, then the respondent presents its case. The complainant may then make rebuttal. At that stage there may be argument as to whether the rebuttal is true rebuttal or not. In such a case, the tribunal can make a decision on the issue with the full benefit of all the evidence and material submitted over the course of the hearing. In the present case, the Respondent seeks to strike part of the rebuttal before the merit hearing even commences. How can the Board make a determination that rebuttal materials are not responsive to the Respondent's issues, evidence, and argument without hearing those issues, evidence and argument?

[5] At the outset of the hearing on June 26, 2012, the Respondent asserted that Exhibit C-2 was not proper rebuttal because "in the assessment submission there is nothing dealing with onus of proof and *prima facie* case." Onus of proof is not a matter that the Board is unfamiliar with. It is an element of the determination of any assessment complaint. Further, section 38(9) of the Board Policies and Procedural Rules provides that "[a] decision of a court or tribunal may be considered by the Board in a complaint hearing even where such a decision has not been provided in disclosure material, and court or tribunal decisions shall not be marked as exhibits, nor do they form part of the Board record."

[6] Most of the City's submissions to the Board on June 26, 2012 in connection with the application to strike are focussed on the allegation that Altus, and specifically Mr. Brazzell, have deliberately misrepresented, or in other words lied, to the Board regarding the state of the law. Undoubtedly, a ruling from the Board that Altus Group Limited and Mr. Brazzell have lied to the Board would provide ample grounds for striking out of portions of the rebuttal. Furthermore, the Board would be reminded throughout the merit hearing that it was dealing with a Complainant

who lied to it. To remove any doubt that the Respondent is urging the Board to find that it has been lied to, counsel for the Respondent states at page 115 of the hearing transcript: "I have here evidence that Altus has not provided the truth to this Board . . . "

[7] To support its allegation that the Board has been lied to, the Respondent refers to the fact that Altus cited paragraph 157 of the *CNRL* decision, i.e., *Canadian Natural Resources Ltd.* v. *Wood Buffalo (Regional Municipality)* 2010 ABQB 177, in support of arguments with respect to disclosure in this case. The Respondent refers to another part of the *CNRL* decision that deals with a different issue, namely paragraphs 163 and 164, which deal with questions of onus. The Respondent argues that by not referring to these paragraphs in relation to onus issues, the Complainant has deliberately misled the Board. This proposition has no merit.

[8] If the Respondent feels that the *CNRL* decision is the determining authority, it is at liberty to advance that argument. Altus in the course of the merit hearing can submit its own arguments as to why the case was not cited, or whether it is relevant with respect to onus in the context of the present case. If the Respondent is so bold as to argue at the merit hearing that Altus and Mr. Brazzell have deliberately lied to the Board in not citing CNRL, it can do so, and if those arguments are accepted it might request costs.

[9] The Respondent's theory seems to be that Altus and Mr. Brazzell conspired to present part of the *CNRL* case, in hopes the balance of the case would never come to the Board's attention. If that is the Respondent's theory, and it has evidence to prove it, it can make argument to the Board accordingly. The Respondent can also make a report to the Law Society if it feels there has been a breach of the Code of Conduct.

[10] The Respondent's submission goes to weight, not admissibility. The Respondent advances no argument with respect to relevance as a ground for excluding disclosure materials. Opposing parties often argue that their opponent's evidence, opinions, and authorities should not be followed and not be given any weight for a variety of reasons. Such arguments are always made in the course of the merit hearing. The Respondent's argument is nothing more than a submission that little or no weight should be attached to Altus' rebuttal, or a portion thereof. That is never a basis for striking out disclosure material.

[11] The Respondents notions about tax agents breaching the Code of Conduct was addressed some years ago through a joint referral by the Respondent and Altus to the Professional Responsibility Committee of the Law Society of Alberta. The issue before the Committee was whether a tax agent like Mr. Brazzell, who is also a member of the Law Society of Alberta, is restricted in appearances before the Board. In its letter of May 22, 2009 the Committee stated that when appearing in a capacity other than that of a lawyer, it is appropriate for a lawyer to identify that he is a lawyer, then clarify the capacity in which he is acting when engaged in activities other than the practice of law. That is why Mr. Brazzell advises the Board that he is appearing as a tax agent, but that he is also a member of the Law Society. Mr. Brazzell is not, as the counsel for the Respondent repeatedly contends, stating that he is a lawyer and not a lawyer.

[12] In its letter of May 22, 2009, the Committee also refers to Chapter 10, Rule 10 of the Code of Conduct which relates to the lawyer as advocate, now dealt with in Section 4.01 of the current Code of Conduct. The Respondent has referred to Section 4.01 in its submissions to the Board on June 26, 2012, suggesting that Mr. Brazzell misled and lied to the Board. However, the Committee considers the effect of Chapter 10 (now Section 4.01) to apply to proceedings before

a decision-making body only to the extent that the rule is not inconsistent with rules or procedures of the body in question.

[13] The Board will note that the Professional Responsibility Committee goes out of its way to defer to the Board's procedures (in that case the Municipal Government Board) and the ability of a tribunal to control its own proceedings. The Committee states that Mr. Brazzell should not be subject to different procedural rules than those applicable to non-lawyer tax consultants appearing before the Municipal Government Board.

[14] The ruling of the Professional Responsibility Committee in its letter of May 22, 2009, appears to be studiously ignored by counsel for the Respondent. Mr. Brazzell appears before the Board as a tax consultant, not as legal counsel. Nevertheless, counsel continues to argue that Mr. Brazzell is acting as retained legal counsel, or, in the alternative, attempts to restrict his role so as to be meaningless to ensure that he does not transform himself into the role of legal counsel. At page 6 of the transcript of proceedings in this matter, counsel for the Respondent states at line 19, "While Mr. Brazzell is saying he is here as a tax agent, he is speaking to you now about a legal matter and the legal regulation." Similarly, at page 7 of the transcript, counsel asks "And so Mr. Brazzell will not be making any legal argument; is that correct, Sir?" Further, at page 10, counsel states "I don't know if the Board is confused about how he can speak to cases and not be in the role of a lawyer or not; that's up to the Board to decide."

[15] At page 5, line 26 of the transcript of the proceedings in this matter, counsel for the Respondent states "And so the City takes exception to him (Brazzell) being here unless he is going to abide by the Law Society Code of Conduct." It appears that the Respondent not only wishes the Board to make a ruling on the effect and operation of the Code of Conduct of the Law Society, but also if the Board concludes there has been a breach of the Code, Mr. Brazzell is not to be permitted to participate in the hearing. The Respondent seeks to have the Board make a preliminary determination as to the effect of the Code of Conduct, the objective being the restriction of Mr. Brazzell's role, or excluding him from the process. This is a waste of the Board's time. What should not be allowed to continue are the persistent attempts by the City and its counsel to blacken Mr. Brazzell's reputation and impliedly argue that Altus' complaints should be dismissed because Altus and Mr. Brazzell are lying or otherwise acting unethically.

[16] Parties before the Board often provide information that could be characterized as evidence. The Board is not bound by the rules of evidence, nor is it constricted by formality, but the Respondent is attempting to persuade the Board that it is bound by those constraints when considering the submissions of Mr. Brazzell. At page 114 of the transcript of these proceedings, counsel for the Respondent puts Section 4.01(5) of the Law Society's Code of Conduct before the Board, and goes on to testify as to which version of the Code of Conduct is currently in effect, but neglects to inform the Board that Section 4.01 in entirety relates to the lawyer as advocate.

[17] Similarly, at page 89, line 24 of the transcript, counsel for the Respondent gives evidence with respect to certain sales not used by the Respondent in the preparation of assessments. Further, at page 100 of the transcript, counsel gives evidence as to whether the assessor used post-facto sales or distress sales in developing assessments, and goes on to give evidence that certain sales were not disclosed because they weren't used by the assessor.

[18] The premise of the Respondent is that Mr. Brazzell should be seen as appearing as legal counsel retained by the taxpayer to represent the taxpayer as legal counsel. The Respondent

neglected to advise the Board that this issue had been referred to the Law Society in 2009, and had been dealt with. Perhaps there is a potential complaint to the Law Society regarding this conduct. Nevertheless, all of this is irrelevant to the Board. Put simply, the Board needs to be satisfied that it is conducting its process in proper fashion, and that the parties appearing before it are acting appropriately. This Board should not allow itself to be cast in the role of handmaiden to the Respondent, which is seeking a declaration that Mr. Brazzell has acted unethically and in breach of the Code of Conduct to gain advantage at an early stage in the complaint hearing.

