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

BETWEEN:

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

- a n d -

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

BEFORE:

Members:
D. Marchand, Presiding Officer
E. McRae, Member
S. Odemuyiwa, Member

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

Staff:
N. MacDonald, Assessment Review Board Clerk

A second preliminary hearing was held on November 12, 2010, in Edmonton in the Province of Alberta to consider further preliminary jurisdictional issues related to complaints about the assessments of the following property tax roll number:

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

PART A: BACKGROUND AND DESCRIPTION OF PROPERTY UNDER COMPLAINT

Roll number 8992004911 carries the amended machinery and equipment (M&E) assessment. Components in the amount of $3,222,500,860. It was sent to the property owner on March 5, 2010. The Complainant questions not only the quantum, but the legality of the amended assessment.

PART B: PROCEDURAL and JURISDICTIONAL MATTERS

The CARB derives its authority to make decisions under Part 11 of the Act. A preliminary hearing was held on September 7, 8 and 9, 2010 in Fort McMurray to consider certain preliminary issues related to complaints about the above assessment. A decision was issued by CARB on October 7, 2010 (CARB 007/2010-P).

Shortly after the issuance of the decision, counsel for CNRL requested a further preliminary hearing. On November 4, 2010, the Clerk of the Assessment Review Board notified the parties that a second preliminary hearing would be held on November 12, 2010 to deal with the following issues:

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

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

ISSUE #1 – Request for adjournment

Summary of Complainant's Position – Issue 1

CNRL requested an adjournment of the merit hearing which is currently set to commence on November 30, 2010.

Counsel for CNRL argued that CNRL cannot properly prepare for the hearing until the issues relating to disclosure are resolved – what is to be filed and by whom; and until CARB has provided direction on the question of onus. CNRL acknowledged CARB's efforts to schedule a second preliminary hearing before November 30, 2010, but suggested that it would result in a piecemeal approach, which negatively affects CNRL's right to have adequate time to prepare and respond.

CNRL argued that the statutory timeline found in s. 468 of the *Municipal Government Act is* not a true limitation. The jurisprudence suggests that failure to meet the statutory time frames does not void the CARB's jurisdiction, but the Court may impose a cost sanction against the CARB. Both CNRL and RMWB have committed in the June 2010 hearing that neither would seek costs against the CARB or against each other for an extension. CNRL will provide its undertaking again that it is not seeking costs.

Moreover, the legislation contemplates an extension of time in exceptional circumstances. There are exceptional circumstances in this case which justify the extensions contemplated, although the parties are committed to moving the matter forward. CNRL argued that given the timing of the decision in CARB 007/2010-P, it did not have sufficient time to gather its evidence. CNRL indicated that it did not feel that there was sufficient time to properly prepare for the hearing on the basis that it will be required to put together a report which deals with 4 years of work and which requires the review of hundreds of thousands of pages of material in a limited time frame.

RMWB has indicated in R20 that it requires more details and more time to prepare. If RMWB requires more information, CNRL needs more information so it can respond. It is not possible for CNRL to file materials on November 15, 2010. It is not fair to CNRL to require it to respond without RMWB providing further information.

CNRL suggested that the merit hearing be adjourned *sine die*, with the parties to report back to CARB with convenient dates. Counsel for CNRL suggested that the merit hearing should be held in early spring 2011, possibly May 1, 2011. The time set aside commencing November 30, 2010 could be used to argue and present the case on preliminary issues and to receive directions from CARB.

CNRL also suggested that:

1. the preliminary hearing set for today be moved to December 7, 2010, either in Edmonton or in Fort McMurray. This would permit the parties sufficient time to prepare.
2. The timelines in CARB 007/2010-P should be suspended and new filing dates established by agreement or order to prevent a piecemeal approach.

CNRL argued that CARB does not have the jurisdiction to order the parties to meet, although by granting an adjournment, CARB will permit the parties more time to resolve the arithmetic issues illustrated on the spreadsheets.

