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

**BETWEEN:**

**Federated Co-operatives Limited as represented by Altus Group – Complainant**

**-and-**

**Wheatland County represented by Reynolds Mirth Richards & Farmer LLP – Respondent**

BEFORE:

C. J. Griffin, Presiding Officer

Board Counsel:
G. Stewart-Palmer, Barrister & Solicitor

Staff:

J. Laslo, Composite Assessment Review Board Clerk

A preliminary hearing was held on October 11, 2012 with representatives attending in person and others by conference call to consider procedural matters relating to a complaint about the assessment of the following property tax roll number:

| | | |
|---|---|---|
| Roll #8695000 | Assessment | $ 72,877,430 |

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

[1] This appeal relates to an assessment of a fuel tank farm which is under construction. This fuel tank farm is located on land legally described as:
SW 9-22-26-W4M
Lot 1,
Block 2, Plan 1012248.

[2] The Respondent advised that this property is unique in Wheatland County, and perhaps within the Province of Alberta. The scale of this operation dwarfs anything else that the assessor is aware of. Fuel will be railed and trucked to this site, and then trucked to other sites. It will be a significant operation when it is completed. It is estimated that the total capacity of the storage will be approximately 1 million barrels.

## PART B: PROCEDURAL OR JURISDICTIONAL MATTERS

[3] The CARB derives its authority to make decisions under Part 11 of the *Municipal Government Act*, R.S.A. 2000, c.M-26 ("MGA"). On September 20, 2012, the Assessment Review Board Clerk notified the parties of the hearing date set for December 3, 2012, and disclosure dates – for the Complainant 42 days prior to the hearing (October 22, 2012), and for the Respondent 14 days before the hearing (November 19, 2012). On September 26, the Respondent municipality applied for a preliminary hearing to request the rescheduling of the December 3, 2012 hearing and to establish new exchange dates.

[4] Both parties waived the 15 days' notice required by section 38 of the Matters Relating to Assessment Complaints Regulation, AR 310/2009 (MRAC).

### Position of the Respondent

[5] The Respondent indicated that the issues in the merit hearing include the type of improvements (machinery & equipment or structures) and in relation to section 291, whether the assessment is to be placed on the tax roll. The construction started in 2010, and at December 31, 2010 was approximately 60-70% complete. The parties have had meetings, but have not been able to reach a resolution.

[6] The Respondent indicated that on September 19, 2012, it requested a preliminary hearing to schedule the hearing, which, in its experience would take approximately 3-5 days. The Respondent received notification by way of the September 20, 2012 letter that the hearing had been set for one day, on December 3, 2012.

[7] In its September 26, 2012 letter (Exhibit R1), the Respondent requested a rescheduling of the hearing which included:

a) The fact that a hearing of this nature will take 3-5 days;
b) The Respondent may need to retain additional witnesses, but cannot make that determination until it knows what type of witnesses the Complainant will call. The Respondent has had no opportunity to determine if witnesses are available for the hearing dates;
c) The Respondent's counsel has been scheduled for a linear hearing for the week of December 3, 2012 and two other CARB matters for the weeks of December 10 and 17th, and is scheduled to be in a 6 week CARB hearing October 15 – November 23, 2012, as will counsel for the CARB.

[8] The Respondent argued that the above circumstances fall within the "exceptional circumstances" as contemplated by Justice Germain in a recent Court of Queen's Bench decision.

[9] The Respondent also requested the following:

a) That, within the next 4 – 6 weeks, the Complainant advise the Respondent of the types of witnesses that it will be calling. This will permit the Respondent an opportunity to

consider what types of witnesses it will need in advance of having to file its materials. This is not an onerous requirement. If there is a delay in providing this information, then the Respondent may require an adjournment to obtain the appropriate witnesses, which might have the effect of delaying the merit hearing; and

b) That the disclosure dates be altered as follows:

| | |
|---|---|
| Complainant's Disclosure | December 17, 2012 |
| Respondent's Disclosure | March 8, 2013 |
| Complainant's Rebuttal | March 22, 2013 |
| Hearing | April 2 – 5, 2013 with April 8 and 9 held in case they are needed. |

