COMPOSSITE ASSESSMENT REVIEW BOARD

BETWEEN:

La Societe Franco Canadienne de Calgary

Complainant

-and-

Foothill County Assessor

Respondent

BOOK OF AUTHORITIES

Rebuttal Brief of the Complainant

La Societe Franco-Canadienne

Roll Number: 2004257520

Hearing Date: November 5th, 2024

WILSON LAYCRAFT
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Attn.: Gilbert J. Ludwig, K.C.

TAB 1

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. 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. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Employment Standards Act, 1974, S.O. 1974, ch. 112, art. 40(7).
Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2.
Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

[TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, 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.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

TAB 2

Indexed as:

Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours

Corporation Notre-Dame de Bon-Secours, appellant;
v.
Communauté urbaine de Québec and
City of Québec, respondents,
and
Bureau de révision de l'évaluation foncière du Québec,
respondent, and
The Attorney General of Quebec, respondent.

[1994] 3 S.C.R. 3

[1994] 3 R.C.S. 3

[1994] S.C.J. No. 78

[1994] A.C.S. no 78

File No.: 23014.

Supreme Court of Canada

1994: May 25; 1994: September 30.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier,
Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Municipal law -- Real estate valuation -- Tax-exempt immovables -- Reception centres -- Whether appellant can qualify as reception centre and benefit from tax exemption -- Interpretation of tax legislation -- Act respecting Municipal Taxation, R.S.Q., c. F-2.1, s. 204(14) -- Act respecting Health Services and Social Services, R.S.Q., c. S-5, ss. 1(k), 12.

Taxation -- Legislation -- Rules for interpreting tax legislation.

The appellant is a non-profit corporation created in 1964 for the purpose of providing low rental housing to indigent elderly persons. There are over 450 residents at the appellant's facilities, which have been in operation since 1969. Of this total, 20 are located in the shelter section, for which the appellant holds a permit issued pursuant to the Act respecting Health Services and Social Services ("A.H.S.S.S."). This permit authorizes it to operate a private reception centre for 20 persons. The government pays part of their room

and board and exercises a measure of control to ensure that all the places in the shelter section are filled. The remainder of the facilities receive no government grant and are managed entirely by the appellant. The services offered are provided for all residents and the premises in general are designed to meet the special needs of the elderly. The criteria for admission are a minimum age of 60, a low income and physical and psychological autonomy. In 1982 an assessor found that 89 percent of the total area of the property was reserved for apartments and that the shelter section and the community services took up 11 percent. He therefore gave the appellant a real estate tax exemption for 1980 to 1984 of 11 percent. The appellant claimed the reception centre exemption provided for in s. 204(14) of the Act respecting Municipal Taxation ("A.M.T.") for all its facilities, in view of the nature of its mission, and filed a complaint with the Bureau de révision de l'évaluation foncière du Québec ("BREF"). The BREF allowed its complaint and found that the appellant's activities are those of a reception centre and exempted its facilities from all real estate taxes for 1980 to 1984. The Provincial Court affirmed that decision but the Court of Appeal reversed the judgment of the Provincial Court and held that the exemption did not apply to 89 percent of the appellant's surface area.

Held: The appeal should be allowed.

The principles that should guide the courts in interpreting tax legislation are as follows: (1) The interpretation of tax legislation is subject to the ordinary rules of interpretation; (2) A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent; (3) This teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions; (4) Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute; (5) Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

In light of these rules of interpretation, the appellant may benefit from the tax exemption provided for in s. 204(14) A.M.T. for all its facilities. First, on the facts found by the BREF the appellant's facilities can be classified in their entirety as a reception centre within the meaning of ss. 1(k) and 12(b) A.H.S.S.S. To be treated as a reception centre an establishment must first offer certain services; it must then place these services at the disposal of persons whose condition requires them. Lodging is a service sufficient in itself to meet the requirements of the "services" part of the definition in s. 1(k). It is not necessary to offer the full range of services enumerated in that paragraph. For the "need" part, age is sufficient as such to justify a need to be treated or kept in a protected residence, regardless of any physical, personality, psycho-social or family deficiency. The notion of care cannot be limited to a purely therapeutic aspect. As to the concept of a protected residence in s. 1(k), for which no definition is given in the A.H.S.S.S., it should not be given a narrower meaning than that of a residence providing a secure location adapted to the special physical and mental needs of the people for whom it was designed and whom it serves. Second, the appellant's entire facilities are used for the purposes provided by the A.H.S.S.S., as stipulated by s. 204(14). Just as the autonomy of elderly persons at the time of their admission cannot be the decisive test in determining the concept of need provided for in s. 1(k), it also cannot be used to determine whether the appellant's facilities are being used for the purposes provided by the A.H.S.S.S. The answer to that question will depend entirely on the finding that in fact these facilities are designed and adapted for accommodating the elderly with a real need, though that need may be variable in degree or immediacy. Here the BREF found that the services provided by the appellant, taken together with the needs of its residents, lead to the conclusion that it must be classified in its entirety as a reception centre for the purposes of the A.H.S.S.S. Though aware of the existence of s. 2 A.M.T., which allows the assessment unit to be divided, the BREF nevertheless considered that the appellant was operating facilities which as a whole met the two parts of the definition of a reception centre. The decision of the BREF, a specialized tribunal, discloses no error subject to review on appeal. Finally, a reception centre may be exempt from real estate taxes even if it does not hold a permit required by the A.H.S.S.S. Similarly, there is nothing to indicate that failure to observe the requirement provided for in s. 18.1 A.H.S.S.S. -- submission of admission criteria to the Conseil régional de la santé et des services sociaux or the Minister responsible, for approval -- will as such affect the status of an establishment as a reception centre. The decision of the BREF must therefore be restored.

Cases Cited

Distinguished: Services de santé et services sociaux -- 7, [1987] C.A.S. 579; referred to: Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536; The Queen v. Golden, [1986] 1 S.C.R. 209; Ville de Montréal v. ILGWU Center Inc., [1974] S.C.R. 59; Johns-Manville Canada Inc. v. The Queen, [1985] 2 S.C.R. 46; The Queen v. Imperial General Properties Ltd., [1985] 2 S.C.R. 288; Bronfman Trust v. The Queen, [1987] 1 S.C.R. 32; Symes v. Canada, [1993] 4 S.C.R. 695; Ville de Québec v. Corp. Notre-Dame de Bon-Secours, Prov. Ct. Québec, No. 200-02-008522-793, November 27, 1980, unreported.

Statutes and Regulations Cited

Act respecting Health Services and Social Services, R.S.Q., c. S-5, ss. 1(a) [am. 1981, c. 22, s. 40], (b), (c), (k) [repl. 1979, c. 85, s. 82], 3, 9, 10 [am. 1981, c. 22, s. 41], 11, 12(a), (b), 18.1 [ad. idem, s. 43; am. 1983, c. 54, s. 72], 76, 82 [repl. 1981, c. 22, s. 63].
Act respecting Municipal Taxation, R.S.Q., c. F-2.1, ss. 2, 204(14) [repl. 1980, c. 34, s. 27], (15).
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Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.
Morgan, Vivien. "Stubart: What the Courts Did Next" (1987), 35 Can. Tax J. 155.

APPEAL from a judgment of the Quebec Court of Appeal, [1993] R.L. 68, 47 Q.A.C. 47, reversing a judgment of the Provincial Court rendered on May 19, 1987, affirming a decision of the Bureau de révision de l'évaluation foncière du Québec, [1985] B.R.E.F. 130. Appeal allowed.

André Bois and André Lemay, for the appellant. Estelle Alain, for the respondents the Communauté urbaine de Québec and the City of Québec. No one appeared for the respondent the Bureau de révision de l'évaluation foncière du Québec. Alain Tanguay, for the respondent the Attorney General of Quebec.

Solicitors for the appellant: Tremblay Bois & Associés, Ste-Foy. Solicitors for the respondents the Communauté urbaine de Québec and the City of Québec: Alain, Tardif & Associés, Québec. Solicitors for the respondent the Attorney General of Quebec: Rochette Boucher & Gagnon, Québec.

English version of the judgment of the Court delivered by

1 GONTHIER J.:-- The issue in this case is whether the appellant, an institution devoted to the welfare of elderly persons living under the poverty line, may benefit from the tax exemption provided for in s. 204(14) of the Act respecting Municipal Taxation, R.S.Q., c. F-2.1 ("A.M.T.") for all its facilities. There are two main questions: (1) What are the principles that should guide the courts in interpreting tax legislation? (2) In light of these principles, can the appellant qualify as a reception centre within the meaning of s. 12 of the Act respecting Health Services and Social Services, R.S.Q., c. S-5 ("A.H.S.S.S."), referred to in s. 204(14) A.M.T.?

I - Facts

2 The appellant, the Corporation Notre-Dame de Bon-Secours, is a non-profit corporation created in 1964 for the purpose of providing low rental housing to indigent elderly persons. On June 16, 1967 the Soeurs de la Congrégration de Notre-Dame conveyed to the appellant for one dollar the land on which it would erect the facilities for use in carrying out its mission, facilities to be known as "La Champenoise" (which we will use to

refer to the appellant). Its construction began in 1968 and it was officially opened in November 1969.

3 There are 456 people at La Champenoise, with an average age of 83. The residents' annual income varies between $6,000 and $9,000 and 80 percent of the people at the establishment are women. Of the total number of residents, 20 are physically located in a single sector of the establishment known as the shelter section, for which La Champenoise holds a permit issued pursuant to the A.H.S.S.S. authorizing it to operate a private reception centre for 20 residents. The shelter section apartments are similar to those of other residents, except that they have no kitchenette. Part of the room and board of the residents of this section is borne by the government, which pays a per diem allowance. The government also exercises a measure of control to ensure that the 20 places are filled. The remainder of the facilities receive no government grant and are managed entirely by La Champenoise. Its administrators and managers work as volunteers.

4 In addition to the services of a resident priest, the chapel, an infirmary which is accessible 24 hours a day, the cafeteria and the social activities which La Champenoise provides for all residents, it should also be noted that the premises in general are physically designed to meet the special needs of the elderly. Thus, inter alia, there are ramps, there are no door sills, electrical outlets are 24 inches from the ground and bathrooms are equipped with support bars.

5 The criteria for admission to La Champenoise are a minimum age of 60, a low income and physical and psychological autonomy. The latter factor is not, however, a requirement for staying on in the establishment, since it appears that elderly persons may remain in the premises despite a subsequent deterioration in their health. In his testimony given in 1984 the director general of La Champenoise noted that places which became vacant were offered to applicants who had made their applications for admission in 1976: there was a considerable waiting list of 1,800 persons.

6 In 1982 an assessor from the Communauté urbaine de Québec visited La Champenoise to determine the proportion of the premises used as an apartment building and as a reception centre. He found that 89 percent of the total area of the property was reserved for apartments and that the shelter section and the community services took up 11 percent: he gave La Champenoise a real estate tax exemption for 1980 to 1984 only for this 11 percent. La Champenoise filed a complaint with the Bureau de révision de l'évaluation foncière du Québec ("BREF"), in which it claimed an exemption for all its facilities in view of the nature of its mission.