Submissions by Counsel for the Respondent of July 31, 2012

Preliminary Matters

[19] Part 3 of the Complainant's rebuttal entitled *Onus of Proof and the Prima Facie Case* is not proper rebuttal in that it does not rebut anything in the Respondent's submission to the Board. It was right and proper to bring this up as a preliminary issue.

[20] A preliminary matter refers to a request of challenge by a party with respect to a matter before the Board. As can be seen by the following excerpt from Macaulay and Sprague's *Practice and Procedure Before Administrative Tribunals*, Vol. 2, at page 17-6.45, it is appropriate and common to raise these matters at the beginning of the hearing:

> *Many decision makers find it valuable when faced with what appear to be irrelevant evidence to allow the individual presenting it sufficient time to satisfy themselves that the material being put in is irrelevant (and to ensure that a reasonable person would believe that they have listened enough to be able to adequately judge its relevance). They then interject to attempt to control it. This usually involves explaining the purpose of the proceeding and an explanation as to why the evidence going in appears to be irrelevant. The person attempting to put the evidence in should then be allowed to argue why he or she thinks the material is relevant or sufficiently weighty. The ruling as to admissibility is then made and the hearing proceeds. Time taken up front in this exercise will save time in the long run as the decision-maker will have set the proper tone, be in control of the hearings (but fairly so), and be better positioned to control future diversions into relevancy.* (Emphasis added)

[21] It is normal procedure in administrative tribunals to have such issues, such as the one raised by the Respondent, dealt with as a preliminary matter so that when the merit hearing starts, it can continue uninterrupted.

City's Request to the Board

[22] The City's request in this matter is found in the transcript on the hearing at page 110, beginning at line 14:

> Thank you. The City is asking that the part of the Rebuttal document, C-2, beginning on page 23 dealing with onus of proof in the prima facie case be not admitted by this Board.

[23] This is the request made by the The City, and the only issue that the Complainant was to deal with because the Board has dealt with the concern and confusion raised by the statement of Mr. Brazzell that he is a "lawyer but not acting as a lawyer." The City is of the opinion that Altus' submissions dealing with that matter are not in accordance with CARB 0906/2012-P, because it directs submissions only with respect to paragraph 17 and 18 of the order.

Role of Mr. Brazzell at ARB Hearing

[24] As Altus has raised the City's concern with Mr. Brazzell's position, it will be addressed briefly. In para. 17 of the Altus' submission, a ruling of the Professional Responsibility Committee of the Law Society of Alberta dated May 22, 2009, was referenced. The City did not "studiously" ignore that report. The difference in facts is that in this case the City now has an audio recording of what occurred in the hearing, which did not exist in 2009.

[25] The letter of May 22, 2009 did not state that Mr. Brazzell is not bound by the Law Society's Code of Conduct. The letter states:

> With regard to the general application of the code of Professional Conduct to lawyers, while they are otherwise engaged in activities other than the practice of law, the Committee agreed that lawyers will at all times be bound by the Code in its entirety. (Emphasis added)

[26] The City didn't ask the Board to decide whether Mr. Brazzell was acting in breach of the Code of Conduct; rather, The City raised a concern that there is confusion about Mr. Brazzell's role. As the transcript shows, the Respondent was confused and is still confused with respect to Mr. Brazzell's role and his ability to adduce contrary evidence.

[27] In my arguments in regard to the Complainant's s. 299 request, and Altus' allegation that The City had not provided the information, I reference factual information from four sales. The evidence is not contrary, as the date on two of the sales indicate they are post-facto the valuation date. The other two sales were distress sales. The central difference is that I attended as a lawyer and did not provide evidence to the Board that was not proven by information on the face of documents.

[28] In response to the comments of Altus' counsel that The City advanced no argument with respect to relevance as a ground for excluding disclosure materials, The City raised that very issue beginning at page 110 of the transcript of the proceedings, but was interrupted by Mr. Brazzell beginning at page 111, line 24 of the transcript, and at that point the Board determined it would allow the parties to submit argument in this regard. Therefore, The City had no opportunity to address all the points that counsel for Altus accuses of not addressing at the hearing.

[29] The City's argument that part of Exhibit C-2 should not be allowed does not deal solely with the weight it should be given, but rather the fact that the part of the rebuttal dealing with onus is not proper rebuttal.

[30] At no time did The City ask the Board for a declaration that Mr. Brazzell acted unethically and in breach of the Code of Conduct, as alleged by counsel for Altus.

Request of City to Remove Part of C-1

[31] Counsel for Altus did not deal with what is "proper" rebuttal. As this was the issue the Board instructed the parties to provide submissions on, The City submits that Altus should not be allowed to introduce case law or argument in response to this issue in their reply, as they would once again be splitting their case.

[32] It is important that the Board and Altus understand what rebuttal evidence is. "Rebuttal" is used in s.8(2)(c) of MRAC, and rebuttal is described as ". . . the documentary evidence, a summary of the testimonial evidence, including a signed witness report for each witness, and any written argument that that the complainant intends to present at the hearing in rebuttal to the disclosure made under clause (b) in sufficient detail to allow the Respondent to respond or rebut the evidence at the hearing."

[33] In accordance with the modern rule of statutory interpretation, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of parliament. In *Celgene Corp.* v. *Canada (Attorney General)* [2011] 1 S.C.R. 3 at para. 21, statutory interpretation was described as follows:

> 21 The parties both relied on the approach used in *Canada Trustco Mortgage Co.* v. *R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10, which confirmed that statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found:
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> It has long been established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada,* [1999] 3 S.C.R. 804, at para 50.

[34] In the *Canadian Oxford Dictionary*, 2nd Ed., (Oxford University Press:2004), "Rebut" is defined as "refute or disprove." The issue of rebuttal evidence was considered by the Supreme Court of Canada in *R.* v. *Krause,* 1986 CarswellBC 330, 2 S.C.R. 466. Although this case was a criminal case and dealt with when and in what circumstances the Crown may be permitted to call evidence and rebuttal of evidence given by the accused person, the Supreme Court states the rule and in para. 15 states that the rule is generally consistent with the rules of law and practice governing the the procedures followed in civil as well as criminal trials.

[35] As specified by the Supreme Court in para. 15 of *Krause*, the rule relating to rebuttal evidence arises from the general rule in civil matters that the plaintiff will not be allowed to split its case:

> 15 . . . The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R.* v. *Bruno* (1975), 27 C.C.C. (2d) 318 at 320 (Ont. C.A.), per MacKinnon J.A., and for a civil case see *Allcock Laight & Westwood Ltd.* v. *Patten; Patten v. Bernard,* [1967] 1 O.R. 18 at 21-22 (C.A.), per Schroeder J.A. This rule prevents unfair surprise , prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence – as much as is deemed necessary at the outset – then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response. (emphasis added)
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> 16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce

> earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

[36] In *Dezwert* v. *Misericordian Hospital*, 1988 CarswellAlta 242, 64 L.R. (2d) 72, the Alberta Court of Queen's Bench considered the issue of "splitting a case" and the reason for the rule against allowing the Complainant to adduce new evidence under the guise of rebuttal. In para. 33 of the decision, the court cites from the same case cited by the Supreme Court, i.e., *Allcock Laight & Westwood* v. *Patten,* where the court held:

> . . . the trial judge had erred in permitting the plaintiff to adduce evidence ostensibly as rebuttal when the evidence was in effect confirmatory only of the plaintiff's case. Then they quote Justice of Appeal Schroeder, noting with approval an earlier decision of the Court of Appeal, *R.* v. *Michael,* [1954] O.R. 926, 20 C.R. 18, 110 C.C.C. 30, where the following statement is made:
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> > It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on *prima facie* proof, and when this has been shaken by his adversary, adducing confirmatory evidence, *Jacob* v. *Tarlton* (1848), 11 Q.B. 421, 115 E.R. 534 . . . The rule is now so well settled that it requires no further elaboration. It is important in the trial of actions whether before a jury or a Judge alone, that this rule should be observed. A defendant is entitled to know the case which he has to meet when he presents his defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion.