[10] The Respondent argued that the change to the exchange dates should be directed due to the requirement to provide both parties with a fair hearing, which includes both availability of witnesses and counsel, as well as sufficient preparation time for the hearing. The Respondent argued that there is no prejudice to the Complainant, who would have had to file its materials on October 22, 2012 under the previous notice provided by the CARB Clerk. The proposed dates gives the Complainant another 2 months to file its materials. A hearing booked so far in advance of the 70 days' notice is not a normal hearing, and most boards recognize that it is not fair if the complainant gets months to prepare its case while the respondent gets only 30 days.

[11] The Respondent's assessor will be working through January and February to prepare the municipality's assessment. Under the proposed schedule, both parties get more time for their respective filings.

[12] The Respondent argued that s. 468 of the *Municipal Government Act*, R.S.A. 2000, c.M-26 (MGA) is directory, and not mandatory. The Respondent gave an overview of the cases in this area, starting with *Tolko* and *Rendez-Vous Inn.* It was the Respondent's position that the CARB does not lose jurisdiction if the hearing is not concluded by the end of the year based upon a review of the previous legislation, the cases which have examined the issue, and the absence of a penalty in the language of the MGA.

[13] In reply, the Respondent indicated that this hearing is not in Calgary and considerations which may apply there do not apply in this case. The overall objective of a tribunal is to provide a fair process, which includes a reasonable time for each side to prepare. There is no requirement for "exceptional circumstances" in section 10 of MRAC. There is no prejudice to the Complainant from the proposed filing dates. This is not a "slippery slope" situation. The Respondent here is not asking for equal time, but for an adjustment to the disclosure dates in light of the length of time there is until the hearing, and the circumstances of this case.

**Position of the Complainant**

[14] The Complainant indicated that it did not have objection to the Respondent's request to reschedule the hearing.

[15] The Complainant indicated that it would not oppose the position advanced by the Respondent on the question of s. 468 of the MGA, but it would not comment in a global sense on that interpretation. It did indicate that there is clear evidence that other Assessment Review Boards have taken the position that they do not lose jurisdiction if the hearing proceeds beyond the end of the year. For the purpose of this hearing, the Complainant would accept that the CARB would have jurisdiction even if the hearing is scheduled in 2013.

[16] The Complainant indicated that it was prepared to consider the Respondent's request to notify it of the types of witnesses which it will be calling.

[17] The Complainant strongly disagreed with the Respondent's request to change the disclosure dates from that provided for in MRAC. The Complainant argued that there is a comprehensive legislative scheme dealing with all aspects of complaints, which should be adhered to. There are different provisions in section 8 and 10 of MRAC, from section 15, which deals with rescheduling of hearings.

[18] The Complainant took the CARB through its authorities (Exhibit C1) arguing that other boards did not always change the disclosure dates when postponements were granted. The disclosure dates is based on a coherent strategy, which works in the framework of the system and which should be tied to the date of the hearing. There is no unfairness in the disclosure schedule provided for in MRAC. There are harsh penalties for non-compliance with the statutory requirements. In this case, all parties know the issues and there is nothing unusual about this case which would justify the adjusted disclosure dates. The provisions as set out in MRAC allow information to be disclosed, so there is no surprises. The Complainant takes a strong stance because there is no need to change the rules of disclosure. MRAC is part of an overall system, which should be followed. Moving away from the provisions in MRAC leads to:

a) A loss of certainty and consistency;
b) An erosion of a pillar of the new system;
c) Complexity. Permitting changes here may encourage others to request changes, which leads to increased complexity in the system. The Complainant urged the CARB to consider what might happen in Calgary if requests were made to change disclosure dates;
d) More preliminary hearings, which will cause the system to box down and fail; and
e) A distortion in the system. Changing one component of the system without a broader view of all issues may create issues.

[19] The Complainant's position was that no change to the disclosure dates was warranted.