7 The real estate tax debt to date amounts to over $4.5 million and it goes without saying that the size of the amounts involved will have a determining effect on the viability of La Champenoise and the security of its 456 elderly residents.

II - The Courts Below

Bureau de révision de l'évaluation foncière du Québec, [1985] B.R.E.F. 130

8 According to the respondents the City of Québec and the Communauté urbaine de Québec, holding a permit to operate a reception centre is an essential condition for benefiting from the tax exemption. It follows that as La Champenoise only holds a permit for 20 residents its entire facilities cannot be regarded as a reception centre. After reviewing the testimony and the applicable provisions of the A.H.S.S.S., Mr. Barbe, of the BREF, found that the activities of La Champenoise are those of a reception centre and that it was not necessary for it to hold a permit in order to be treated as such. He accordingly exempted the appellant's property from all real estate taxes.

Provincial Court (District of Québec, No. 200-02-004152-858, May 19, 1987)

9 Aubé Prov. Ct. J. concurred in the findings of the BREF. He was of the view that the entire La Champenoise property constitutes a reception centre within the meaning of s. 1(k) A.H.S.S.S. and is used for the purposes provided by the Act. He took note of the parties' admission that the shelter section meets the conditions for the exemption provided for in s. 204(14) A.M.T. He also noted the presence of s. 2 A.M.T., which allows an assessment unit to be divided. In light of these observations, he nevertheless stated, at p.

12 of his reasons:

> [Translation] The evidence here is clear, however, that La Champenoise in fact forms a single well-integrated unit and that there is a direct, permanent and necessary connection between the shelter section and the rest of La Champenoise.
>
> In the presence of such a well-established and well-articulated overall reality, the court could not allow technical considerations to obscure the true nature of La Champenoise, namely that of a facility at which, for all practical purposes, all services are available to everyone.

The BREF's decision was upheld.

Quebec Court of Appeal (1992), 47 Q.A.C. 47

10 In the opinion of Bisson C.J.Q., the outcome of the case depended on the answer to two questions. First, the nature of La Champenoise had to be determined. After examining certain definitions included in the A.H.S.S.S., including that of a "reception centre", Bisson C.J.Q. finally concluded, at p. 55, that [Translation] "[t]he legal and factual existence of the respondent [La Champenoise] is far from establishing that it meets the definition of a reception centre, except with respect to the shelter section". He also noted that the solution of the matter had to be based on more fundamental questions than whether or not a permit was held, and so he did not consider it necessary to rule on the point.

11 The second question was to determine whether the property was used for the purposes provided by the A.H.S.S.S. To decide whether the La Champenoise facilities were used as a reception centre strictly speaking, Bisson C.J.Q. considered in particular the criteria for admission to the establishment. He noted that the evidence presented as to the La Champenoise admission criteria indicated that they did not meet the requirements of the definition of a reception centre. In the opinion of the Chief Justice, at p. 56, there had been an error in characterizing the facts:

> [Translation] Where the error was made was in making the availability of community services the test by which La Champenoise was regarded as a reception centre.
>
> The fact that these community services are available to all residents -- tenants and sheltered persons -- does not mean that the residents are all in a condition, "by reason of their age or their physical, personality, psycho-social or family deficiencies, . . . such that they must be treated, kept in protected residence or . . ." (s. 1(k)).
>
> I note that the evidence showed that in order to obtain an apartment at La Champenoise residents had to be autonomous physically as well as mentally and financially, though in the latter case with limited means.

12 Finally, since the issue is whether to apply an exemption to the principle of real estate taxation, Bisson C.J.Q. was in favour of adopting a restrictive interpretation. With this in mind, he concluded at p. 56:

> [Translation] It is true that the respondent [La Champenoise] is a non-profit corporation and engaged in an eminently praiseworthy undertaking, but this is not a basis for an interpretation that conflicts with the purpose contemplated by the legislature when it created the exemption.
>
> I therefore conclude that 89 percent of the surface area of the property occupied by La Champenoise . . . was not used for the purpose provided in the [A.H.S.S.S.], and

that proportion of it could not be regarded as a reception centre.

13 Bisson C.J.Q. accordingly applied s. 2 A.M.T., which allows a unit of assessment to be divided, and held that the exemption provided for in s. 204(14) of that Act did not apply to 89 percent of the surface area of La Champenoise.

III - Issues

14 To determine whether La Champenoise may benefit from the tax exemption provided for in s. 204(14) A.M.T. for all its facilities, the Court must answer the following two questions:

1. What are the principles that should guide the courts in interpreting tax legislation?
2. In light of these principles, can La Champenoise qualify as a reception centre within the meaning of s. 12 A.H.S.S.S., referred to in s. 204(14) A.M.T.?

IV - Relevant Legislation

15 At the relevant times the A.M.T. provided the following:

2. Unless otherwise indicated by the context, any provision of this act which contemplates an immoveable property, moveable property or unit of assessment is deemed to contemplate part of such an immoveable property, moveable property or unit of assessment, if only that part falls within the scope of the provision.

204. The following are exempt from all municipal or school real estate taxes:

. . .

(14) an immoveable belonging to a public establishment within the meaning of the Act respecting health services and social services (chapter S-5), including a reception centre contemplated in section 12 of that act, used for the purposes provided by that act, and an immoveable belonging to the holder of a day care centre permit or nursery school permit contemplated in paragraph 1 or 2 of section 4 or 5 of the Act respecting child day care (chapter S-4.1), used for the purposes provided by that act;

16 The A.H.S.S.S. provided:

1. In this Act and the regulations, unless the context indicates a different meaning, the following expressions and words mean:

(a) "establishment": a local community service centre, a hospital centre, a social service centre or a reception centre;

(b) "public establishment": an establishment contemplated in sections 10 and 11;

(c) "private establishment": an establishment contemplated in sections 12 and 13;

. . .

(k) "reception centre": facilities where in-patient, out-patient or home-care services are offered for the lodging, maintenance, keeping under observation, treatment or social rehabilitation, as the case may be, of persons whose condition, by reason of their age or their physical, personality, psycho-social or family deficiencies, is such that they must be treated, kept in protected residence or, if need be, for close treatment, or treated at home, including nurseries, but excepting day care establishments

contemplated in the Act respecting child day care (chapter S-4.1), foster families, vacation camps and other similar facilities and facilities maintained by a religious institution to receive its members or followers;

3. The Minister shall exercise the powers that this Act confers upon him in order to:

(a) improve the state of the health of the population, the state of the social environment in which they live and the social conditions of individuals, families and groups;

. . .

(c) encourage the population and the groups which compose it to participate in the founding, administration and development of establishments so as to ensure their vital growth and renewal;

9. Every establishment is public or private.
10. The following are public establishments:

(a) every establishment constituted under this Act or resulting from an amalgamation or conversion made under this Act;

(b) every hospital centre or social service centre maintained by a non-profit corporation;

(c) every establishment using for its object immovable assets which are the property of a non-profit corporation other than a corporation incorporated under this Act.

11. Every reception centre maintained by a non-profit corporation other than a corporation contemplated in section 10 is also a public establishment, subject to section 12.
12. However, a reception centre maintained by a non-profit corporation other than a corporation resulting from an amalgamation or conversion made under this Act is a private establishment:

(a) if it is arranged to receive not more than 20 persons at one time; or

(b) if it was already constituted on 1 January 1974 and if it operates without recourse to sums of money derived from the consolidated revenue fund or if such sums do not cover more than 80% of the net amounts it would receive for its current operating expenses, if it were a public establishment;

V - Analysis

A. Rules for interpreting tax legislation

17 In this Court the appellant argued that a provision creating a tax exemption should be interpreted by looking at the spirit and purpose of the legislation. In this connection it is worth looking briefly at the development of the rules for interpreting tax legislation in Canada and formulating certain principles. First,

there is the traditional rule that tax legislation must be strictly construed: this applied both to provisions imposing a tax obligation and to those creating tax exemptions. The rule was based on the fact that, like penal legislation, tax legislation imposes a burden on individuals and accordingly no one should be made subject to it unless the wording of the Act so provides in a clear and precise manner. The effect of such an interpretation was to favour the taxpayer in the case of provisions imposing a tax obligation, and the courts placed on the tax department the burden of showing that the taxpayer fell clearly within the letter of the law. Conversely, a taxpayer claiming to benefit from an exemption had "to establish that the competent legislative authority, in clear and unequivocal language, [had] unquestionably granted him the exemption claimed" (Fauteux C.J. in Ville de Montréal v. ILGWU Center Inc., [1974] S.C.R. 59, at p. 65). Any doubt was thus to be resolved in favour of the tax department. In view of this situation, it followed from the strict construction rule that in cases of doubt a presumption existed in the taxpayer's favour in taxing situations but against the taxpayer in those involving exemptions.

18 It should at once be noted that there is a risk of confusion between the rule that a taxing provision is to be strictly construed and the burden of proof resting upon the parties in an action between the government and a taxpayer. According to the general rule which provides that the burden of proof lies with the plaintiff, in any proceeding it is for the party claiming the benefit of a legislative provision to show that he is entitled to rely on it. The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and with the taxpayer in the case of a provision creating a tax exemption. It will be noted that the presumptions mentioned earlier tend in more or less the same direction. This explains why these concepts have been at times superimposed to the point of being confused with each other. With respect, they are nevertheless two very different concepts. In any event, the rule of strict construction relates only to the clarity of the wording of the tax legislation: regardless of who bears the burden of proof, that person will have to persuade the court that the taxpayer is clearly covered by the wording of the legislative provision which it is sought to apply.

19 In Canada it was Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, which opened the first significant breach in the rule that tax legislation must be strictly construed. This Court there held, per Estey J., at p. 578, that the rule of strict construction had to be bypassed in favour of interpretation according to ordinary rules so as to give effect to the spirit of the Act and the aim of Parliament:

> . . . the role of the tax statute in the community changed, as we have seen, and the application of strict construction to it receded. Courts today apply to this statute the plain meaning rule, but in a substantive sense so that if a taxpayer is within the spirit of the charge, he may be held liable.

20 This turning point in the development of the rules for interpreting tax legislation in Canada was prompted by the realization that the purpose of tax legislation is no longer simply to raise funds with which to cover government expenditure. It was recognized that such legislation is also used for social and economic purposes. In The Queen v. Golden, [1986] 1 S.C.R. 209, at pp. 214-15, Estey J. for the majority explained Stubart as follows:

> In Stubart . . . the Court recognized that in the construction of taxation statutes the law is not confined to a literal and virtually meaningless interpretation of the Act where the words will support on a broader construction a conclusion which is workable and in harmony with the evident purposes of the Act in question. Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statutes in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.