[37] The Court of Queen's Bench dealt with rebuttal in *Katish* v. *Mergaert*, 2006 CarswellAlta 239, ABQB 166. The issue was the Plaintiff's right to call certain rebuttal evidence. The Court cites the decision of the Supreme Court of Canada in *R.* v. *Krause*, and states:

> 7 The starting point of the law in this area is the English case of *R.* v. *Frost* (1939), 4 State Tr. N.S. 85 (Eng. Nisi Prius), at 385, quoted in *R.* v. *Campbell* (1977), 38 C.C.C. (2nd) 6 (Ont. C.A.): -
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> > There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit or a prisoner on in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown. (Emphasis added)
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> 8 Subsequent case law has relaxed the "human ingenuity" test referred to above, however, the Defendants evidence still has to be evidence that the Plaintiff could not be reasonably expected to anticipate. That test is stated in *R.* v. *Campbell*, *supra,* which concluded by quoting the B.C. Court of Appeal in *R.* v. *Coombs* (1977), 35 C.C.C. (2d) 85 (B.C. C.A.) where after a review of the case law it was concluded that: - (Emphasis added)
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> > From these authorities and others I think that it is clear that the Judge in each case has discretion with regard to the admission of evidence in rebuttal and that in exercising his discretion he should not generally allow such evidence to be given when it has before or during the presentation of the Crown's case been both within the possession of the Crown and clearly relevant to the issue.

9 The Canadian *Encyclopedic Digest (Western),* vol. 12, 3d ed. (Carswell: 1998) at pg. 395, para. 375 identifies the four situations when rebuttal evidence is allowed: -

> (i)The evidence becomes relevant to the plaintiff's case as a result of defence evidence of new facts which the plaintiff could not reasonably be expected to have anticipated;
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> (ii)The evidence is offered to dispute a matter, the proof of which rested on the defendant;
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> (iii)The evidence is offered to contradict unforeseen facts brought out on cross-examination of a defence witness; or
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> (iv)The evidence is offered to contradict the report of a defence expert which the plaintiff received before trial.

[38] In another Alberta Court of Queen's Bench decision, *Elgert* v. *Home Hardware Stores Ltd.*, 2010 CarswellAlta 227, 2010 ABQB 66, the Court discusses when rebuttal is allowed:

10 McIntyre J.A. provides further elaboration in *R. v. Krause* at paragraph 17:-

> 17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in the case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e., it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed. An early expression of this proposition is to be found in *Attorney-General v. Hitchcock*, [1847] 1 Ex. 91, 154 E.R. 38, and examples of the application of (he principle may be found in *R.* v. *Cargill*, [1913] 2 K.B. 271 (Ct. Crim. App.); *R.* v. *Hrechuk* (1951), 58 Man. It 489 (C.A.); *R. v. Rafael* [1972] 3 OR. 238 (Ont. C.A.); and *Latour* v. *The Queen*, [1978] 1 S.C.R. 361. This is known as the rule against rebuttal on collateral issues. Where is applies, Crown counsel may cross-examine the accused on the mailers (*sic*) raised, but the Crown is bound by the answers given. This is not to say that the Crown or the trier of fact is bound to accept the answers as true. The answer is binding or final only in the sense that rebuttal evidence may not be called in contradiction.

11 Secondary sources also explore the rule against collateral facts, but disagree as to whether facts speaking to credibility are *prima facie* collateral to the main issues under dispute:-

> A party may not in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters, and his answers thereon will be conclusive. This rule is not absolute. The test whether a matter is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your own to prove in evidence – if it had such a connection with the issues, that you would be allowed to give it in evidence – then it is a matter in which you may contradict him. M.V. Argyle, *Phipson on Evidence*, 14th Ed. (London: Sweet and Maxwell, 1990).
>
> It is obvious that there are two different groups of facts of which evidence would have

> been admissible independently of the contradiction (and are therefore not collateral): (1) facts relevant to some issue in the case, and (2) facts relevant to the discrediting the witness. J. H. Wigmore, *Evidence, v. 3A* (Boston: Little, Brown, 1970), ss. 1003-1004.

12 The definition of "collateral" was central to the case of *R. v. Krause* at the appeal level. Taggart J.A. considered "collateral" to be a question of degree assessed on the facts of each case, and went on to state at paragraph 120 that whether or not credibility is a collateral to a fact at issue depends directly upon the relevancy of a witness' words and conduct to that issue: -

> 120 There are several meanings of "collateral" including "secondary" and "indirect." In law, the word collateral may be used in two senses – materiality and relevancy: *Wigmore on Evidence,* Vol. 1A (Tiller's Rev. pp. 1101-1104). Evidence to prove a fact may be inadmissible because it is probative of a fact which is immaterial (or not in issue), or because, even though probative of a fact in issue its admission would cause confusion of issues, surprise and unfair prejudice. The substantive law determines what facts are material. The rules of evidence determine the admissibility of evidence which is tendered to prove an issue: Wigmore on *Evidence,* Vol. 1A (Tiller' Rev. s.2). The general rule of evidence is that evidence is not admissible to contradict an answer which a witness has given on cross-examination regarding a collateral fact. Collateralness, in the sense of relevancy, is a question of degree. In some cases, the previous circumstance upon which it is proposed to cross-examine the witness will be so extraneous as to a fact in issue, or to the proof of a fact in issue, that it is clearly collateral. In some cases, the relevancy of the proposed evidence may be marginal. In other cases, the proposed evidence is clearly not collateral. The commonly accepted guide for determining if a circumstance is collateral is the one proposed by Pollock C. B. In *A.G. v. Hitchcock*, [1847] 1 Exch. 91, but this guide, while helpful, is far from conclusive.
>
> One sometimes reads, or hears, a statement that credibility is a collateral issue. This is misleading. Credibility may be a secondary issue in a particular case . . . but it is always an underlying issue. Evidence of the former words and conduct of a witness which is unrelated to the circumstances in issue is inadmissible either because it is immaterial or because it is irrelevant. It is collateral in both senses of the word. To the extent, however, that the former words and conduct of a witness may bear on his credibility in the case before the court, he may be questioned about them, but his answers may not be contradicted because to permit such a contradiction would cause confusion of issue, surprise and unfair prejudice. On the other hand, a person's words and conduct in relation to the case before the court are not collateral. They are very relevant. In this case, the main fact in issue was whether Krause had killed Barry Hatter on or about March 13th. The Crown adduced evidence to prove he had killed Hutter. Krause denied he had killed Hutter. His words and actions pertaining to the circumstances of this case were relevant to the main fact in issue and also, to Krause's credibility,: *R* v. *Krause*, [1984] B.C.J. No. 1609. (Emphasis added)

[39] As can be seen from the cases above, rebuttal submissions need to be directed at some evidence provided in the assessor's evidence package that Altus could not have foreseen. There was nothing in The City's evidence package dealing with onus or *prima facie* case. It is simply a new issue raised under the guise of rebuttal and The City has asked that it be excluded.

[40] The City's request is based on the fact that rebuttal evidence is only admissible when the matter arises out of the Respondent's case, is not collateral and the Complainant could not have foreseen its development. This is the determination by the Supreme Court in *Krause*, which is binding on this Board. The City submits that the part of Exhibit C-2 that it wants disallowed is not proper rebuttal; it is Altus splitting its case, which offends the general rule relating to the

calling of rebuttal evidence. The rule is designed to prevent unfair surprise, prejudice and confusion which could result and will result if Altus is allowed to split its case, that is, to put in part of its evidence – as much as it deems necessary at the outset – then to close this case and after the defence of the assessment is complete, to add further evidence to bolster the position it originally advanced.

[41] The second reason for not allowing part of Exhibit C-2 to be admitted is The City's submission that Altus is misleading the Board in regard to the law on onus. The City refers to the *Canadian Natural Resources Limited* v. *Wood Buffalo (Regional Municipality)*, 2010 ABQB 177 ("CNRL") in support of its argument that the onus does not shift to The City. This is stated in paragraphs 163 and 164 of the *CNRL* case. Further, Altus did not provide the case to the Board and in its argument in regards to onus did not include those two paragraphs. That means the Board would have no way of knowing the binding decision of the Court of Queen's Bench.

[42] There is nothing in the submission of Altus' counsel that deals with proper rebuttal, nor is there explanation as to why Altus did not include the entire case and why Altus did not cite paragraphs 163 and 164 from the case when it cited other parts of the decision.

[43] Credibility of witnesses before the Board is a proper matter for The City to raise. It is entirely within the Board's jurisdiction to determine not only the weight it would give this type of information but its admissibility as The Respondent has argued it is not proper rebuttal.