## DECISION AND REASONS

### *Merit hearing and Disclosure Dates*

[20] The disclosure and hearing dates are as follows:

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|---|---|
| Complainant's Disclosure | January 4, 2013 |
| Respondent's Disclosure | March 1, 2013 |

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| Complainant's Rebuttal | March 22, 2013 |
| Hearing | April 2-5, 2013, with April 8 and 9 to be reserved by the parties in the event that the hearing does not conclude on April 5, 2013. |

[21] The merit hearing will take place in the Administration Offices of Wheatland County, Alberta. The hearing will commence on April 2, 2013 at 9 am.

[22] Each party must provide its submissions electronically to the other parties and to the CARB by no later than 4:30 pm of the required date. Hard copies may follow on the following day. The parties are requested to send 4 hard copies to the CARB Clerk at the Administration Offices and one hard copy directly to CARB counsel in Edmonton.

[23] The CARB directs that the parties page number each page of the submission, including any materials contained as exhibits or tabs.

[24] The parties should arrange for a court reporter to be present during the hearing with the cost to be shared between the parties, and a copy of the transcript provided to the CARB at no cost.

*Reasons*

[25] The CARB notes that the application to reschedule the hearing is the Respondent's application and that the change of dates is agreed to by both parties. Section 15 of MRAC provides:

> **Postponement or adjournment of hearing**
>
> **15(1)** Except in exceptional circumstances as determined by an assessment review board, an assessment review board may not grant a postponement or adjournment of a hearing.
>
> **(2)** A request for a postponement or an adjournment must be in writing and contain reasons for the postponement or adjournment, as the case may be.
>
> **(3)** Subject to the timelines specified in section 468 of the Act, if an assessment review board grants a postponement or adjournment of a hearing, the assessment review board must schedule the date, time and location for the hearing at the time the postponement or adjournment is granted.

[26] The CARB has reviewed the submissions of the parties, including the case provided by the Respondent in relation to exceptional circumstances. The CARB is aware of the obligation to provide a fair hearing for the parties, which includes the consideration of both witnesses and counsel for the parties. As a result of the need to reschedule to permit sufficient time for the hearing, and in light of the other commitments of counsel for the parties, the CARB finds the circumstances are exceptional and justify a rescheduled hearing date. The CARB finds the change to the hearing dates reasonable.

[27] The CARB notes that, for the purposes of this hearing, both parties agree that the CARB does not lose jurisdiction to hear this complaint if the hearing is heard beyond the end of the calendar year, notwithstanding the provisions of s. 468 of the *Municipal Government Act,* R.S.A.

2000, c.M-26. Having read the authorities provided by the Respondent, the CARB is of the opinion that the language of section 468 is directory, and not mandatory. While not bound by the decisions of other assessment review boards, this CARB finds that it does not lose jurisdiction if the merit hearing is scheduled after the end of the year.

[28] The CARB is pleased to note that the parties have been in discussions about the matter and is encouraged by what appears to be a willingness to explore the issues between the parties. The CARB hopes that the spirit of cooperation which is evidenced by the discussions will continue and that the Complainant will share the types of witnesses with the Respondent requested documents in the time requested by the Respondent. However, it is not prepared to make this a condition of the order at this time.

[29] In relation to the disclosure dates, the CARB considered the language of section 8 and 10 of MRAC

> **Disclosure of evidence**
> **8(1)** In this section, "complainant" includes an assessed person who is affected by a complaint who wishes to be heard at the hearing.
>
> **(2)** If a complaint is to be heard by a composite assessment review board, the following rules apply with respect to the disclosure of evidence:
>
> (a) the complainant must, at least 42 days before the hearing date,
>
> (i) disclose to the respondent and the 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 composite assessment review board an estimate of the amount of time necessary to present the complainant's evidence;
>
> (b) the respondent must, at least 14 days before the hearing date,
>
> (i) disclose to the complainant and the 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 composite assessment review board an estimate of the amount of time necessary to present the respondent's evidence;
>
> (c) the complainant must, at least 7 days before the hearing date, disclose to the respondent and the 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 rebuttal to the disclosure made under clause (b) in sufficient detail to allow the respondent to respond to or rebut the evidence at the hearing.