21 Such a rule also enabled the Court to direct its attention to the actual nature of the taxpayer's operations, and so to give substance precedence over form, when so doing in appropriate cases would make it possible to achieve the purposes of the legislation in question. (See Johns-Manville Canada Inc. v. The Queen, [1985] 2 S.C.R. 46, and The Queen v. Imperial General Properties Ltd., [1985] 2 S.C.R. 288.) It is important, however, not to conclude too hastily that this latter rule (giving substance precedence over form)

should be applied mechanically, as it only has real meaning if it is consistent with the analysis of legislative intent. As Dickson C.J. noted in Bronfman Trust v. The Queen, [1987] 1 S.C.R. 32, at pp. 52-53:

> I acknowledge, however, that just as there has been a recent trend away from strict construction of taxation statutes . . . so too has the recent trend in tax cases been towards attempting to ascertain the true commercial and practical nature of the taxpayer's transactions. There has been, in this country and elsewhere, a movement away from tests based on the form of transactions and towards tests based on what Lord Pearce has referred to as a "common sense appreciation of all the guiding features" of the events in question . . .
>
> This is, I believe, a laudable trend provided it is consistent with the text and purposes of the taxation statute. Assessment of taxpayers' transactions with an eye to commercial and economic realities, rather than juristic classification of form, may help to avoid the inequity of tax liability being dependent upon the taxpayer's sophistication at manipulating a sequence of events to achieve a patina of compliance with the apparent prerequisites for a tax deduction.
>
> This does not mean, however, that a deduction such as the interest deduction in s. 20(1)(c)(i), which by its very text is made available to the taxpayer in limited circumstances, is suddenly to lose all its strictures. [Emphasis added.]

22 In light of this passage there is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. At page 87 of his text Construction of Statutes (2nd ed. 1983), Driedger fittingly summarizes the basic principles: ". . . 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". The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision. The following passage from Vivien Morgan's article "Stubart: What the Courts Did Next" (1987), 35 Can. Tax J. 155, at pp. 169-70, adequately summarizes my conclusion:

> There has been one distinct change [after Stubart], however, in the resolution of ambiguities. In the past, resort was often made to the maxims that an ambiguity in a taxing provision is resolved in the taxpayer's favour and that an ambiguity in an exempting provision is resolved in the Crown's favour. Now an ambiguity is usually resolved openly by reference to legislative intent. [Emphasis added.]

The teleological approach makes it clear that in tax matters it is no longer possible to reduce the rules of interpretation to presumptions in favour of or against the taxpayer or to well-defined categories known to require a liberal, strict or literal interpretation. I refer to the passage from Dickson C.J., supra, when he says that the effort to determine the purpose of the legislation does not mean that a specific provision loses all its strictures. In other words, it is the teleological interpretation that will be the means of identifying the purpose underlying a specific legislative provision and the Act as a whole; and it is the purpose in question which will dictate in each case whether a strict or a liberal interpretation is appropriate or whether it is the tax department or the taxpayer which will be favoured.

23 In light of the foregoing, I should like to stress that it is no longer possible to apply automatically the rule that any tax exemption should be strictly construed. It is not incorrect to say that when the legislature makes a general rule and lists certain exceptions, the latter must be regarded as exhaustive and so strictly construed. That does not mean, however, that this rule should be transposed to tax matters so as to make an absolute parallel between the concepts of exemption and exception. With respect, adhering to the principle that taxation is clearly the rule and exemption the exception no longer corresponds to the reality of present-day tax law. Such a way of looking at things was undoubtedly tenable at a time when the purpose of tax legislation was limited to raising funds to cover government expenses. In our time it has been recognized

that such legislation serves other purposes and functions as a tool of economic and social policy. By submitting tax legislation to a teleological interpretation it can be seen that there is nothing to prevent a general policy of raising funds from being subject to a secondary policy of exempting social works. Both are legitimate purposes which equally embody the legislative intent and it is thus hard to see why one should take precedence over the other.

24 One final aspect requires consideration. In Johns-Manville Canada, supra, this Court itself referred to a residual presumption in favour of the taxpayer, and were it not for certain qualifications that must be added, it would be difficult to justify maintaining this presumption in light of what was discussed earlier. Estey J. said the following at p. 72:

> . . . where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer. This residual principle must be the more readily applicable in this appeal where otherwise annually recurring expenditures, completely connected to the daily business operation of the taxpayer, afford the taxpayer no credit against tax either by way of capital cost or depletion allowance with reference to a capital expenditure, or an expense deduction against revenue. [Emphasis added.]

25 Earlier, at p. 67, he said the following:

> On the other hand, if the interpretation of a taxation statute is unclear, and one reasonable interpretation leads to a deduction to the credit of a taxpayer and the other leaves the taxpayer with no relief from clearly bona fide expenditures in the course of his business activities, the general rules of interpretation of taxing statutes would direct the tribunal to the former interpretation.

Two comments should be made to give Estey J.'s observations their full meaning: first, recourse to the presumption in the taxpayer's favour is indicated when a court is compelled to choose between two valid interpretations, and second, this presumption is clearly residual and should play an exceptional part in the interpretation of tax legislation. In his text The Interpretation of Legislation in Canada (2nd ed. 1991), at p. 412, Professor Pierre-André Côté summarizes the point very well:

> If the taxpayer receives the benefit of the doubt, such a "doubt" must nevertheless be "reasonable". A taxation statute should be "reasonably clear". This criterion is not satisfied if the usual rules of interpretation have not already been applied in an attempt to clarify the problem. The meaning of the enactment must first be ascertained, and only where this proves impossible can that which is more favourable to the taxpayer be chosen.

The rules formulated in the preceding pages, some of which were relied on recently in Symes v. Canada, [1993] 4 S.C.R. 695, may be summarized as follows:

- The interpretation of tax legislation should follow the ordinary rules of interpretation;

- A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;

- The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;

- Substance should be given precedence over form to the extent that this is consistent

with the wording and objective of the statute;

- Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.

B. Characterization of La Champenoise as a reception centre used for the purposes provided in the Act

26 Two reasons were given by Bisson C.J.Q. for allowing the respondents' appeal: first, the legal and factual existence of La Champenoise does not indicate that all its facilities can meet the definition of a reception centre; second, it is a mistake to conclude, as the courts below did, that the availability of the services offered means that the immovable is being used for the purposes provided by the A.H.S.S.S., as required by s. 204(14) A.M.T.

27 The first reason is based principally on analysis of s. 1(k) A.H.S.S.S. I reproduce it again here for the sake of convenience:

> (k) "reception centre": facilities where in-patient, out-patient or home-care services are offered for the lodging, maintenance, keeping under observation, treatment or social rehabilitation, as the case may be, of persons whose condition, by reason of their age or their physical, personality, psycho-social or family deficiencies, is such that they must be treated, kept in protected residence or, if need be, for close treatment, or treated at home, including nurseries, but excepting day care establishments contemplated in the Act respecting child day care (chapter S-4.1), foster families, vacation camps and other similar facilities and facilities maintained by a religious institution to receive its members or followers; [Emphasis added.]

Two parts of this definition may be considered: to be treated as a reception centre an establishment must first offer certain services; it must then place these services at the disposal of persons whose condition requires them. This is the part relating to need. It will be seen that for both parts the paragraph is worded disjunctively. For the "services" part, the words "or" and "as the case may be" clearly indicate that lodging is a service sufficient in itself to meet the requirements of the definition. There is no need to offer the full range of services mentioned in s. 1(k) A.H.S.S.S. in order to qualify as a reception centre; nonetheless, the evidence was that the La Champenoise population as a whole benefits from a large number of them. The paragraph is worded similarly for the "need" part, in that age is sufficient as such to justify a need to be treated or kept in a protected residence, regardless of any physical, personality, psycho-social or family deficiency. The notion of care in this sense cannot be limited to a purely therapeutic aspect. As to the concept of a protected residence, for which no statutory definition is given, it should not be given a narrower meaning than that of a residence providing a secure location adapted to the special physical and mental needs of the people for whom it was designed and whom it serves.

28 The fact that La Champenoise requires its residents to be physically and psychologically autonomous on admission is an entirely different matter, and that leads me to discuss the second reason. I note that Bisson C.J.Q. mentioned that the availability of services should not be a basis for assessing the need of residents and, indirectly, determining whether the La Champenoise property was being used for the purposes provided in the A.H.S.S.S. I share this view. With respect, however, I consider that the need of an elderly person also cannot be determined by his or her autonomy. It can certainly be concluded from the definition of a reception centre that the autonomy of those referred to in s. 1(k) may be affected in varying degrees. That does not mean we can conclude that an autonomous person is not in need of care and protection, a fortiori if as in the case at bar the autonomy is only determined at the stage of admission and will inevitably diminish thereafter. Nowhere is it stated that the individual's need must be immediate. There is no bar to its being foreseeable.

29 With respect, the autonomy of elderly persons at the time of their admission cannot be the decisive test

in determining the concept of need as provided for in s. 1(k) A.H.S.S.S. In the same way, it also cannot be used to determine whether La Champenoise's immovable is being used for the purposes provided by the Act, as prescribed in s. 204(14) A.M.T. The outcome of the latter analysis will depend entirely on the finding, whether satisfactory or otherwise, that in fact the institution is designed and adapted for accommodating the elderly with a real need, though that need may be variable in degree or immediacy.

30 Section 12(b) A.H.S.S.S., reproduced earlier and applicable to the situation of La Champenoise, might well have added to the previous test the requirement that the establishment be legally made a reception centre on January 1, 1974. The only date referred to by Mr. Barbe of the BREF in this matter is that of the incorporation of La Champenoise as a non-profit corporation. It is implicit from his reasons that 1964 is the year to be considered in fixing a starting-point for the activities of La Champenoise as a reception centre. He concludes, at p. 137 of the BREF's decision:

> [Translation] It appears from the evidence that these were "facilities where in-patient . . . services are offered for the lodging, maintenance, keeping under observation, treatment . . . of persons whose condition, by reason of their age . . . is such that they must be treated, kept in protected residence . . .". The establishment is accordingly one that meets the legislative definition of a "reception centre".

31 These reasons are in accord with the findings of fact made by Judge Larochelle of the Provincial Court in a judgment allowing an application for an earlier exemption, included in the case on appeal with supporting testimony. It states:

> [Translation] Over this four-year period, from 1972 to 1975 inclusive, [La Champenoise] as a non-profit corporation always pursued its stated purposes and objectives, namely lodging and sheltering at a low cost elderly persons who are in need, while at the same time providing them with medical care and giving them every assistance and moral support made necessary by their state and condition, and did so consistently.
>
> (Ville de Québec v. Corp. Notre-Dame de Bon-Secours, Prov. Ct. Québec, No. 200-02-008522-783, November 27, 1980, at p. 10.)

32 The respondents argued that the appellant could not have been established as a reception centre on January 1, 1974 since at that time it was still covered by the Public Charities Act, R.S.Q. 1964, c. 216. With respect, that does not call into question the implicit conclusion of the BREF, since there is nothing to prevent La Champenoise from having in fact been able to meet the requirements of both statutes. This conclusion is all the more compelling when we consider that historically the A.H.S.S.S. was adopted in order to update certain older legislation, including the Public Charities Act, while preserving the fundamental principles contained in that legislation. From this perspective, it necessarily follows that the test to be adopted in determining whether the property is being used for the purposes provided in the Act must be limited to an assessment of the reception centre de facto.