Summary of Respondent's Position – Issue 1

RMWB reluctantly supports the adjournment request by CNRL, although not because CNRL has filed legal proceedings. RMWB suggests that CNRL should have first asked for an adjournment from CARB before requesting a stay of proceedings. RMWB supports CNRL's request for an adjournment because it believes that CNRL is seeking to understand the cost rendition (R20) and has recognized that it needs to communicate with RMWB. On that basis, it supports the request for an adjournment.

If CNRL files substantive materials, there is insufficient time for RMWB to respond in 1 week. RMWB is seeking information about the costs report. If that is to be forthcoming, RMWB must have sufficient time to respond to it.

Section 468(1) of the Municipal *Government Act* provides that all appeals from the current year's assessments must be heard by the end of that assessment year. Section 468(2) provides that an

assessment appeal board must render its decision regarding an amended assessment notice in accordance with the regulations. Section 53 of the *Matters Relating to Assessment Complaints Regulation*, Alta. Reg. 310/2009 (the "*Regulation*") provides that a board must render its decision and reasons within 210 days from the date that a complaint was filed. However, s. 15(1) of the *Regulation* provides:

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.

In *Edmonton (City) v. Edmonton (Assessment Review Board),* 2010 ABQB 634, at paragraph 35 and following, Germain, J. offers his comments on what constitutes "exceptional circumstances". Exceptional circumstances are dependent upon the circumstances, but can include the ability of the parties to respond to an expert report (at paragraph 43 and 44). Exceptional circumstances can include having adequate time to prepare for and have a hearing. On those grounds, the submissions of both parties fit within the direction given by Germain, J.

RMWB provided further submissions on the issue of the effect of s. 468 and s. 605 of the *Municipal Government Act.* The language of s. 468 is mandatory. If CARB grants an adjournment beyond December 31, 2010, s. 468 is not complied with.

RMWB provided excerpts from Driedger on Construction of Statutes at pages 156 and 157. RMWB relied upon two presumptions. The first is that the Legislature is presumed to know the state of the law at the time of the amendment. Previous decisions of the Court indicate that the previous time frame was not mandatory and failure to meet it did not result in a loss of jurisdiction. However, the court could award costs if it felt that the Board was delaying.

The second presumption (found at page 450) is that the change was purposeful – the Legislature is meant to have done something when language is changed. Although the presumption is strong, it is not irrebuttable. The question is whether the Legislature intended to change the law.

In *Tolko Industries Ltd. v. Big Lakes (Municipal District),* [1998] A.J. No. 161, 1998 ABQB 51, at paragraph 20 and 21, the Court held that a failure to meet the statutory time period did not result in a loss of jurisdiction, but the Board was subject to an award of costs against it.

In *Rendez-Vous Inn Ltd. v. St. Paul (Town),* [1999] A.J. No. 1428, 1999 ABQB 942 at para. 33, the Court agreed with the conclusion in *Tolko*, indicating that the remedy is mandamus and that the Court can award costs. The key factor of these 2 decisions is that the board does not lose its jurisdiction.

In *Rahman v. Alberta College and Assn. of RespiratoryTherapy*, [2001] A.J. No. 343, 2001 ABQB 222 at paras. 23 and 24, the Court set out the issue which was whether the board lost jurisdiction under the wording of the statute in question. The Court examined David J. Mullan, in Administrative Law, 3d ed., (Scarborough: Carswell, 1996) at p. 317 to assist in determining whether the wording was mandatory or directory. At para 52, the Court concluded that the language in the statute in question was directory and set out the factors examined, including the purpose of the legislation (para 52(b)), weighing the consequences of holding a statute to be

directory or mandatory (para 52(d)), the penalty for failure to meet the deadlines (para 52(e)), whether the deadline was procedural in nature (para 52(f)).

RMWB argued that there is no penalty to a failure by CARB to decide within the time limits of s. 468. The timelines are procedural in nature. To decide otherwise would deprive the parties of their right of appeal.

RMWB also brought to the attention of CARB the decision of *Alberta Teachers' Assn. v. Alberta (Information and Privacy Commissioner),* [2010] A.J. No. 51, 2010 ABCA 26 in which the Court concluded that the language of the section was mandatory.

Finding – Issue 1

In view of the above considerations, the CARB finds as follows with respect to Issue 1:

The request for an adjournment is granted.