[44] The credibility of Altus has already been commented on in LARB 0609/2012-P. In that case, the Board found that the Complainant's (Altus – Andrew Izard) argument to be misleading and extremely unprofessional conduct of a seasoned tax agent. This comment was made on page 3 of the decision. It was made in response to the request of Mr. Izard to have sections of the assessment evidence package not included as Mr. Izzard had alleged that the municipality had not complied with his s.299 request under the MGA.

Conclusion

[45] In conclusion, The City repeats its request to have part of Exhibit C-2 removed and not admitted into evidence as it is not a proper rebuttal and would reward the Complainant for "splitting its case."

[46] In addition, The City cautions the Board as to relying on statements made by Altus staff that signed these evidence packages as there is a concern that Altus is not fully disclosing all relevant information. In addition, Altus does not bring any expert witnesses but rather acts as advocate and witness, therefore, their credibility, or lack thereof, is important for this Board to determine.

The Complainant's Reply Submission of August 3, 2012

Introduction

[47] The brief of argument of the City of Calgary (the "City") in this matter concludes by stating that the Board is to be cautioned as to relying on statements made by Altus' staff, and that there is a "concern" that Altus is not fully disclosing all relevant information. The City's brief also argues that Altus should be regarded as an unprofessional Complainant which will mislead the Board.

[48] The City advances no proper preliminary issue in this case. The City is pursuing a strategy of denigration of Altus. The objective is to position Altus and its representatives in the eyes of the Board as unethical, unprofessional, deliberately misleading, and not to be trusted. The City's conduct in pursuing this strategy, under the guise of a preliminary application, is abusive and completely improper.

Submissions

The City's Improper Procedure

[49] The City received the rebuttal submission of Altus seven days in advance of the commencement of the hearing. There was no indication whatsoever from the City to Altus or otherwise to that there was an intention to make a preliminary application to strike the submission until late in the first day of the hearing. As a matter of professional courtesy, and in accordance with the practice before the Board, the City, rather than lying in ambush, was obliged to notify the Board and Altus of its intention to request on a preliminary basis, and prior to commencement of the hearing, that a portion of disclosure by Altus be struck out.

[50] The City's contention that it is not required to give advance notice of its intention to apply to strike disclosure in incorrect. If this proposition is accepted, it would wreak havoc on the Board's hearing process.

[51] The *Matters Relating to Assessment Complaints Regulation* (MRAC) provides that a one member panel may be established and may hear and decide "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."

[52] Section 38 of MRAC provides a notice provision for a hearing of issues involving the disclosure of evidence, and section 39 provides the timelines for disclosure which allow both parties the ability to make submissions and provide a response to the other party. The timelines ensure that the common law principle of *audi alterem partem* (natural justice) is adhered to. The fairness and efficiency of these proceedings would have been preserved had the City followed the provisions of MRAC intended to deal with a matter of disclosure, or had waited until the appropriate time in the course of the merit hearing to address the rebuttal submission.

[53] Notwithstanding the provisions of MRAC respecting issues "involving the disclosure of evidence," the Board in argument should not be asked to make a decision on whether Rebuttal is proper prior to the merit hearing and the presentation to the Board of the cases of the parties.

[54] The City in para. 20 of its brief states that Altus should not be allowed to introduce any case law or argument in response to the issue of proper rebuttal. The contention is based on the City's argument that Altus did not address the question in its brief, a curious argument in light of the fact that this is the application of the City to strike out disclosure, and not any application by Altus. The City's application is reflected beginning at page 110 of the transcript of the proceedings before this Board. The City refers to the rebuttal not being proper because there was nothing to rebut on onus, but the argument substantively and virtually in its entirety is devoted to striking the rebuttal on the basis that it was inherently unreliable due to alleged deliberate misleading by Altus and Mr. Brazzell. At page 16 of the transcript, the Presiding Officer asks Ms. Gosselin if there is anything further in connection with her argument, to which

she replies that she thinks she has shown that the disclosure is not rebuttal and inherently unreliable, and completes her argument.

[55] The City now contends that that Altus did not, in its brief, deal with the concept of rebuttal and what is proper rebuttal, and therefore Altus should be restricted in addressing all of the arguments on rebuttal that are in fact advanced for the first time in the City's brief of argument. Further, the City states at paragraph 16 of its submission that it was interrupted by Mr. Brazzell, suggesting that the City was somehow precluded from advancing its argument on rebuttal, notwithstanding that Ms. Gosselin confirms at page 116 of the transcript that her submissions on the application to strike the rebuttal are concluded.

[56] Clearly Altus had no opportunity, prior to the City's brief, to be aware of, let alone address, the new submissions on rebuttal, seen for the first time in the City's submission in this matter. Notwithstanding this, the City improperly attempts to take away Altus' opportunity to address these new arguments.

The True Nature of the City's Application

[57] The City states that the only issue before the Board on its application is the request to strike a portion of Altus' rebuttal submission. On reviewing the City's brief of argument however the application is in fact an attempt to destroy the credibility of Altus and its representatives and a request to the Board that Altus and its representatives be regarded as misleading and extremely unprofessional. Thus, in para. 41 of the City's submission it is stated that credibility of witnesses before the Board is a proper matter for the City to raise. In para. 42 the City, gratuitously referring to an unrelated hearing, states that Altus' credibility has been the subject of comment and that an Altus representative should be regarded as misleading and extremely unprofessional. In paragraph 45 of the City's submission it is stated that the credibility, or lack thereof, of Altus and its representatives "Is important for this Board to determine."

[58] While the City complains that Altus' submissions in this matter are not compliant with CARB 0906/2012-P, it is to the contrary the City that has ignored CARB 0906/2012-P and transformed its application, ostensibly concerning Altus' rebuttal, into one that raises the issue of the credibility of Altus and its representatives. All this is pursued as a preliminary issue when obviously credibility can never be determined prior to the commencement of the merit hearing.

[59] The time for raising issues with respect to whether proper rebuttal has been tendered is after the Board has heard the City's case, and Altus as Complainant, proceeds to rebuttal. The Board is then in a position to consider the arguments on rebuttal in the context of the case presented by Altus as responded to by the City. Similarly, it is ludicrous to proceed with submissions to the Board on credibility of evidence when the merit hearing has not commenced and nothing has been heard from Altus or City representatives. The City is attempting to poison the Board against Altus in advance of the merit hearing.

The City's Application Raises no Proper Preliminary Issue

[60] The City's brief at paragraph 5 argues that it is appropriate to raise as a preliminary issue the matter of whether a rebuttal submission is to be admitted or not. At paragraph 7 of its brief, the City asserts that it is "normal procedure" for administrative tribunals to deal with issues such as the admissibility of rebuttal as a preliminary matter so that when the hearing begins, It can continue uninterrupted. This remarkable assertion confirms that it is indeed the City's position

that the Board should rule on the admissibility without hearing the cases presented by the parties, and prior to the merit hearing commencing.

[61] In support of this argument, the City at paragraph 6 of its brief refers to Robert W. Macaulay and James L. H. Sprague's *Practice and Procedure Before Administrative Tribunals*, Volume 2, at page 17-6.45 ("Macaulay and Sprague"). Unfortunately, the passage cited by the City does not address in any way what might constitute a "preliminary matter" before the Board.

[62] Rather, Macaulay and Sprague states that when faced with contested material,

> . . . the common approach on evidentiary disputes is for an agency to allow the disputed material in with the statement that they will give it due weight.
>
> This latter approach . . . permits the weight or relevance of the matter to be determined in light of all the evidence and avoids premature rulings.

[63] While Altus acknowledges the concerns outlined by Macaulay and Sprague with respect to allowing irrelevant evidence into proceedings at pages 17-6.42 to 17-6.45, it notes that the authors expressly state that any such concerns should be addressed during the hearing, and not as a *preliminary matter*:

> . . . if a decision-maker allows irrelevant evidence into its proceedings without making a ruling during the hearing it will likely have to expressly point out in its reasons that evidence which was found to be irrelevant, lest a reviewing body assume that the decision-maker had based its decisions on irrelevant considerations.
>
> *Practice and Procedure Before Administrative Tribunals, at p. 17-6.44.*

[64] Therefore, it is not proper to hear issues of pertinence and relevance as preliminary matters prior to the commencement of the hearing. This would constitute an error of law reviewable by the court.