33 Here we have these positive findings by the BREF that the services provided by La Champenoise, taken together with the needs of its residents, lead to the conclusion that it must be classified in its entirety as a reception centre for the purposes of the Act. It was objected that the BREF had not applied s. 2 A.M.T. and divided the unit of assessment. With respect, it is clear from the reasons of Mr. Barbe that that section was not overlooked. This is especially apparent in his decision when he notes, referring to the assessor's work, [Translation] "[that the latter] established the percentage of the exemption but not the principle of an exempt part and a part subject to tax" (p. 134). Though aware of the existence of s. 2 A.M.T., the BREF nevertheless considered that La Champenoise was operating facilities which as a whole met the two parts of the definition of a reception centre. Moreover, it was in the best position to conclude, following a visit to the premises, that the undertaking was indivisible, and this conclusion was concurred in by Judge Aubé of the Provincial Court on appeal, as mentioned earlier. The primary area of expertise of this specialized tribunal is certainly not that of social services: I would note, however, that what was required here was to define a

reception centre for tax purposes. That being so, there is no need to question its findings.

34 In this Court the respondents the Communauté urbaine de Québec and the City of Québec cited the decision in Services de santé et services sociaux -- 7, [1987] C.A.S. 579, in support of their arguments that La Champenoise could not be classified as a reception centre in its entirety. That decision was clearly made by a tribunal specializing in social services. With respect, the fact remains that that case cannot apply here. The Commission des affaires sociales ("the Commission") was required to interpret the concept of a reception centre in connection with the power of the Minister of Health and Social Services to relocate two elderly residents living in a home which had no permit within the meaning of s. 136 A.H.S.S.S. In addition to accommodation, the home provided food and care to the two residents, whose respective conditions required regular attention, one having difficulty in moving about and the other being subject to periods of confusion. The Commission reversed the Minister's decision and found that the home in question was not a reception centre within the meaning of s. 1(k) A.H.S.S.S. In a passage which I shall reproduce at length for greater clarity, the Commission said the following, at p. 582:

> [Translation] The activities described in this definition of a reception centre are in fact very broad and capable of being carried on in various locations where individuals are lodged. Offering in-patient services for the lodging and maintenance of individuals is thus a task which in our society is far from being a function exclusive to reception centres. Even in the case of persons having certain problems or deficiencies, such centres do not have a monopoly.
>
> There are in fact many places providing lodging to elderly persons whose autonomy is more limited and who, though not needing constant care, simply must live in places where . . . certain maintenance services are provided for them. In such places they may find someone capable of providing a form of assistance and help if required, not to mention out-patient services which are provided to them in the same way as if they lived elsewhere.
>
> Formerly, such persons found this type of lodging within an extended family unit. Now, this resource is less available and they must have access to different places.
>
> In the Commission's opinion this is not the type of lodging contemplated by the relocation power conferred on the Minister by s. 182 [A.H.S.S.S.]. That power, which is special and exceptional, is an incidental measure for the purpose of penalizing a breach of the Act, namely the operation of an establishment without a permit (s. 136).
>
> The establishment is truly a facility whose activities must be so arranged that relatively constant special care can be provided to the persons living there who require it. It is not a place the primary activity of which is to lodge and maintain persons who may occasionally need certain care and for whom it provides reassuring and beneficial surroundings.
>
> The Minister's power of relocation should not be isolated but seen in its context. Otherwise it might be used to transfer one or more persons from locations where activities of the kind described in s. 1(k) are carried on and where care may be provided from time to time but which are not truly facilities for this purpose. Examples of this are families where an elderly or handicapped person lives. [Emphasis added; italics in original.]

35 There is no doubt that the factual background to that decision is completely different from the case at

bar; the same is true of the section of the Act relied on in support of these arguments. The first passage underlined in the extract nevertheless suggests that the rental portion of La Champenoise might not be classified as a reception centre. That does not prevent me from coming to the opposite conclusion. The type of lodging referred to by the Commission is inconsistent with the concept of an organized institution. This follows from the last phrase underlined above, when the Commission mentions facilities which are not created for the purposes of providing the services described in s. 1(k) A.H.S.S.S. In the present case La Champenoise is an organized institution which was specifically created for the purpose of catering to the special needs of the elderly.

36 Another argument put forward by the respondents to show that La Champenoise cannot be classified as a reception centre in its entirety relies on the reasons of Bisson C.J.Q., when he noted that the composition of the board of directors and the criteria for admission to La Champenoise are not in accordance with the respective requirements of ss. 82 and 18.1 A.H.S.S.S. With respect, reading ss. 82 and 76 A.H.S.S.S. together with the heading of the division covering them clearly shows that s. 82 applies only to public establishments. Clearly, therefore, it cannot be made to cover La Champenoise. As for s. 18.1 A.H.S.S.S., which obviously applies to public and private establishments, it provides for the submission of admission criteria to the Conseil régional de la santé et des services sociaux or the Minister, as the case may be. There is nothing to indicate, however, that failure to observe this requirement will as such affect the status of an establishment as a reception centre.

37 The respondents submitted, finally, that a reception centre is not exempt from real estate taxes if it does not hold a permit required by Division VI of the A.H.S.S.S. As La Champenoise holds a permit for 20 residents, the tax exemption could not be valid for its facilities in their entirety but should be limited to the shelter section only. In support of this argument the respondents relied on s. 204(14) A.M.T., which does not define a reception centre as such but rather proceeds by way of a reference to s. 12 A.H.S.S.S. Such a reference, they argued, is not limited to the definition of a reception centre but also takes in the provisions of the Act governing the activities of this type of establishment. I shall again reproduce the paragraph for the sake of convenience:

> 204. The following are exempt from all municipal or school real estate taxes:
>
> . . .
>
> (14) an immoveable belonging to a public establishment within the meaning of the Act respecting health services and social services (chapter S-5), including a reception centre contemplated in section 12 of that act, used for the purposes provided by that act, and an immoveable belonging to the holder of a day care centre permit or nursery school permit contemplated in paragraph 1 or 2 of section 4 or 5 of the Act respecting child day care (chapter S-4.1), used for the purposes provided by that act;

With respect, I cannot subscribe to the respondents' arguments. If the legislature had intended that the tax exemption of a reception centre should be subject to the existence of a permit issued by the proper authority, it would have said so expressly as it did for day-care centres. The same textual argument can be drawn from s. 204(15) A.M.T. with respect to educational institutions. Expressio unius est exclusio alterius. I accordingly share the findings of the BREF on this point.

VI - Conclusion

38 In light of the rules of interpretation formulated in the first part of this analysis, it appears that on the facts found by the BREF the facilities of La Champenoise can be classified in their entirety as a reception centre within the meaning of ss. 1(k) and 12(b) A.H.S.S.S. Similarly, it appears that its property as a whole is used for the purposes provided by that Act, as stipulated by s. 204(14) A.M.T. The decision of the BREF, a specialized tribunal, discloses no error subject to review on appeal. I would accordingly restore the decision of the BREF that the La Champenoise property should be declared exempt from real estate taxes in its entirety for the 1980 to 1984 fiscal years inclusive.

VII - Disposition

39 The appeal is allowed. The judgment of the Quebec Court of Appeal is set aside and the decision of the BREF is affirmed, the whole with costs before the BREF and in all courts.

TAB 3

Strathcona No. 20 (County) v. Alberta (Assessment Appeal Board)

Alberta Judgments

Alberta Court of Appeal

Edmonton Civil Appeals

Fraser C.J.A., Belzil and Conrad JJ.A.

Heard: January 16, 1995.

Judgment: filed April 20, 1995.

Appeal No. 9403-0085-AC

[1995] A.J. No. 369 | 165 A.R. 300 | 1995 ABCA 165 | 54 A.C.W.S. (3d) 834

Between The County of Strathcona No. 20, appellant, and The Alberta Assessment Appeal Board and Shell Canada Limited, respondents

(14 pp.)

On appeal from V. Smith J.

Case Summary

Statutes, Regulations and Rules Cited:

Assessment Appeal Board Act, s. 29. Municipalities Assessment and Equalization Act. Municipal Taxation Act, R.S.A. 1980, c. M-31, ss. 1(g), 1(h), 4(1), 6(1), 7(1), 7(2), 10(1), 11(1), 51, 60. Regulation 372/67. Regulation 505/81.

Real property tax — Assessment appeals — Provincially or municipally appointed tribunal or board — Jurisdiction — Duty of board to give reasons.

The County appealed from a decision dismissing its application to quash a decision of the Alberta Assessment Appeal Board with respect to the Board's assessment of a refinery of Shell Canada Ltd. The Board assessed the property using a particular method of calculation of depreciation. In doing so, it declined to follow the procedure outlined in the Assessors' Manual, adopted by Regulation, for the determination of depreciation.
HELD: The appeal was dismissed.

The court agreed entirely with the Board's conclusion that a mandated twenty five per cent depreciation had no bearing or relationship to market value. A regulation had to remain within the confines of its statute and one could not amend it, as it did in the present case, by adding a foreign factor to the definition of depreciation. In the event of a conflict between the regulation and the statute, the statute had to prevail. That was what the Board had properly recognized. The Board's treatment of mandated depreciation was consonant with the fair and equitable overriding principle expressed in the Act and the general law. The Board did not err in law, but acted within its broad jurisdiction to make assessments. It gave clear and adequate reasons for its decision.

Counsel

W.H. Hurlburt, Q.C. and S.C. McNaughtan, for the appellant. W. Nugent, C.W. Sanderson and E.S. Ruud, for the respondents.

MEMORANDUM OF JUDGMENT

The following judgment was delivered by

THE COURT

1 This appeal is from an order of Mr. Justice Smith of the Court of Queen's Bench dismissing an application by the appellant County of Strathcona for an order in the nature of certiorari quashing a decision of the Alberta Assessment Appeal Board with respect to its assessment of refinery property of the respondent Shell Canada Limited. The appeal raises two grounds, first, failure to assess according to law and lack of jurisdiction, and second, failure to give adequate reasons.

2 The appeal to the Board arose out of the 1985 and 1986 assessments of the styrene plant and the benzene plant which form part of Shell's refinery complex at Scotsford. By its last order which is now the subject matter of this application for judicial review, the Board determined the amount of the assessment for these plant improvements to be $669,707,570.00. The specific issue is whether the Board erred in its method of calculation of depreciation in arriving at fair actual value for assessment purposes.

3 In its detailed reasons, the Board identified the crux of the issue which it had to decide:

> "The fundamental issue facing the Board at this point remains the same as at the original hearing This plant, the Styrene portion, was only constructed at this location because of the perceived advantages of a 'made in Canada' price, under the provisions of the National Energy Program, for crude oil and natural gas. The advantage, in Shell's opinion, tended to offset the disadvantages of the location of this facility, which is many miles from tidewater and major markets. Other styrene plants are located on the Gulf Coast and in Saudi Arabia. There is only one other plant in Canada which is located at Sarnia, Ontario; however, it is very small by the subject's standards.
>
> After the repeal of the National Energy Program and the policy to allow crude oil and natural gas to seek its market level with world prices, Shell contends that this plant, with its locational disadvantages, is unable to compete in the world market and therefore suffers excessive and abnormal depreciation."