Reasons – Issue 1

CNRL requested an adjournment because it required more time to prepare its case in order to have a full and fair merit hearing. It indicated that it needed further information in order to respond to the case once it has been provided with directions on disclosure and onus. The request for the adjournment was supported by RMWB.

Although the language of s. 468 and s. 53 of the *Regulation* is mandatory, section 15(1) does provide for an extension of time in exceptional circumstances. The decision in *Edmonton (City) v. Edmonton (Assessment Review Board)* provides some guidance for CARB in terms of what constitutes "exceptional circumstances". CARB notes that it is to "ensure that the parties have a fair, complete, and comprehensive hearing. By inference, this must include sufficient time to prepare." Both parties have requested more time to prepare, which CARB is prepared to grant.

As indicated in *Edmonton (City) v. Edmonton (Assessment Review Board)* at paragraphs 40 and 41:

[40] The Regulation however must be interpreted contextually, as it is ancillary to the overarching authority given to the ARB to deal with the serious matters of municipal tax assessment. ARB decisions often have significant economic consequence. A property owner may by virtue of an erroneous assessment pay more than they should, or alternatively the City may receive less than *it should. For this reason the board must both have the power, as well exercise the power appropriately, to ensure that the parties have a fair, complete, and comprehensive hearing. By inference, this must include sufficient time to prepare.*

[41] If the ARB is not given the opportunity to adjourn cases from time to time then they will have to, in a case *such as this (where one adjournment is granted to obtain expert reports, and that implies similar reports in reply), ensure that the hearing is set so far into the future that the respondent will always have sufficient time to respond.*

CARB has considered the impact of granting an adjournment on its jurisdiction and has noted that the Court in both *Tolko* and *Rendez-Vous Inn Ltd.* have concluded that the board did not lose jurisdiction, but could be subject to an order of mandamus and, possibly, to an award of costs.

CARB has also considered the decision in *Rahman* and the factors set out in paragraph 52 of that decision. CARB notes that the language of s. 468 is mandatory. However, the purpose of the appeal sections of the *Municipal Government Act* is to provide parties with a fair process to appeal their assessments. The appeal process is to resolve those appeals as expeditiously as possible in a manner that serves the specific interests of both the complainant and respondent. As indicated, hearings can be complex. In this case, the materials filed by both parties are voluminious and, as indicated by CNRL, represent the summary of four years work and hundreds of thousands of pages of materials. It is not a reasonable interpretation of the section that a hearing of this magnitude must occur by year end. The circumstances of this particular case are unique. The merit hearing will be complex and have previously been set for a lengthy period of time. There have been multiple preliminary issues raised. There are a number of expert reports and the parties have indicated that they require time to prepare. These factors suggest that the timeline of s. 468 is not mandatory.

If the timeline in s. 468 were mandatory resulting in a loss of jurisdiction, the parties right of appeal would be lost, defeating the purpose of the statute. Moreover, both parties have argued for an adjournment. CARB has heard no evidence of prejudice to either party from the adjournment. There is no penalty in the legislation, thus supporting a view that the timeline is directory. CARB views the timeline in s. 468 as procedural in nature, dealing with steps for the hearing.

Although CARB was advised of the decision in *Alberta Teachers' Assn. v. Alberta (Information and Privacy Commissioner),* it is of the view that the language of s. 468 and the circumstances of this case support an interpretation that s. 468 is directory.

ISSUE #2 –Timing for disclosure and dates for hearing

Summary of Complainant's Position – Issue 2

CNRL suggested that the next preliminary hearing be set for December 7-9, 2010 to address the balance of the issues identified in the CARB's November 4, 2010 letter. Exchange dates could be set for November 22, 2010 for CNRL and December 2, 2010 for RMWB. The merit hearing could be scheduled for 4-5 weeks in the spring, perhaps May, 2011. In regard to a joint document, CNRL does not agree with the statement of issues marked PR1 and PR2, but does agree that documents PR3 and PR4 set out the disputed items between the parties. On the issue of interim filing dates, CNRL submits that no interim filing can be done unless the parties get a ruling on disclosure and onus. There is no point in a "hurry up and stop" approach.