[65] Disclosure should be excluded from a hearing only in rare and exceptional circumstances. Exclusion would be premature without an understanding of how such disclosure would fit into the overall context of the hearing. Examples of this approach are illustrated by the following CARB decisions:

> CARB 1322/2010-P, at page 2:
>
> Upon review, the Board found that a proper determination of the materials could not be made until all of the evidence had been heard. As a result the Board proceeded with the hearing of the merits of the complaint, and reserved the decision relating to new evidence until such time as all of the evidence had been heard, at which time the Respondent withdrew the objection to pages 18 to 25, pages 47 and 49; and appendix 5, and page 247 of appendix 7.
>
> CARB 1656/2010-P, at page 2:
>
> . . . Following an adjournment the CARB decided to accept the rebuttal evidence with the caveat that the extent to which the document would be considered would be determined during the

> process of the presentation and discussion of the evidence. The CARB's decision was accepted by both the Complainant and the Respondent.

The City's Position that Altus' Rebuttal Submission Should be Struck Out is Without Merit and Unsupported by the Law and Decisions of the Board

[66] Altus takes no issue with the City's statement of the law with respect to the modern rule of statutory interpretation. The leading Supreme Court of Canada (SCC) decision in that regard was properly stated by the City as *Celgene Corp* v. *Canada (Attorney General),* 2011 SCC1, [2011] 1 SCR 3 and *Merck Frosst Canada Limited* v. *Canada (Health)*, 2012 SCC 3.

[67] As established by the SCC in *Celgene*, at para. 21, "The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole.

[68] When the use of a word is clear, the ordinary, or dictionary, meaning may be applied. However, based on the modern canons of interpretation, the interpretive process must take stock of the Act as a whole, and the ordinary meaning of the words plays a lesser role. Thus, the effect of the dictionary meaning is relative, and one must seek to read the act in its context.

[69] In the present matter, the relevant provision which includes the term "rebuttal" in MRAC, that is, section 8(2)(c), must not be looked at from the narrow dictionary meaning perspective. Rather, it must be read in context, and in light of the Act and the regulation as a whole in order to yield an interpretation that best meets the overriding purpose of the statute. From this perspective, it is well established that an administrative agency is the "master of its own procedure."

[70] As noted by Macaulay and Sprague in *Practice and Procedure Before Administrative Tribunals*, Vol. 2, loose-leaf (Toronto: Thomson Canada Limited, 2004) at pages 9-2, in determining its procedures, an agency is not bound by the manners and traditions of the courts. At page 9-3, the authors state:

> Subject to the general limitations upon its general authority . . . , an agency can structure its proceedings in any way it feels most effective for the accomplishment of its mandate. This would include, for example, determining the order and form in which evidence is filed or witnesses are called.

[71] Turning to the broad legal context of the term "rebuttal," the timing and the content of a party's rebuttal is strictly a matter of procedure to be determined by the Board in accordance with its mandate, without undue emphasis placed on procedure set out by the courts.

[72] The Respondent relies on *R* v. *Krause*, [1986] 2 SCR 466 ("*Krause*") as relevant to the issue of the circumstances, content, and timing of a rebuttal. Altus submits that *Krause* is entirely irrelevant to the present matter for several reasons. It is a criminal law case, where issues of Crown disclosure are not only assessed by the courts with a view to fairness to the accused in circumstances where liberty may be at stake, but where the accused's constitutional rights are in mind. These concerns are not present in the context of civil matters, and are even less present in administrative hearings.

[73] As argued above, the Board is master of its own proceedings, and is not bound by judicial procedures. On this basis, Altus submits that *Dezwart* v. *Misericordian Hospital,* [1988] 64 LR (2d) 72, *Katish* v. *Mergaert*, 2006 ABQB 166, and *Elgert* v. *Home Hardware Stores Ltd.*, 2010 ABQB 66, all cited by the City, are similarly distinguishable.

The Issue of Onus is Always Germane and Need not Appear in Disclosure at All.

[74] At para. 33 and para. 34 of its submission, the City states that rebuttal submissions must be directed at some evidence provided in the City's evidence package that Altus could not have foreseen. The City further states that there was nothing in the City's evidence package dealing with onus, and that onus is a *new* issue raised by Altus.

[75] Firstly, it is trite that onus is not a matter of evidence, but a matter of legal argument based on the law. Secondly, the question of onus is always an issue in every proceeding before the Board.

> The presence of a legal onus means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant.
>
> *Reed Elsevier Properties Inc.* v. *Plesman Publications Ltd.* [1997], 77 CPR (3d) 370 (TM Opp Bd) at p 379.

[76] Onus is germane and relevant at every stage of the proceedings and simply connotes the burden that a party must discharge throughout its case. For these reasons, the suggestion that a party is required to inform the other side of the issue of onus is misguided. Implicit in any trial or hearing is the question of discharge of the onus, which exists by the very nature of the adversarial system. Presumably the City is not suggesting that onus is not an issue before this Board, or that there will be no legal argument as to onus, or that it is surprised that onus is an issue.

The Board is Not Bound by the Rules of Evidence

[77] The City in its application adopts a strict and highly formalistic approach to how proceedings before this Board are conducted and completely ignores section 464(1) of the *Municipal Government Act* (MGA). Section 464(1) states "Assessment review boards are not bound by the rules of evidence or any law applicable in court proceedings and have power to determine the admissibility, relevance and weight of any evidence." Section 464(1) is echoed in the ARB's Policies and Procedure Rules.

[78] The following passage from *Nexen Inc.* v. *Alberta (Municipal Affairs, Linear Assessor)* DL 183-05 reflects the appropriate approach to the application of section 464(1) of the MGA:

> The MGB also notes section 496(1) of the Act, which speaks to the rules of evidence in proceedings before the Board:
>
> > 496(1) The Board is not bound by the rules of evidence or any other law applicable to court proceedings and has power to determine the admissibility , relevance and weight of any evidence.
>
> **Since the MGB is not bound by the formal rules of evidence, the MGB's task is not to**

> **determine whether Mr. Kennedy's evidence is valid rebuttal evidence in a strict or formal sense. Rather, the crucial question to be determined is whether admitting Mr. Kennedy's proposed evidence in rebuttal would prejudice the Respondent or result in a breach of natural justice.** (Emphasis added)

[79] A rigorous test based on a legal definition or court decisions regarding the admission of "rebuttal evidence" is not appropriate for interpreting section 8(2)(c) of MRAC. Altus agrees with the City that the whole of section 8(2)(c) and more particularly the word "rebuttal" must be interpreted in its ordinary and grammatical sense. The basis rule of interpretation of legislation applicable is as follows:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.
>
> Ruth Sullivan, ed., *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON; Butterworths, 2002.

[80] The language of section 8(2)(c) of MRAC makes it clear that the concern is only that whatever material the complainant disclosed is disclosed "in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing." The intent is not to provide a means to exclude evidence based on technical analysis of disclosure and a restrictive interpretation of the word "rebuttal."

[81] Rebuttal means:

> To deny the truth of something, especially by presenting argument that disproves it. (Encarta Dictionary)
>
> An attempt to contradict or disprove an argument by offering a counter argument or countervailing proof. A rebuttal is not automatically a refutation. (Business Dictionary.com)

If this basic test is satisfied, then the material disclosed by the complainant pursuant to s.8(2)(c) is rebuttal.

[82] Natural justice and the integrity of the hearing process dictate that only where a respondent is placed in an untenable position by the disclosure pursuant to section 8(2)(c) of MRAC should exclusion of evidence be contemplated. Even then, if the impugned evidence is critical to the making of the decision, it should be admitted, with accommodation made to provide the respondent a fair opportunity to respond.

[83] As illustrated by the following passages, CARB decisions are rife with comments which reflect understanding of the need to consider all probative evidence.

> CARB 1571/2011-P:
>
> The Board did not interpret MRAC as instruction to either party to provide a summary of such length and detail that the relevance and standing of every particulate of disclosure evidence is established. The Board found that MRAC actually speaks to the entirety of disclosure including the summary, table of contents, witness statements, written argument and evidence.

CARB 1453/2010-P at page 3:

. . . The Board notes that the purpose of the complaint process is to determine whether the assessment is proper, and to that end the more complete the evidence the better for the Board to make its decision. The Board is of the opinion that the purpose of the timelines in the Regulation is to ensure that the each party is fairly apprised of the case it must meet. The second rebuttal was submitted in sufficient time for the Respondent to review it prior to the scheduled hearing, therefore there was no prejudice to the Respondent.