**Abridgment or expansion of time**

**10(1)** A composite assessment review board may at any time, with the consent of all parties, abridge the time specified in section 7(d).

**(2)** Subject to the timelines specified in section 468 of the Act, a composite assessment review board may at any time by written order expand the time specified in section 8(2)(a), (b) or (c).

**(3)** A time specified in section 8(2)(a), (b) or (c) for disclosing evidence or other documents may be abridged with the written consent of the persons entitled to the evidence or other documents.

[30] The CARB notes that section 10 does not require the CARB to find any exceptional circumstances before it can expand the disclosure dates.

[31] The CARB has reviewed the submissions of the parties and the authorities presented by them. The CARB is prepared to adjust the disclosure dates as provided for above for the following reasons:

[32] The CARB notes that the application to reschedule the hearing and the disclosure dates was that of the Respondent. The Complainant filed its complaint June 28, 2012. Under the notification provided by the CARB clerk, the Complainant would have had to disclose October 22, 2012. Since the Complainant did not bring any application to alter the disclosure dates, the implication is that the Complainant would have been ready to file its disclosure in approximately 2 weeks.

[33] The Complainant provided no evidence of prejudice if it is required to file its disclosure outside of the timelines set out in section 8 of MRAC. As indicated above, the extra time for disclosure (to January 4, 2012) would provide 2 more months for the Complainant from the original disclosure dates.

[34] The Complainant argued that there would be negative consequences to the assessment complaint system created by the changes to the legislation in 2010. The CARB does not believe that a change in disclosure dates will set a dangerous precedent. The CARB notes that some of the decisions which have been provided by the parties date back to 2010, yet there was no evidence provided to the CARB that the system has become so bogged down in requests for change that the system is being crushed by the weight of additional disclosure requirements. Further, decisions of one assessment review board are not binding upon any other. Each assessment review board, if faced with a request to alter the disclosure dates, is able to consider the circumstances of the case before it and make its own assessment to provide procedural fairness to those parties.

[35] The evidence before the CARB is that this facility is unique in Wheatland County, and perhaps the province. There are no other facilities like this in Wheatland County, and the CARB assumes that since the facility is still under construction, the assessor has not had any experience in dealing with issues as are raised in these circumstances. Since this complaint may raise issues which are both unique and novel in Wheatland County, the Respondent may require additional time to prepare for a hearing in relation to these issues. This factor weighted most heavily in the CARB's determination to alter the disclosure dates from those set out in section 8 of MRAC.

[36] It is so ordered.

Dated at the City of Edmonton, in the Province of Alberta, this 18th day of October, 2012.

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C. J. Griffin, Presiding Officer

**APPENDIX 'A"**

ORAL REPRESENTATIONS

| **PERSON APPEARING** | | **CAPACITY** |
|---|---|---|
| 1. | Robert Brazzell, | Representative of the Complainant, Altus Group |
| 2. | Steven Eady | Representative of the Complainant, Altus Group |
| 3. | David Porteous | Representative of the Complainant, Altus Group |
| 4. | Carol M. Zukiwski | Counsel for the Respondent |
| 4. | Dennis Klem | Assessor for the Respondent |

**APPENDIX 'B"**

MATERIALS PRESENTED TO THE CARB

| | | |
|---|---|---|
| R1 | Letter from Richards Mirth Reynolds & Farmer LLP | September 26, 2012 |
| R2 | Letter from Richards Mirth Reynolds & Farmer LLP with attachments (10 authorities) | October 4, 2012 |
| R3 | Email from Richards Mirth Reynolds & Farmer LLP and attachments (4 authorities) | October 10, 2012 |
| C1 | Email from Altus Group and attachments (5 authorities) | October 11, 2012 |

| **Subject** | **Type** | **Sub-type** | **Issue** | **Sub-issue** |
|---|---|---|---|---|
| CARB | | | Prelim. Scheduling | 468 (1) (b) |