Summary of Respondent's Position – Issue 2

RMWB agrees that the parties could use December 7-9 for other preliminary matters. For the merit hearing, if CNRL will communicate with RMWB, 3 weeks may be sufficient. RMWB is available for hearings commencing May 2, 2011, but notes that Mr. Schmidt for RMWB is committed full time in order to prepare and send assessments for RMWB.

RMWB submits that PR1 and PR2 summarize PR3 and PR4. They state in words the issues identified in PR3 and PR4.

RMWB is concerned that if CARB does not order disclosure until after the December preliminary hearing, there will be a longer period in which nothing occurs on this matter. RMWB urges CARB to keep the momentum going on this file. Further communication between the parties is essential. If PR3 and PR4 are treated as "living documents", the parties can advise CARB what steps have been made to resolve the issues between them.

Finding – Issue 2

In view of the above considerations, the CARB finds as follows with respect to Issue 2:

1. November 22, 2010 - CNRL to exchange argument and authorities with regard to the remaining Preliminary Issues;
2. November 25, 2010, CNRL to provide a response to the witness report (R20) of Mr. Schmidt and Dr. Thompson (even if it is incomplete);
3. December 2, 2010, Wood Buffalo to provide reply to the argument regarding the Preliminary Issues;
4. December 6, 2010, Wood Buffalo to provide reply to the November 25th witness reports filed by CNRL (even if it is incomplete);
5. December 6 – 8, 2010 , starting at 10:00 am, Preliminary Hearing in Fort McMurray;
6. May 2 - 20, 2011 - merit hearing.

Reasons – Issue 2

Since CARB has granted an adjournment of the merit hearing, the dates contained in CARB 007/2010-P must be altered. Given the parties availability (both counsel and witnesses (both expert and lay witnesses)), it is reasonable to set the merit hearing for May 2, 2010, a time for which both counsel have indicated they are available. The merit hearing was originally set for 3 weeks. Although counsel for CNRL has indicated that 4-5 weeks might be necessary, CARB believes that 3 weeks is likely sufficient, particularly in light of CARB's previous direction that the parties identify the issues in dispute. PR1, PR2, PR3 and PR4 should be treated as "living documents" by the parties. The parties should utilize these documents to identify issues in dispute and to narrow, if possible, those items that the parties cannot agree upon.

Although CARB has heard CNRL's argument about not setting interim exchange dates, CARB is also aware of the need to have appeals resolved in a timely way. CARB is concerned that if it does not direct interim exchanges to occur, there may be a delay until the decision from the December 2010 preliminary hearing is delivered. Such a delay might impact the timing of the

May 2, 2010 merit hearing, which has already been adjourned to permit the parties more time to prepare.

DECISION

1. The adjournment of the merit hearing is granted in accordance with the timelines below.
2. The exchange deadlines set out in CARB 007/2010-P are modified as set out below.
3. November 22, 2010 - CNRL to exchange argument and authorities with regard to the remaining Preliminary Issues;
4. November 25, 2010, CNRL to provide a response to the witness report of Mr. Schmidt and Dr. Thompson (even if it is incomplete);
5. December 2, 2010, Wood Buffalo to provide reply to the argument regarding the Preliminary Issues;
6. December 6, 2010, Wood Buffalo to provide reply to the November 25th witness reports filed by CNRL (even if it is incomplete);
7. December 6 – 8, 2010 , starting at 10:00 am, Preliminary Hearing in Fort McMurray;
8. May 2 - 20, 2011 - merit hearing.

It is so ordered.

Dated at the Regional Municipality of Wood Buffalo, in the Province of Alberta, this November 25, 2010.

For: Presiding Officer, D. Marchand

APPENDIX "A"

DOCUMENTS RECEIVED AND CONSIDERED BY THE CARB:

NO.	ITEM
PR1.	CNRL-RMWB Joint Report for CARB
PR2.	CNRL/RMWB Joint Report to CARB
PR3	RMWB Horizon Oil Sands Project
PR4	CNRL Horizon Oil Sands Project

APPENDIX 'B"

ORAL REPRESENTATIONS

PERSON APPEARING	CAPACITY
1. G. Ludwig	Counsel for the Complainant
2. C. M. Zukiwski	Counsel for the Respondent