Therefore the Board allowed the second rebuttal into evidence.

CARB 0918/2010-P at page 5:

Although the matter was raised after the merit hearing had commenced, the Complainant requested permission to submit the 2010 Assessment Request for Information (ARFI) document for the subject property into evidence. The complainant admitted that this document was not disclosed to the Respondent prior to the hearing, but suggested that the document in fact belongs to the Respondent and therefore should not be considered prejudicial to their position . . .

. . . The Board ruled that given the unusual circumstances of the subject property; the 2010 ARFI for the subject property was important to the deliberations of the Board. The Board had received little evidence from the parties on market leases and the assessment was being argued based on equity. The 2010 ARFI would be of assistance to the Board to establish based on current lease rates, whether or not the subject property was capable of achieving typical market rents as at the valuation date. The Board considered the objections of the Respondent, but considering that the document had been in the hand of the City of Calgary for some time prior to the merit hearing, there is no compelling reason to consider the ARFI prejudicial to the defence of the assessment. In summary, the 2010 ARFI for the subject property was admitted as Complainant Exhibit 5.

CARB 2242/2010-P at pages 2-3:

. . . The Board finds that the original submission sets out the basis for the Complainant's submission that the parcels provide parking required for another parcel. The Board finds the rebuttal evidence is intended to bolster that position in the face of the Respondent's position disputing this premise. While the supporting details could have been provided in the original submission, and possibly should have, the initial statement that the parcel provided for the condominium property was clearly in the original disclosure. The supporting information was provided 7 days prior to the hearing in accordance with MRAC. The Board is of the opinion that given the nature of the information, this was sufficient time to respond or rebut at the hearing and the failure to disclose the supporting details in the initial submission did not prejudice the Respondent. Accordingly, the rebuttal evidence was accepted in its entirety.

[84] In *Access Pipeline Inc.* v. *Alberta (Designated Linear Assessor)*, DL 063/09 the Board addressed the very issue raised by the City in the present matter, including the *Krause* case that is being relied on.

2. New Evidence and Issue in Rebuttal

23 The MGB sees two competing interests that arise under this issue. Firstly, natural justice in the hearing and decision making process is best served when the decision maker has all of the relevant information before it. Secondly, parties have the right to know the case to be met in order that they may have a fair opportunity to respond to the evidence and argument of the opposing party. It is the MGB's view that the first interest must significantly diminish the second before information that is probative to the issues to be decided can be excluded. For the reasons that

follow, the Respondent's ability to properly know and respond to the case against it will not be diminished to such an extent as to justify the exclusion of the Complainant's evidence.

24 First, by this decision, the MGB has provided the Respondent with a fair opportunity to meet the Complainant's rebuttal evidence by way of its own sur-rebuttal, which is to be filed the day before the merit hearing. This greatly minimizes the degree to which the alleged new information and evidence prejudices the Respondent's ability to know and respond to the case against it.

. . . . .

28 The MGB finds that the *Krause* case cited by the Respondent to support its conclusion that the Complainant has split its case has little application to these proceedings. In that case, the Supreme Court found that the rebuttal evidence, being probative to the main issue in the case, should have been raised as part of the Crown's original case argued during the trial, and not as rebuttal evidence. In a procedural sense, this is very unlike the present situation, in that *Krause* pertained to new evidence raised on rebuttal during the trial of a criminal matter after the Crown had closed its case, leaving defence counsel with little or no ability to challenge the rebuttal evidence. In the present case, the rebuttal issues are not unrelated to the issues originally raised by the Complainant, and could have likely been addressed at the merit hearing, even if the MGB had not given an opportunity for written sur-rebuttal ahead of the hearing. As it also stated above, the rebuttal of the Complainant is said to address, in its view, issues or misunderstandings in the Respondent's submissions, which the Complainant is entitled to do.

29 For these reasons, and the fact that section 496 specifies that the MGB is not bound by the rules of evidence that applied in *Krause*, the MGB denies the application to strike the Complainant's rebuttal material on grounds that they are an attempt to split the Complainant's case.

The City's Application to Strike Relies on the Law Relating to Rebuttal Evidence, but the City Seeks to Strike Out Only Legal Argument.

[85] It is clear from the City's submission, for example paragraphs 25, 27, and 30, that the City frames its application as a request to strike rebuttal evidence. In addition, the authorities relied on by the City deal with rebuttal evidence. In fact, however, the portion of the Altus rebuttal submission that the City seeks to strike is legal argument.

[86] Altus could never have anticipated that the City would apply to strike out legal argument disclosed by Altus in advance of the hearing. The City does not apply to strike out any evidence.

[87] In fact Altus may advance argument at any time and is not required to submit written argument. The fact that it has done so as part of its disclosure is entirely to the City's advantage. Altus notes that this was substantially more notice than it received from the City in connection with the City's untimely application to strike Altus' legal argument with respect to onus. Case law can at any time be introduced to this Board and in fact the Board can request the parties to speak to any case law which it feels is relevant. This is reflected in section 38(9) of the Board's Policies and Procedural Rules which state that "[a] decision of a court or tribunal may be considered by the Board in a complaint hearing even where such a decision has not been provided in disclosure materials, and court or tribunal decisions shall not be marked as exhibits, nor do they form part of the Board record."

[88] This Board is master of its own procedure, and the Board can at any time introduce its own authorities, or permit any party to introduce cases, decisions or authorities, at any time in the

course of a hearing, up to the time when a decision is rendered

Hunter v. *Calgary (City)* [2000] A.M.G.B.O. No. 155

Hospitality Inns Ltd. v. *Calgary [2000]* A.M.B.G.O. No. 105

MGB No. DL 087/07

The City's Application to Strike Legal Argument as to Onus, which is Always in Issue Before this Board, is Misguided.

[89] There is no precedent or basis for the City's application to strike out legal argument as to onus submitted by Altus in advance of the merit hearing. Relevance is a basis for arguing admissibility. At no time did the City argue that the rebuttal submission of Altus is irrelevant. Rather, the City submits that the rebuttal should be struck out on the basis that it is unreliable. This is purely a matter of weight to be assessed at the merit hearing; it could never be grounds to striking out Altus' legal argument as to onus.

The City's Argument that Altus' Legal Argument as to Onus Should by Struck Out on the Basis that it is Inherently Unreliable is Without Merit.

[90] The City argues that Altus' legal argument as to onus is inherently unreliable because Altus is alleged to have deliberately misled the Board in its legal argument. This is part of the City's strategy of poisoning Altus in the eyes of the Board. The CNRL case does not support the proposition the City attributes to it.

[91] In contending that Altus is misleading the Board with respect to the law on onus, the City refers to paragraphs 163 and 164 of *Canadian Natural Resources Ltd.* v. *Wood Buffalo (Regional Municipality),* 2012 ABQB 177 *("CNRL")* as authority for the proposition that onus does not shift to the Respondent in assessment appeals. That is not what the paragraphs state. Paragraphs 163 and 164 of *CNRL* are as follows:

> [163] I have little difficulty concluding that *CNRL* has established a reasonable chance of success on this issue. As a starting point, I agree with *CNRL* that a party who asserts a proposition bears the burden of proving it: Sopinka J et al. The Law of Evidence in Canada, 2d ed (Toronto:Butterworths,1999) at 57-59, 63. Since *CNRL* is seeking to establish a lower assessment amount as correct, this principle would suggest that it has the burden to prove that number. At the same time, I am not convinced by *CNRL's* argument that the Municipality's s.299 response can be characterized as asserting a proposition which the Municipality has to prove. The statutory scheme established by s. 460 of the MGA clearly contemplates an appeal by the taxpayer, not the Municipality. In my view, this implies that the taxpayer bears the onus to show that the original assessment should be changed. This is an ordinary procedure on an appeal to an administrative tribunal. I thus see no basis for the CARB's decision. There is nothing in the MGA to suggest that each party bears the onus to prove its own number as correct.
>
> [164] I also find that the CARB's decision is problematic in principle. I am not aware of any area of law or any type of proceeding that employs the type of "dual onus" the CARB suggests. The onus must rest with someone. I cannot be any other way. The allocation of onus becomes a determining factor where evidence is equally balanced: *Robins* v. *National Trust Co*, [1927] AC 515, 2 DLR 97 (PC). In an ordinary civil case, if the evidence equally favours the plaintiff and the defendant, the defendant is entitled to succeed because the plaintiff carries the burden to prove his case on the balance of probabilities: Alan W Bryant, Sydney N Lederman & Michelle K Fuerst,

> The Law of Evidence in Canada, 3d ed (Markham: LexisNexis, 2009) at 113. That means the plaintiff must overcome the 50% threshold. If the CARB's view of the onus were correct, then if *CNRL's* and the Municipality came up with equally persuasive evidence for their respective numbers, the CARB would forever be suspended in a limbo, legally unable to declare either party successful. Even on the most deferential approach, the CARB's decision with respect to onus is unreasonable.