4 The course of the proceedings since the assessments is traced by the learned chambers judge:

> "The decision of the Board arises out of the 1985 and 1986 assessments of the styrene plant and the portion of the refinery which was dedicated to the production of benzene. Shell claimed that the styrene plant and a portion of the refinery were suffering from abnormal depreciation due to locational factors. Shell claimed that the location of the property in the County created an economic disadvantage as compared to Shell's competitors who are located on tidewater. Shell appealed the two assessments of the properties. The appeals were dismissed by the Court of Revision in the year they were taken and an appeal was taken to the Board. The Board, heard the appeal and dismissed it in January, 1990. Shell then brought an application for judicial review before Mr. Justice MacCallum. In June, 1991, he quashed the Board's decision and remitted the appeal to the Board for re-hearing. By agreement of the parties, the Board relied on the record it already had and heard the parties' arguments on the implications of the Court's decision for the outcome of the appeal. Based on those arguments, the Board rendered its decision in December, 1992. In June, 1993, the County applied for judicial review of the decision. Later in June, Shell filed a cross-application for judicial review."

5 These assessments were made pursuant to the Municipal Taxation Act c. M-31 R.S.A 1980 (hereafter referred to as the Ad). The relevant sections of the Act are the following:

> ''1 In this Act,
>
> (b.1) 'assessor' means a person appointed under

(i) the Municipalities Assessment and Equalization Act, or

(ii) the Act governing the municipality, to make an assessment in a municipality;

(g) 'depreciation' means a loss in value attributable to any cause;

(h) 'fair actual value' means the fair actual value as determined in accordance with this Act or the regulations under Section 6, ...

4(1) Every year, each municipality shall prepare an assessment roll setting forth the assessed value of all assessable property within the municipality as established by the assessor in accordance with this Act

(6)(1) The Minister may make regulations prescribing

(a) standard and methods of assessment,

(b) levels of value to be used in determining what constitutes fair actual value for the purposes of assessment, and

(c) rules and forms,

for the use and guidance of assessors in making assessments in municipalities.

...

(7)(1) In determining value for assessment purposes, an assessor shall apply the standards and methods of assessment and levels of value prescribed pursuant to section 6 and shall assess in accordance with any rules made in relation to it.

(2) If standards and methods of assessment have not been prescribed in respect of an improvement, the assessor shall determine its fair actual value in a manner that is fair and equitable with the level of value prescribed for use in determining the fair actual value of other improvements.

...

10(1) An improvement of any class thereof on assessable land shall be assessed to the owner of the land apart from the land on which the improvement is situated at the prescribed percentage of its fair actual value.

11(1) An improvement described in section 1(n)(iii) shall be assessed at the percentage of its fair actual value prescribed in the regulations."

6 Section 51 deals with the power of the Court of Revision on complaints to it. It provides:

"51. When the value at which any specified land, improvement or business is assessed appears to be more or less than its fair value, the amount of the assessment of the land, improvement or business, as the case may be, shall nevertheless not be varied on complaint if

(a) the value at which the land is assessed is fair and just in proportion to the value at which all other land in the municipality is assessed,

(b) the value at which the improvement is assessed is fair and just in proportion to the value at which other like improvements in the municipality are assessed, or

(c) the business assessment is fair and just in proportion to the other business assessments in the municipality.

60 The Appeal Board in hearing appeals is governed by the provisions of this Act and the Assessment Appeal Board Act."

7 The jurisdiction of the Assessment Appeal Board is set out in s. 29 of the Assessment Appeal Board Act:

"29 The Board has jurisdiction to determine

(a) the amount of an assessment

(b) whether or not any property is or was assessable,

(c) whether or not the name of any person was properly entered on the assessment roll or whether or not any property or business is or was legally assessed or exempt from assessment, and

(d) whether or not any property was properly classified under section 96 of the Municipal Taxation Act."

8 The foregoing provisions of the Municipal Taxation Act reflect the two fundamental principles of municipal taxation in Canada, firstly, that property be assessed on the common basis of fair actual value so that the cost of municipal government will fairly be borne by taxpayers inter se in proportion to the relative values of their assessable properties and, secondly, that the assessor shall determine the fair actual value in a manner that is fair and equitable with the level of value prescribed for use in determining the fair actual value of other like improvements in the municipality. These fundamental principles of uniformity and impartiality in the imposition of municipal taxes have been accepted since the decision of the Supreme Court of Canada in Jonas v. Gilbert *(1881), 5 S.C.R. 356* (S.C.C.). They are discussed in depth in the recent decision of the British Columbia Court of Appeal in Assessor for Area 9 - Vancouver v. Bramalea Limited and T. Eaton Company *(1990), 52 B.C.L.R. (2d) 218* (C.A). What was said in that case about the British Columbia statute can equally be said about the Alberta Act in this case:

> "So the Act, read in light of the general law, requires, except where otherwise clearly stated, that assessments be both at 'actual value' and also equitable as between taxpayers. It contemplates the possibility that an assessment may be at 'actual value' and yet be inequitable."

9 In T. Eaton Realty Company Ltd. v. Alberta Assessment Appeal Board, et al, *(1992), 1 Alta L.R. (3d) 394* (C.A.) at 398, our Court said "that fair actual value must have relation to the underlying benchmark of market value".

10 In the present case, it is common ground that no standards and methods of assessment and levels of value had been prescribed under s. 6 of the Act, and that actual fair value had to be determined under s. 7(2) "in a manner that is fair and equitable with the level of value prescribed for use in determining the fair actual value of other improvements", to use the words of the section.

11 The submission of the appellant in this case is that the Board erred in law by failing to follow the procedure outlined in the Assessors' Manual adopted by Regulation 372/67 for the determination of depreciation in arriving at "fair actual value" for assessment purposes under the Act.

12 This regulation was first promulgated pursuant to the Municipalities Assessment and Equalization Act the obvious purpose of which, as its title implies, was to equalize assessments between municipalities within the province and not to govern the methods of assessment as between municipality and taxpayer. Regulation 372/67 was intended to achieve that purpose by prescribing uniform standards and methods of assessment to be followed by all assessors in all affected municipalities, and to that end adopted the 1967 Assessment Manual. That Manual prescribed a graduated and declining rate of depreciation for use by assessors in determining actual value for assessment under that Act. The standards, methods, rules and regulations stipulated in that regulation were then made to apply to assessments under the Municipal Taxation Act by Regulation 505/81 which provided:

"i) that in the case of improvements of the kind in question, the assessment should be calculated by

(1) ... adopting the standards, methods, rules and regulations for the guidance of assessors in making assessments prescribed by Appendix "A" and "B" of Alberta Regulation 372/67, and

(2) multiplying the amount so determined by a number that is not relevant to this appeal.

iii) Regulation 358/84 amended Regulation 372/67 by repealing the graduated and declining Depreciation Table in Appendix "C" and substituting a new Depreciation Table A, stated to be a guide to determine depreciation for improvements including the machinery and equipment involved in this appeal."

13 This new depreciation table provided an immediate depreciation allowance of 25% for new machinery and equipment. The 1984 Assessment Manual contained the following explanatory note in s. 1.200.110:

> "1.200.110 REMAINING LIFE: MACHINERY AND EQUIPMENT
>
> 1.200.111 The depreciation of machinery and equipment is, in large measure, influenced by provincial government taxation policies.. The standard remaining life tables for machinery and equipment (1.200.120) are based, essentially, on the declining balance premise of depreciation with the following major modifications:
>
> (1) an immediate depreciation allowance of 25% (75% remaining) is granted to all new machinery and equipment and the allowance remains at this level until the improvement attains an effective age that would have produced a 25% (75% remaining) allowance had the declining balance tables been applicable throughout the life of the improvement;
>
> (2) the declining balance tables are applicable with respect to determining subsequent depreciation allowances when the effective age of the improvement exceeds the age, on the declining balance tables, at which 25% depreciation (75% remaining) is attained;
>
> (3) the declining balance tables continue to be applicable until the improvement attains an effective age that results in a depreciation allowance of 60% (40% remaining) on the declining balance tables. Depreciation is capped at this level and the allowance remains at 60% (40% remaining) so long as the improvement remains in service.
>
> 1.200.112 Abnormal depreciation is not reflected in the standard remaining life tables and may be a potential additional loss in value to the improvement."
>
> [Emphasis added]

14 This 25% immediate depreciation allowance mandated by regulation is what the Board characterized as a "political gift". The Board found that it was not true depreciation within the definition of that term in the Act. It said in its reasons:

> "This brings the Board to the obvious question of the 25% 'political gift' (as it is sometimes called) and whether that should be deducted after the determination of any abnormal depreciation or whether that deduction should be part of the total depreciation even though every plant whether viable or not receives that deduction. It would seem unfair on a plant to plant comparison basis that viable plants receive the same depreciation as uneconomic plants up to 25%. However it is not fair that viable plants receive anything if they should not receive anything. It is an unfortunate use of the term to call this reduction depreciation where depreciation is defined in the Act and cannot mean anything more than what the Act contemplates. The Board will apply the 25% after any abnormal depreciation is determined believing the 25% to be in the nature of a political gift and not depreciation at all."

15 We agree entirely with the Board's conclusion. A mandated 25% depreciation has no bearing or relationship to market value which the appellant itself submits on the authority of Eaton v. Edmonton is the benchmark and lower limit of fair actual value. It does not represent a "loss in value from any cause" within the words of the definition of depreciation in s. 1(g) of the Act. It introduces an artificial factor which is incompatible with the accepted open market concept for the determination of fair value. Its application in the manner advocated by the appellant must inevitably produce a result which conflicts with the basic principle of fairness in municipal taxation reflected in the Act. A regulation must remain within the confines of its statute; it cannot amend it as it did in the present case by adding a foreign factor to the definition of depreciation. That foreign factor was first introduced by the prior declining and graduated depreciation table; increasing it to a flat 25% rate merely made its incompatibility with actual value more apparent. It goes without saying that in the event of a conflict between regulation and statute, the statute must prevail. This is what the Board properly recognized.

16 This depreciation schedule has the earmarks of a tax incentive under government taxation policy referred to in the cautionary note in s. 1.200.111 of the Manual which we have emphasized.

17 Following the hearing of this appeal, the Court requested and received from counsel further written submissions on whether the Board was bound at all by the regulations. In their submissions, both counsel agreed that it was bound by Appendices "A" and "B", but respondent's counsel did not agree that the Manual and Appendix "C' were ever made part of the regulations binding on the Board. In view of the conclusion reached here, this question must remain to be answered on another occasion.

18 The Board's treatment of mandated depreciation was consonant with the fair and equitable overriding principle expressed in the Act and the general law. The Board did not err in law but acted fully within its broad jurisdiction "to make assessments". It gave clear and adequate reasons for its decision.

19 While dismissing the application for judicial review on other grounds, the learned chambers judge in his reasons found that the Board had erred in law in falling to follow the regulation in its calculation of depreciation. While we do not agree with this finding, we otherwise fully agree with his disposition of the application.

20 The appeal is accordingly dismissed with costs. In view of this result, we were advised by counsel for the respondent that we do not have to address his cross-appeal.

FRASER C.J.A.
BELZIL J.A.
CONRAD J.A.