[92] At its conclusion, paragraph 163 states there is nothing to suggest that each party bears the onus to prove its own number correct. Altus does not dispute that. This also highlights something not mentioned by the City, i.e., that *CNRL* deals with a case where a taxpayer appealed an assessment, and in the course of the hearing the assessor had requested an increase to the assessment, a situation akin to a cross-appeal. That was the context in which the court in *CNRL* was considering the onus or burden of proof, a situation quite different from a typical complaint hearing where there is no request from the assessor for an increase in the assessment.

[93] Paragraph 164 of *CNRL* says the onus must rest with someone, and that means the plaintiff must overcome the 50% threshold. Altus agrees with that, and in fact that reference to overcoming the 50% threshold supports the submission of Altus on onus. Altus could have cited *CNRL* in support of its argument on onus. Despite this, the City seeks to cast paragraphs 163 and 164 as its definitive "trump card" authority that contradicts Altus' argument, and not for the first time.

[94] In CARB 0907/2012-P, the City's interpretation of *CNRL* was rejected:

> [31] The Complainant created a *prima facie* case, casting doubt on the correct rental rate. Though the Complainant's evidence is not conclusive as to the correct value, the testimony from the Complainant convinced the Board that the assessed value is correct.
>
> [32] Furthermore; the Respondent, in the Board's view, misinterpreted the message being sent by the courts in *Canadian Natural Resources Ltd.* v. *Wood Buffalo (Regional Municipality)*, 2012 ABQB 177 [CNRL]. The Respondent directed the Board to highlighted paragraphs numbered 163 and 164. The Respondent asserted from these paragraphs that the court does not believe a respondent bears an *onus* to defend their assessment.
>
> [33] The Board read the entirety of the *CNRL* decision and interprets the message to be; a respondent does not have the obligation of *onus* until the complainant creates a *prima facie* case. In the *CNLR* [sic] decision, the complainant wanted the respondent to prove their revised assessment is correct versus the original assessment before the complainant proved it is incorrect, leading the Honourable Madam Justice D. A. Sulyma to say; "*There is nothing in the MGA [the Act] to suggest that each party bears onus to prove its own number is correct.*" [*CNRL* at para.163] (Emphasis added)
>
> [34] Perhaps, had the Respondent provided the Board with a detailed report showing how their $19 figure had been arrived at rather than taking the position that they did not need to prove their numbers, a different decision may have been rendered.

[95] As can be seen, the CARB decision rejects the City's interpretation of paragraphs 163 and 164 of *CNRL*, and confirms that *CNRL* supports Altus position regarding onus. In fact there is no difference in substance between Altus and the City with respect to onus and proof. In the part of Altus' legal argument that the City seeks to strike, there is reference to MGB Board Order 036/03, *Manyluk* v. *Calgary (City)*, at paragraph 20. That decision supports the proposition that

the ultimate burden of proof or onus rests on the Appellant in an assessment appeal to convince the Board that the Appellant's case is more credible than that of the Respondent. If, however, the Appellant leads sufficient evidence at the outset to establish a prima facie case, the evidentiary onus shifts to the Respondent. The City cites *Manyluk* in its own authorities on the question of onus before tribunals.

Crediblity

[96] The proposition that *CNRL* is contrary to Altus' argument on onus, and has been deliberately hidden from the Board with intent to mislead, is risible and without merit. The City has impugned the conduct of Mr. Brazzell, one of Altus' representatives, without foundation. It is important to address this matter because the City has disclosed in its brief or argument that it is raising the credibility of Altus and its representatives as a preliminary issue. This is an integral part of the City's strategy of denigration. In particular, the City's application, while cast as an application to strike rebuttal disclosure, is in fact premised on the argument that that the rebuttal is "unreliable" because certain portions of case law were omitted by Altus with the conscious intention of misleading the Board.

[97] In seeking to explain its failure to advise the Board that the matter of a tax agent appearing before the Board while concurrently a member of the Law Society of Alberta had been addressed by the Professional Responsibility Committee (the "Committee") of the Law Society of Alberta, and that a letter had been issued by the Committee in that regard, the City now states that it has an audio recording that did not exist in 2009. There has been nothing from the City as to how that fact would change the City's obligation to make the Board aware that the issue had been addressed by the Law Society. To the contrary, the City persists in its argument that the Board should regard Mr. Brazzell as acting unethically, and contrary to the Code of Conduct.

[98] The letter dated May 22, 2009 issued by the Committee was included in Altus' brief of argument in this matter. The City does not refer to that letter in its brief, but does quote selectively from it, and in particular, refers to the third paragraph of the letter that states that lawyers will at all times be bound by the Code of Conduct in its entirety. Nevertheless, the City, for obvious reasons, neglects to cite the following paragraphs in the Committee's letter, which state:

> The Committee also specifically considered the effect of Chapter 10, Rule 10, of the Code of Professional Conduct. The commentary which follows Rule 10 specifically provides that Rule 10 is only intended to apply to proceedings before any decision-making body to the extent that the rule is not inconsistent with the rules of procedure established by the body in question.
>
> The Committee expressed a concern that its comments and findings should not be seen as restricting or affecting the established procedures of the Municipal Government Board in any way. The Municipal Government Board must obviously be able to control its own proceedings. Further, in coming to its decision, the Committee is also not suggesting that Mr. Brazzell should be subject to different procedural rules than those which are applicable to other non-lawyer tax consultants appearing in front of the Municipal Government Board. The decision of the Committee reflects its findings with regard to Mr. Brazzell's obligations as a member of the Law Society of Alberta, pursuant to the Code of Professional Conduct and the Rules of the Law Society of Alberta while acknowledging the jurisdiction of the Municipal Government Board to make such decisions as it sees fit. [emphasis added]

[99] The City's intent is clear. The City is raising credibility as a preliminary issue in advance of the merit hearing. The City's submission is that Altus and its representatives are unethical, misleading and therefore not credible. With respect to Mr. Brazzell, the City says he should be regarded as acting in breach of the Code of Conduct, and thus not credible. The City attempts to mask these attacks on the basis that the City is "confused" as to Mr. Brazzell's role. There is no confusion, except as raised by the City to cover its strategy of denigration. As stated by the Committee, Mr. Brazzell should not be subject to different procedural rules than those applicable to other tax consultants who are not lawyers.

[100] Improperly, under the guise of preliminary issues, the City seeks to restrict Mr. Brazzell's role on the basis that otherwise he will be acting unethically and in breach of the Code of Conduct. As stated by counsel for the City at page 5, line 26 of the transcript, "And so the City takes exception to him being here unless he is going to abide by the Law Society Code of Conduct."

[101] The City's counsel, Ms. Gosselin, is anxious to portray Mr. Brazzell as unethical on the basis that he is involved in providing evidence to the Board, this based on the City's premise that Mr. Brazzell is not a tax agent, but is appearing as legal counsel retained by Altus and the taxpayers it represents. In fact, in proceeding before this Board, it is typical for tax agents, and indeed lawyers acting as retained legal counsel, such as Ms. Gosselin, to provide evidence to the Board. This occurred before the Board on Tuesday, July 31, 2012, when Ms. Gosselin presented evidence to a panel of this Board concerning the existence of a letter not in evidence, the roll numbers referred to in that correspondence, and the type of property that was the subject of the roll.

Relief Requested

[102] The City's submission to strike out legal argument on onus submitted by Altus is entirely without merit, a waste of the Board's time and resources, and is clearly a screen to disguise an strategy of denigration, depicting Altus and its representatives as liars, unethical, unprofessional, and not to be trusted.