End of Document

TAB 4

Court of King's Bench of Alberta

Citation: McDonald v Edmonton (City), 2023 ABKB 615

Date: 20231101
Docket: 2103 18650
Registry: Edmonton

Between:

Cameron Fraser McDonald and
Right at Home Housing Society

Applicants

- and -

The City of Edmonton and
The City of Edmonton Composite Assessment Review Board

Respondents

Memorandum of Decision
of the
Honourable Justice G.R. Fraser

---

[1] This matter comes before me by way of Judicial Review. The applicants, Cameron Fraser McDonald and Right at Home Housing Society (Society) seek to overturn the finding of the City of Edmonton's Composite Assessment Review Board (Board) that a property was not tax-exempt. The Board's decision can be found at***: Cameron Fraser McDonald, Right at Home Housing Society v The City of Edmonton***, 2021 ABECARB 1331.

[2] The property in question is located in Edmonton's Belvedere neighbourhood. It is a 42 unit building that provides housing and support services to low-income individuals and families. The building also has an office, meeting rooms, and a large common area. Building management

uses a “housing first” method to try and assist homeless people. The building is run as a not-for-profit business collaboration between the Society and NiGiNan Housing Ventures (NiGiNan). NiGiNan is a registered charity that was formed to address the needs and requirements of Indigenous people in Edmonton.

[3] In order to construct the building, the partners received large grants from the City of Edmonton and the Alberta Social Housing Corporation. To receive the grants, the partners had to comply with various conditions.

[4] The building opened in September 2020. Shortly after it opened, an application was made to have it exempted from property taxes. That application was denied January 26, 2021. The denial was appealed to the Board. The appeal was heard in August 2021 and dismissed in a split decision dated September 21, 2021. It is the decision of the Board that is now subject to Judicial Review.

[5] The issues before the Board were as follows:

a. Is the property primarily used for a charitable or benevolent purpose (s 4)?

b. Is the property owned by a non-profit organization and not subject to a lease, license or permit (s 5a)?

c. Are individuals restricted from using the property more than 30% of the time that the property is in use, (s 10) on any basis, including race, culture, ethnic origin or religious belief or the requirement to pay fees of any kind, other than minor entrance or service fees (s 7)?

d. If the residential units are not exempt, should the fifth floor (which contained the office, meeting room, and common area) be exempt?

[6] The Board’s decision was based on the application of the *Community Organization Property Tax Exemption Regulation*, AR 281/98 (COPTER). The relevant sections for the purpose of the Board’s decision were as follows:

> 1 (1) In this Regulation,
>
> ...
>
> (b) “charitable or benevolent purpose” means the relief of poverty, the advancement of education, the advancement of religion or any other purpose beneficial to the community;
>
> 4 (1) Property is not exempt from taxation under section 362(1)(n)(iii), (iv) or (v) of the *Act* or Part 3 of this Regulation unless the property is primarily used for the purpose or use described in those provisions.
>
> (2) For the purposes of this Regulation, a property is primarily used for a purpose or use if the property is used for the specified purpose or use at least 60% of the time that the property is in use.

5 When section 362(1)(n)(i) to (v) of the *Act* or Part 3 of this Regulation requires property to be held by a non-profit organization, a society as defined in the Agricultural Societies Act or a community association for the property to be exempt from taxation, the property is not exempt unless

(a) the organization, society or association is the owner of the property and the property is not subject to a lease, licence or permit, or

(b) the organization, society or association holds the property under a lease, licence or permit.

7 (1) In this Regulation, a reference to the use of property being restricted means, subject to subsections (2) and (3), that individuals are restricted from using the property on any basis, including a restriction based on

(a) race, culture, ethnic origin or religious belief,

(b) the ownership of property,

(c) the requirement to pay fees of any kind, other than minor entrance or service fees, or

...

(3) Not permitting an individual to use a property for safety or liability reasons or because the individual's use of the property would contravene a law does not make the use of the property restricted.

10 (1) Property referred to in section 362(1)(n)(iii) of the *Act* is not exempt from taxation unless

(a) the charitable or benevolent purpose for which the property is primarily used is a purpose that benefits the general public in the municipality in which the property is located, and

(b) the resources of the non-profit organization that holds the property are devoted chiefly to the charitable or benevolent purpose for which the property is used.

(2) Property is not exempt from taxation under section 362(1)(n)(iii) of the *Act* if, for more than 30% of the time that the property is in use, the use of the property is restricted within the meaning of section 7.

[7] The Board denied the application on three grounds:

1. Under s 10(2) the use of the property was restricted more than 30% of the time. This was due to leases for individual units that granted the tenant exclusive use and control of the unit.

2. Under s 7(1)(c) the requirement to pay rent for a residential unit, even a below-market rent, was found to be more than a minor entrance or service fee.

3. Also under s 10 (2), the requirement that at least 50% of the lessees have an Indigenous background also restricted the property more than 30% of the time.

Standard of Review

[8] The leading case on standard of review in the context of judicial review is ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65. The Supreme Court was clear that reasonableness is the presumptive standard of review. In this case, all parties agree that the standard of review is reasonableness.

[9] The Board found that the property met the test under s 362(n)(iii) of the *Municipal Government Act* as it is used for a charitable and benevolent purpose that is for the benefit of the general public. There can be no doubt that the goals of the Society and NiGiGan are highly laudable. They are working very hard to address an urgent need in Edmonton. Homelessness has become a serious problem in Edmonton. One only has to look out the window of the Courthouse or walk a few blocks in any direction to see multiple people who are un-housed.

[10] The City of Edmonton's website states it is building an inclusive city where everyone can enjoy safety, stability, and the opportunity to build a life. That begins with ensuring there are housing options for all Edmontonians.

[11] The funding agreement between the City of Edmonton and the Society includes in the preamble that creating permanent supportive housing is the highest priority for investment in the eradication of homelessness.

[12] The Society and NiGiGan are trying to provide housing options for some of those who are most hard to house. They have other successful joint projects within the city. Successfully moving people away from homelessness saves every level of government a significant amount of money.

[13] However, laudable actions do not mean laws and regulations do not apply. Section 7 and s 10 of COPTER apply to the property.

[14] The majority of the Board found that the property did not comply with COPTER s 7(1)(c). It found that access to the property was restricted more than 30% of the time it was in use in three ways. First, the individual leases meant that tenants had exclusive use of the units. Second, it found the requirement to pay rent to be more than a minor fee. Thirdly, the NiGiGan Agreement requiring 50% Indigenous occupancy also provided a more than 30% restriction.

[15] COPTER does provide some permissible reasons for restricting access. Those reasons are contained in s 7(3). It reads:

> (3) Not permitting an individual to use a property for safety or liability reasons or because the individual's use of the property would contravene a law does not make the use of the property restricted.

[16] The majority decision took a broad interpretation of the phrase in s 7 of COPTER. "use of the property is restricted". It found that the property is restricted if individuals are restricted from using the property on any basis. I find this interpretation to be unreasonable. It is too broad.

[17] In order for any property to operate effectively, there must be some restrictions on its use. Some areas may be required to have limited access for reasons other than safety or liability. A property may not want people from the next building coming into use the microwave, lunchroom and bathroom. This is certainly a reasonable restriction, but hard to categorize as one required for safety or liability reasons.

[18] I note that other decisions of the Board have found that non-profit daycares can be eligible for exemption[1]. It is difficult to envision a daycare that does not in someway restrict public access to its facility.

[19] The Board has also found that a fenced storage and parking area could qualify for tax-exempt status.[2] Again, it is difficult to envision how a fenced storage area does not restrict public access to the property.

[20] It is difficult to imagine any building that provides individual housing units that does not also restrict access. It would be ridiculous to provide people an apartment, but then allow anyone access at any time. Even people living in a tent have some control over who enters the tent.

[21] The minority decision interprets s 7 in a narrower manner. It found that whether "individuals are restricted from using the property on any basis" should be interpreted as meaning restricted from participating in the program.

[22] I find that this is the proper interpretation of the section. The property does not restrict who can access the services offered at the property. Those services include providing accommodation, counselling, and other support services. Consequently, providing individual, exclusive access accommodation does not constitute a restriction of use under s 7.

[23] Using the same interpretation, I find that charging rent does not violate s 7. There are no fees to access the services offered at the property. There are fees associated with having dedicated accommodation at the property. In order to be eligible for accommodation at the property, the tenant must meet requirements under the Provincial Affordable Housing initiatives. Among other things, the tenant must have income below a certain threshold.

[24] I note that previous Board decisions have found that fees charged for space rental were not considered a restriction under COPTER s 7(1)(c) when the fees were similar to those charged by other non-profit organizations. I also note that a not-for-profit daycare was found to not violate the same section. Although not specifically stated, it seems that the daycare did not provide free childcare services. It likely charged subsidized user fees.

[25] I find that the minority decision was correct. Charging a fee for individual accommodation at the property does not constitute a restriction under COPTER s 7(1)(c).

[26] The third ground on which the Board based its decision concerned the requirement that 50% of the program participants self-identify as Indigenous. This requirement is contained in the

[1] See ***Arabian Muslim Association as represented by Canadian Valuation Group Ltd v The City of Edmonton,*** 2022 ABECARB 504; and

[2] ***Al Shamal Shriners Holding Association as represented by Powers & Associates Appraisal Services Inc v The City of Edmonton***, 2021 ABECARB 2206.

Articles of Agreement between Homeward Trust Edmonton and the Homeward Trust Foundation and NiGiGan Housing Ventures and the Society. Pursuant to the agreement, Homeward Trust Foundation would provide up to $684,500 to NiGiGan to provide services as the property. One of the conditions required to receive the funding was that "a minimum of 50% of the program participants (must) self identify as Indigenous".

[27] It is a sad fact that for various reasons Indigenous persons disproportionately suffer from homelessness. Again, the efforts of the Society and NiGiGan to try and address the overrepresentation of Indigenous persons within the homeless population are truly laudable. However, laudable goals do not mean that laws do not apply.

[28] The dissenting decision of the Board found that having a majority of Indigenous participants and creating programming responsive to their needs was not "a restriction based on … race, culture, ethnic origin or religious belief". Instead, it was simply recognizing the demographics of the population to be served.

[29] Although the restriction might be properly recognizing the demographics of the target population, I find that the specific requirement that a minimum of 50% of the program participants must self-identify as Indigenous to be a restriction based on race, culture, or ethnic origin. There is no other reasonable way to interpret this requirement. I can find nothing unreasonable in the majority decision of the Board on this point.

[30] The property does not qualify for a tax exemption.

[31] It is unfortunate that this written requirement in the funding contract results in a denial of tax-exempt status for the property. It is quite likely that given its mandate, the property would have more than 50% of its program participants self-identify as Indigenous regardless of the written requirement. Funds that would have been used to support programs at the property will now be used for property taxes. The City's website states "The City supports the work of Edmonton's homeless-serving sector, providing funding to social agencies for street outreach and activating the extreme weather response to support vulnerable people". At least some of that funding will come from the homeless-serving sector paying property taxes.

Heard on the 12th day of May, 2023.
Dated at the City of Edmonton, Alberta this 1st day of November, 2023.

G.R. Fraser
J.C.K.B.A.

Appearances:

Roger C. Stephens,
Stephens Mah Toogood
for the Applicants

Tanya Boutin,
The City of Edmonton
for the Respondent, The City of Edmonton

Kate L. Hurlburt, K.C.,
Emery Jamieson LLP
for the Respondent, The City of Edmonton Composite Assessment Review Board

TAB 5

Jaeger v. Sundre (Town)

Alberta Municipal Government Board Orders

Alberta Municipal Government Board

Edmonton, Alberta

R. Scotnicki (Presiding Officer) and D. Marchand, (Secretariat)

Heard: November 15, 2004.