[103] The application by the City should be dismissed, with a direction to the City that to the extent it intends to continue to interrupt and disrupt this Board's proceedings with the argument that the City is "confused" with Mr. Brazzell's role in the hearing, accompanied by allegations that Mr. Brazzell is acting in breach of the Code of Conduct of the Law Society of Alberta, that such concerns and "confusion" on the part of the City be pursued with the Law Society of Alberta.

The Issues

[104] The Board finds the determinant issues to be as follows:

1. Is Part 2 of Altus' rebuttal document entitled "Onus of Proof and the Prima Facie Case" evidence, or legal argument?

2. If Part 2 does not rebut an issue in the Respondent's case, is it nevertheless relevant, and admissible?

3. Will Part 2, if found to be legal argument, "split" the Respondent's case?

4. Did Altus and Mr. Brazzell misrepresent the law with respect to onus?

The Board's Findings on the Issues

[105] With respect to the first issue, the Board finds it obvious beyond question that Part 2 of the Complainant's rebuttal is legal argument, and nothing more. In the Board's view, the issue of the relevance and admissibility of Part 2 of the Complainant's rebuttal could have been better dealt with in the context of a hearing on the merits.

[106] A hearing on the merits did not take place because Ms. Leila Gosselin, counsel for the Respondent, raised issues with respect to whether Mr. Brazzell of Altus was acting as a lawyer or a tax consultant. Ms. Gosselin also expressed concerns with the content of the Complainant's rebuttal, and went on to accuse Altus of "deliberate misrepresentation of the state of law" (transcript, p. 115), this based on Ms. Gosselin's interpretation of the decision in *Canadian Natural Resources Ltd.* v. *Wood Buffalo (Regional Municipality)*, 2012 ABQB 177 ("*CNRL*").

[107] It seems that Ms. Gosselin understands paragraphs 163 and 164 of the *CNRL* decision to mean that onus can never shift from complainant to respondent. Altus appears to be of the view that onus may shift from time to time in the give and take of a hearing. In legal circles, disagreement as to the meaning of the decision of a court is commonly considered a difference of opinion, not grounds for accusations of misrepresentation, deliberate or otherwise.

[108] In regard to the second issue, the Board agrees with the Complainant that onus, and its corollary, the establishment of a *prima facie* case, are intrinsic to every hearing, hence legal argument on those matters is relevant and admissible in the present case.

[109] The third issue deals with "splitting" a case. In all the legal cases cited by counsel for the Respondent, it was the introduction of new evidence in rebuttal that was said to split the case, not new legal argument. In the present case, the legal argument in the Complainant's rebuttal was disclosed to the Respondent 7 days in advance of the hearing.

[110] The Board notes that this was seven days more notice than Altus had of the matters raised by Ms. Gosselin at the commencement of the hearing on June 25, 2012. In any event, the Respondent has now had more than enough time to review the Complainant's rebuttal, and "respond to or rebut," as contemplated in s. 8(c) of MRAC.

[111] Now to the fourth issue, i.e., "Did Altus and Mr. Brazzell misrepresent the law with respect to onus". This issue appears to be an offshoot of Ms. Gosselin's concern about, as she put it, "a lawyer not acting as a lawyer." The Board believed it had dealt with the issue of Mr. Brazzell's role in its decision in CARB 0916/2012-P, but, like a bad penny, it just keeps turning up. In CARB 0916/2012-P, the Board ruled on the issue as follows:

> [4] Having heard both sides of the issue, the Board decided to allow Mr Brazzell to proceed, subject to the limitations he acknowledged would govern his conduct during the hearing. The Board assured Ms. Gosselin that it would not be unduly influenced by the fact that Mr. Brazzell is a member of the Bar. The Board accepted the fact that lawyers often wear other hats, and assured both parties that the Board is able to understand the difference, i.e., whether Mr. Brazell is acting as a lawyer , or a tax consultant. And further, that should Mr. Brazzell make a mis-step, the Board was confident Ms. Gosselin would object.

[112] Despite the Board's ruling, in her submission of July 31, 2012, Ms. Gosselin devotes ten paragraphs to, as stated in the heading, the "**Role of Mr. Brazzell at ARB Hearing.**" In paragraph 12 of her submission, Ms. Gosselin states:

> 12. Further, the LSA in its May 2009 letter did not state that Mr. Brazzell is not bound by the LSA Code of Conduct. The letter explicitly states:
>
> > With regard to the general application of the code (*sic*) of Professional Conduct to lawyers, while they are otherwise engaged in activities other than the practice of law, the Committee agreed that lawyers will at all times be bound by the Code in its entirety. (Emphasis added)

and, in paragraph 14:

> Nowhere in the transcript is there a request by The City that Mr. Brazzell should not attend or speak at the hearing. Rather, as the transcript demonstrates, The City was confused and is still confused as to Mr. Brazzell's role and his ability to adduce evidence.

[113] The letter mentioned above is a letter dated May 22, 2009, from the Professional Responsibility Committee of the Law Society of Alberta. The letter is addressed to Mr. A. L. Friend, counsel for Mr. Brazzell, and Ms. Leila J. Gosselin, counsel for the City of Calgary.

[114] It appears that Ms. Gosselin has been concerned about Mr. Brazzell acting as tax consultant for quite some time. If "The City" continues to be confused as to the role of Mr. Brazzell in the present case, the Board suggests The City turn its attention to the ruling of the Board in paragraph 4 of CARB 0916/2012-P, read it in entirety, and abide by it.

[115] The Board finds that neither Altus nor Mr. Brazzell misrepresented the law. They merely expressed their view of the law.

[116] The Board had the courtesy and patience to listen in good faith to what counsel for the Respondent had to say, and in the result, the matter at hand got further and further out of hand. The Board hopes that what occurred in this case will serve as an object lesson to other Assessment Review Boards. Board members have work to do; they do not have time to waste dealing with legal excursions that, in the final analysis, are much ado about very little.

The Board's Decision

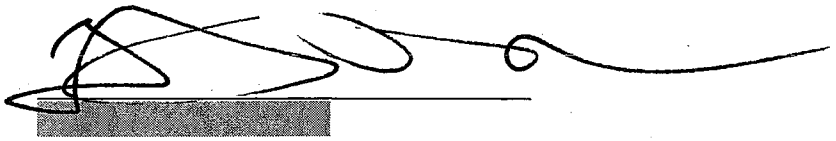
[117] It is the decision of the Board that the Respondent's application to strike Part 2 of the Complainant's rebuttal is dismissed. Exhibit C-2, the Complainant's rebuttal, is admissible, including Part 2. Mr. Brazzell said he was appearing as a tax consultant, and the Board remains confident that Mr. Brazzell will continue to conduct himself as such.

[118] Further, should counsel for the Respondent continue to disrupt the Board's proceedings by asserting that The City is confused with Mr. Brazzell's role in the hearing, or by alleging that Mr. Brazzell is in breach of the Code of Conduct of the Law Society of Alberta, the Board will direct The City to take those matters up with the Law Society.

[119] Finally, if the issues dealt with in this decision arise in those complaints that were to be

heard during the week of June 25, 2012, i.e., complaints with respect to Roll Numbers 067022806 (File 68433), 067023903 (File 68186), 068230309 (File 67017), and 068230408 (File 67020), this preliminary decision shall apply.

DATED AT THE CITY OF CALGARY THIS 5 DAY OF September 2012.



Presiding Officer

Exhibits

C-1, Complainant's Written Argument

C-2, Complainant's Rebuttal

R-1, Letter to Mr. R. Brazzell from Harvey Fairfield, Acting City Assessor/Director

R-2, CQBA Decision, Canadian Natural Resources Limited v. The Regional Municipality of Wood Buffalo, et al, March 14th, 2012

C-3, Submissions of Altus Group Ltd. in Response to Application by City of Calgary to Strike Out Rebuttal Submission.
R-3, Submission of the City of Calgary, in Response to the Submission of Altus Group Ltd. Responding to the City of Calgary's Request to Strike Out Part of Altus Group Ltd.'s Rebuttal Submission.

C-4, Rebuttal Documents of Altus Group Ltd. sent August 3, 2012, at 11:59 AM, 369 pages.

C-5, Rebuttal Documents of Altus Group Ltd. sent August 3, 2012, at 1:54 PM, 417 pages.

C-6, Reply Submission of Altus Group Ltd. ("Altus") in Response to Application of City of Calgary to Strike Out Rebuttal Submission.

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Appeal type	Property type	Property sub-type	Issue	Sub-issue
CARB	Offices	unknown	disclosure	disclosure

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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.