Order: February 23, 2005.

Board Order: MGB 024/05

[2005] A.M.G.B.O. No. 40

IN THE MATTER OF the Municipal Government Act being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act) AND IN THE MATTER OF an appeal from a decision of the 2004 ***Assessment*** Review Board (ARB) of the Town of Sundre (Town) Between Wilfred and Sonya Jaeger and Norman and Phyllis Power, represented by Sonya Jaeger, appellant, and Town of Sundre, respondent

(75 paras.)

Appearances

Sonya Jaeger, Representative for the Appellant

Allan Shantz, Assessor for the Respondent

Stephen Washington, Assessor for the Respondent

D. SCOTNICKI, PRESIDING OFFICER

1 Upon notice being given to the affected parties, a hearing was held in the City of Calgary, in the Province of Alberta on November 15, 2004.

2 This is an appeal to the Municipal Government Board (MGB) from a decision of the 2004 ARB of the Town of Sundre with respect to property assessments entered in the 2004 ***assessment*** roll of the Respondent municipality as follows.

Roll No. Owner	Legal Description	Address	***Assessment***
2642.000 Power	Block 42 Plan 9612304 42, 200 4 Avenue SW		$41,610
2798.000 Jaeger	Block 198 Plan 9612536 198, 200 4 Avenue SW		$48,650

OVERVIEW

3 The properties under appeal are two serviced and improved bare land condominium units, each assessed as a parcel and the improvements to it, as required by the Act, situated within the 214 unit Riverside RV Village located in the Town. The fundamental issue to be decided relates to whether or not ***travel trailers*** situated on each of the units (lots) should be assessed and subject to property taxes. Neither the ***assessment*** placed on the lots nor any other improvements are at issue in these appeals.

4 The Appellant contends the ***travel trailers*** are not attached nor connected to any structure, nor are they connected to any utility services provided by a public utility during the off or winter season and therefore should not be assessed. The Respondent maintains the existence of water, sewer and electrical power to the lots means the properties are connected to a public utility and must therefore be assessed.

5 The parties agreed the appeals on both roll numbers should be conducted as a single hearing.

One Member Panel

6 Pursuant to section 487(1)(1.1) of the Act and section 13 of the ***Assessment*** Complaints and Appeals Regulation AR 238/2000, Mr. Scotnicki was assigned to hear and decide these appeals as a single member panel.

BACKGROUND

7 Riverside RV Village consists of 214 units registered in five phases as a bare land condominium. Units 1 through 12 have deep town water and sanitary sewer, natural gas and electrical power utility services. The balance of the units, including the properties under appeal, are serviced with electrical power and shallow town water and sanitary sewer. There is no disagreement that all are utility services provided by a public utility.

8 Because the water and sewer pipes are shallow in the ground, the condominium association shuts off access to these services to prevent freezing over the period mid September or October to mid May. The owners of the subject properties turn off power at the meter and unplug and store a surface power cord for the same annual period.

9 The RV Village is classified as a Recreation Vehicle Direct Control District (RV-DC) under the Town's Land Use Bylaw. The general purpose of this District is "To provide for and control the placement of seasonal recreational vehicles in areas of unique character or special environmental concern which, in the opinion of Council, requires specific regulations unavailable in other land use districts. The area is to be connected to municipal sewer and water systems".

10 The District does not have permitted uses but does allow for recreational vehicles and accessory structures as discretionary uses.

11 The condominium association apparently sets an upper limit of no more than 240 days of occupancy (presumably human habitation on a lot) in a year.

12 Improvements assessed against unit 42, being the Power property are in the amount of $16,600 for a 1994 model fifth wheel. Improvements on unit 198, being the Jaeger property, consist of an open veranda assessed at $2,700 and a 2001 recreational trailer assessed at $18,453 for a total improvement ***assessment*** of $21,150 (rounded).

13 The year 2002 is the first year ***travel trailers*** were assessed in the seven years the RV Park has been in operation.

LEGISLATIVE BACKGROUND

14 The Municipal Government Act directs a municipality to annually prepare an ***assessment***.

285 Each municipality must prepare annually an ***assessment*** for each property in the municipality, except linear property and the property listed in section 298.

15 Section 298 contains an exclusion for certain ***travel trailers***, the applicability of which is central to this case.

16 Property is a defined term.

284(1) In this Part and Parts 10, 11 and 12, (r) "property" means

(i) a parcel of land,

(ii) an improvement, or (iii) a parcel of land and the improvements to it; ... .

17 In these appeals the assessor assessed both the land and the improvements situated on those lands. The land components of the properties are each bare land condominiums whose scope is defined by section 290.1(1) to include their share of the common property. The land ***assessment*** is not in dispute in this case.

18 The Act directs the assessor to prepare an ***assessment*** that reflects the characteristics and physical condition of the property as of the previous December 31.

289(2) Each ***assessment*** must reflect (a) the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the property, ...

19 Improvement is also a defined term.

284(1) In this Part and Parts 10, 11 and 12, (j) "improvement" means

(i) structure,

(ii) any thing attached or secured to a structure, that would be transferred without special mention by a transfer or sale of the structure, (iii) a designated manufactured home, and ... .

20 This is relevant because a travel trailer, itself a defined term, is a form of "designated manufactured home" and therefore is capable of being an improvement unless it is one of those ***travel trailers*** exempted from ***assessment***.

284(1) In this Part and Parts 10, 11 and 12,

(f.1) "designated manufactured home" means a manufactured home, mobile home, modular home or travel trailer; ... .

(w.1) "travel trailer" means a trailer intended to provide accommodation for vacation use and licensed and equipped to travel on a road; ... .

21 The parties agree the assessed improvements in this case are ***travel trailers*** within this definition. Where they disagree is on whether they qualify for the following exemption from ***assessment***.

298(1) No ***assessment*** is to be prepared for the following

property:

(bb) ***travel trailers*** that are

(i) not connected to any utility services provided by a public utility, and (ii) not attached or connected to any structure.

ISSUES

22 In order to decide this matter, the MGB must resolve the following specific issue.

23 Are the subject improvements, defined as ***travel trailers***, assessable or non-assessable under section 298(1)(bb) of the Act?

(i) How should "connected" be interpreted for the purposes of section 298(1)(bb)(i) of the Act?

(ii) How should "attached or connected" be interpreted for the purposes of section 298(1)(bb)(ii)?

(iii) As of December 31, 2003, were the subject ***travel trailers*** connected to any utility services provided by a public utility?

(iv) As of December 31, 2003, was the Jaeger travel trailer attached or connected to any structure?

(v) What is the significance of December 31 in the ***assessment*** or non-***assessment*** of a travel trailer?

SUMMARY OF APPELLANT'S POSITION

24 Ms. Jaeger, representing the Power and Jaeger properties asserted that neither of the ***travel trailers*** should be assessed because the properties are void of utility services from mid September to mid May and the travel trailer on the Jaeger property is not attached or connected to the adjoining open veranda. This was supported by the following evidence and argument.

25 Because the condominium association shuts off the main valves, water and sewer services are only accessible, on average, from the May long weekend to mid September in any given year. Power is turned off at the meter, the trailer power cord retracted and stored and meter readings remain static from mid September to the May long weekend.

26 The ***travel trailers*** are only used sporadically on weekends and on the road for vacation purposes. Both are registered and licensed under the Highway Traffic Act. Neither is used as a residence. Two colour photographs were presented to support the oral evidence that the developed veranda on the Jaeger property was located two inches from the trailer and therefore not connected or attached to it.

27 It was also identified that the lattice skirting around the base of the trailer is not permanently attached but placed on hooks for each removal.

28 The Appellant referenced section 289(2)(a) of the Act and argued the characteristics and physical condition of the subject properties on December 31 of the ***assessment*** year was not properly considered by the assessor. On December 31, 2003 the ***travel trailers***, pursuant to section 298(1)(bb) were not connected to any utility services provided by a public utility nor were they attached or connected to any structure.

29 The Appellant questioned the Town's position that to qualify as a non-assessable travel trailer, the subject trailers would have to be removed from the RV Park prior to December 31 of every year. It was stated that such a section could not be found in the Act. The Appellant had never heard of a municipal taxing authority assessing ***travel trailers*** as residential households because they did not remove winterized, licensed vehicles off their property prior to December 31. It was argued the ***travel trailers*** are in storage on the subject lots on December 31 and the Act does not direct travel trailer owners to place their trailers in the back yard of their residences, or into storage.

30 The Appellant concluded by requesting that the valuation placed on the two trailers be removed from the ***assessment*** on Roll Nos. 2642.000 and 2798.000.

SUMMARY OF RESPONDENT'S POSITION

31 Mr. Allan Shantz, assisted by Mr. Stephen Washington, presented evidence and argument on behalf of the Respondent.

32 The Respondent stated that he sent the Riverside RV Village condominium executive a letter dated September 18, 2003 regarding an intention to review any assessable improvements in the Park. If owners did not wish improvements such as trailers assessed for 2004 taxation, they would have an opportunity to remove them prior to December 31, 2003. It was mentioned the letter was distributed at the fall condominium annual general meeting about the end of September.

33 All assessed improvements were initially inspected on October 14 and 15, 2003 and again on December 3 and 4, 2003 to review previously completed work and delete assessments on any trailer units that were removed from a lot. It was indicated and confirmed by the Appellant, that both trailers were on their respective lots as of December 31, 2003. The Respondent interpreted section 289(2)(a) of the Act to mean if there is no travel trailer on the lot on December 31, you cannot assess it. Notwithstanding an opinion regarding his defined status of other trailers in the RV Park as being immobile and therefore assessed as structures, the Appellant conceded that the subject trailers met the section 284(1)(w.i) definition of a travel trailer because "... they do occasionally leave their site".

34 The Respondent stated the intent of the definition of "travel trailer" was to have no ***assessment*** prepared for those trailers parked in your back yard, or in storage, that are typically towed to various locations for annual vacation. The intent was not to exempt trailers occupying recreational properties and used for recreational purposes. The intent was to allow for the ***assessment*** of ***travel trailers*** used in the same capacity as a summer cabin or cottage that have either deep, shallow or no utilities and still assessed as an improvement. In this regard, the Respondent indicated that the Act was amended to include a definition for a travel trailer and a new section 298(1)(bb) to specify the criteria required before a travel trailer would not be assessed.

> 298(1) No ***assessment*** is to be prepared for the following
>
> property:
>
> (bb) ***travel trailers*** that are
>
> (i) not connected to any utility services provided by a public utility, and (ii) not attached or connected to any structure.

35 The subject ***travel trailers*** are on lots with power and shallow utilities that are usable approximately mid May to mid October. All available services are used for the purpose for which they were intended, including the length of time connected.

36 Although each improvement is used for only five months a year, it remains assessable for the entire year. To winterize improvements is similar to a summer cabin with shallow utilities, and they are assessed. It was further indicated there is no legislation stating an improvement must be a primary residence in order to be assessed or that there is exception for a seasonally used residence. If that were the case, then any vacant residence or summer cabin would not pay taxes, which is not the case.

37 Colour photographs taken in the spring of 2004 were presented. They showed above ground water, sewer and power public utility hook-ups within each lot and adjacent to each travel trailer. The photographs identify electrical conduit emerging from the ground and terminating in a receptacle. The conduit and receptacle, as well as a water pipe and spigot, are attached to a four by four post at this point. The sanitary sewer also emerges from the ground at this point and rigid plastic pipe continues on the surface from beside the post to the underside of the trailer. A surface water hose exists between the spigot and trailer and a surface power cord exists between the receptacle and trailer. The Respondent asserted that the photographs demonstrate the subject trailers are connected to three public utilities. As a result, it is the Town's position that the subject ***travel trailers*** fail to meet the conditions of 298(1)(bb) and are assessable. They are connected to a public utility or the utility is available to the property line of the condominium and to each lot.

38 In reviewing previous legislation such as the Municipal Taxation Act and amendments to the original 1994 Municipal Government Act, the Respondent stated it was clear the intent of those amendments pertaining to ***travel trailers*** was to strengthen the legislation and allow for their ***assessment*** unless certain conditions were met.

39 The Respondent referred to a decision made by the Alberta ***Assessment*** Appeal Board (AAAB) under the Municipal Taxation Act, being Board Order 39/87; a decision made by the MGB under the Act, being Board Order 33/98; and a more recent MGB Notice of Decision dated January 20, 2000 for a trailer located in Red Deer County in support of argument that the trailers should be assessed. Copies of the two latter decisions were included in the written submission. It was indicated the January 12, 2000 decision upheld the ***assessment*** of a trailer located at Carefree Resort that was connected to shallow utilities and power as a public utility. The MGB determined the trailer was assessable because, pursuant to section 298(1)(bb) it was connected to utility services. The Respondent pointed out the trailer at Carefree Resort was only connected to power as a public utility whereas in these appeals the improvements are connected to three public utilities.

40 In response to questions posed by the Appellant the Respondent replied:

i) that s. 298(1)(bb)(i) regarding public utility services would apply to ***travel trailers*** in back yards;

ii) a commercial campground operator is the assessed person for all improvements on his land.

41 The Respondent requested the assessments be confirmed.

FINDINGS OF FACT

42 Upon hearing and considering the representations and the evidence of the parties shown on Appendix A, and upon having read and considered the documents shown on Appendix B attached, the MGB finds the facts in the matter to be as follows.

1. For the purpose of section 298(1)(bb)(i) of the Act, "connected" means pipes, cables, or things within a travel trailer joined or linked together with pipes, cables or things supplying a public utility for the purpose of providing a utility service for the consumption, benefit, convenience or use of the occupants of a travel trailer.
2. For the purpose of section 298(1)(bb)(ii) of the Act, "attached or connected" means the union of a travel trailer to a structure in a way that both structures are fastened, tied, joined or linked together.
3. As of December 31, 2003, both ***travel trailers*** were connected to an electrical utility service provided by a public utility.
4. As of December 31, 2003, the Jaeger travel trailer was not attached or connected to any structure.
5. December 31 is the uniform statutory date in the province for the determination of the characteristics and physical condition of properties that must be assessed at market value as of July 1 of the ***assessment*** year.

43 In consideration of the above, and having regard to the provisions of the Act, the MGB makes the following decision for the reasons set out below.

DECISION

44 The appeals with respect to the two properties are denied and the assessments are upheld.

45 It is so ordered.

REASONS

46 The legislature has directed itself specifically to the ***assessment*** of ***travel trailers***. They are capable of being used much like an ordinary mobile home (which is subject to ***assessment*** and thus municipal property tax), but they are also capable of being used much like a vehicle and vehicles are not subject to such ***assessment***. This case is about the dividing line between those two uses.

47 Improvements to land are taxable. Whether something is an improvement, in a general sense, is determined by the degree of its connection to the land. This can be seen in the Part's special definitions of structure and improvement. Ordinary chattels are not usually assessable except to the extent they form part of the structure or are affixed to the improvement. The exclusion provision in respect to ***travel trailers*** appears to serve the same function which is to describe the level of connection to the assessable land that justifies the imposition of a municipal property tax.

48 The wording of the exclusion in section 298(1)(bb), with its double negatives, is not immediately obvious. However, read with its purpose in mind its meaning becomes clearer. The Appellant questions whether both criteria in section 298(1)(bb) have to be met for the exemption to apply. The MGB's interpretation of the section is that both criteria must be met or the exemption does not apply. That is, the MGB reads the section to be exempt from ***assessment***.

> "... ***travel trailers*** that are
>
> (i) not connected to any utility services provided by a public utility, and
>
> (ii) not attached or connected to any structure."

49 If either characteristic or physical condition exists, the travel trailer in question is assessable. The use of the term "and" to connect the two sub-clauses of 298(1) (bb) indicates that the conditions listed are both required as a prerequisite for the exemption. If the legislature had intended that meeting either condition would qualify a travel trailer for exemption from ***assessment***, then the term used would have been "or".

As to the Meaning of Connected, Attached

50 The parties differ in their interpretation of the words "connected" and "attached" in section 298(1)(bb), although neither party offered any specific definition to support their position. The words "connected" and "attached" are ordinary English words and for the purposes of the Act, should be given the meaning an ordinary person would attribute to them.

51 The Canadian Senior Dictionary, 1979 defines connect as "join (one thing to another); link (two things together); fasten together; unite". Connected is defined as "joined together" fastened together".

52 The Concise Oxford Dictionary, 7th Edition defines connect as "join (two things, one to another); join in sequence or order; cause to be joined ... practically ...". Connected is defined as "... joined in sequence ...". Attached is defined as "fasten (thing to another); join ... bind ...".

53 Webster's New Collegiate Dictionary, 1979 defines connect as "to join or fasten together usually by something intervening ... to become joined ...". Connected is defined as "joined or linked together ...". Attach is defined as "to bind; fasten; tie; connect".

54 Noting the high level of consistency within the definitions, the MGB is satisfied the ordinary meaning of the words connected and attached for the purposes of section 298(1)(bb) are intended to mean joined together, linked together, fastened or tied together.

55 However, these words need to be interpreted in the context in which they are used in each of Section 298(1)(bb)'s subsections.

As to a Connection to a Public Utility

56 Subsection (i) speaks of connection to utility services provided by a public utility. The term "any" as used in sub-clause (i) indicates that just one utility service connection is sufficient to disqualify the travel trailer from the exemption. Public utility is a defined term.

1(1) In this Act,

(y) "public utility" means a system or works used

to provide one or more of the following for

public consumption, benefit, convenience or

use:

(i) water or steam;

(ii) sewage disposal;

(iii) public transportation operated by or on behalf of the municipality;

(iv) irrigation;

(v) drainage;

(vi) fuel;

(vii) electric power;

(viii) heat;

(ix) waste management;

(x) residential and commercial street lighting,

and includes the thing that is provided for public

consumption, benefit, convenience or use; ....

57 The MGB is satisfied the word "connected" in section 298(1)(bb)(i) is intended to describe the relationship between a travel trailer and a utility service from a public utility, not the relationship between the parcel of land and the public utility. If the latter was the case, the legislature would have used language such as found in Regulation AR 289/99 Matters Relating to ***Assessment*** and Taxation (consolidated up to 330/2003), section 3(3)(d)(ii) which reads

3(3) Despite subsection (1)(b), the valuation standard

for the following property is market value:

(d) an area of 3 acres that

(ii) can be serviced by using water and sewer distribution lines located in land that is adjacent to the parcel;

... .

58 If mere availability of a public utility at the property line was intended to be sufficient, then every travel trailer located on any serviced parcel, but not accessing the adjacent public utility, would be liable to be assessed.

59 In interpreting the degree of connectedness required for the exemption to be lost, the MGB believes that one must again look at the purpose of the provision. ***Travel trailers*** (by definition and in reality) are used to provide accommodation for vacation use. When they are used in this way they frequently make transient use of utility services. They may flush their grey waste through a pipe to a gas station or vacation park's storage pit. They may plug in the electrical cord from their trailer to an available receptacle to provide power for nighttime lighting. In the winter they may plug their block heater into a residential outlet to protect the motor from freezing. None of these temporary uses of utilities indicate a degree of connectedness of the type that would make the trailer in question sufficiently analogous to other types of mobile home for the purposes of municipal ***assessment***.

60 For a travel trailer to be excluded because of its connection to utility services provided by a public utility, the MGB believes that connection must be a dedicated connection for that trailer of the type that would allow the trailer

to be used as a mobile home in a way that would distinguish it from a travel trailer being used for the purposes described in the Act's definition.

61 This does not mean, however, that the utility service must be constantly on. The owners, by voluntarily unplugging the power from the outdoor receptacle and turning off the switch at the meter, do not disconnect themselves from a utility service that is otherwise available. The electrical power supply in this case was switched off from mid September to mid May, and more importantly, on December 31, 2003. However, the evidence suggests that the power from the public utility could be simply accessed by switching on the power at the meter panel or switch box and plugging in the trailer's power cord to the receptacle on the lot. Indeed, the actions of the subject travel trailer owners is really no different from that of a person in a dwelling turning off a switch or breaker at the electrical panel. To conclude that the ***travel trailers*** are not connected to an electrical power utility service is fundamentally unreasonable because such a decision would condone acts of mischief by persons attempting to avoid property taxation. The oral evidence that the meter does not register any power consumption for up to eight months in a year does not mean the trailer is not connected to a utility service provided by a public utility. It only means that the power source has not been accessed or not used. Accordingly, the MGB is satisfied the travel trailer is assessable because it is connected to a utility service provided by a public utility.

As to Water and Sewer Utility Services

62 The MGB agrees with the Appellant that on December 31, 2003 the travel trailer was not connected to the water and sanitary sewer utility services provided by a public utility. On that mid-winter date, it is a certainty that the public utilities could not be accessed or used no matter what attempts might have been made to connect hoses or pipes from the trailer to pipes leading to the public utility services.

63 In the opinion of the MGB, the fact that water and sewer pipes are shallow and not deep provides convincing evidence that the pipes cannot be accessed or used for drawing water or discharging sanitary sewage. If the pipes providing the two utility services were deep, this would signal that water could flow and sewage could be discharged provided the pipes within the lot and to the trailer were also deep or set up as not to freeze.

64 The MGB concludes that connection includes a functional aspect and the fact that pipes are connected is not sufficient for the disqualification if they are incapable of fulfilling their purpose.

As to Being Attached or Connected to a Structure

65 Notwithstanding the Respondent's generic description of numerous structures in the RV Park attached to ***travel trailers*** or attached to other structures not meeting the test of a travel trailer, there was little evidence presented to support a contention in the written submission that inferred the Jaeger travel trailer was attached to an adjacent deck with open veranda. The MGB accepts the Appellant's oral evidence that the deck and open veranda is two inches away from the travel trailer and therefore not attached or connected to it. The photographs presented by both parties identify a structure in very close proximity to the trailer but whether it is attached or not cannot be determined.

As to Prior Legislation and Decisions

66 The reference to a 1987 Alberta ***Assessment*** Appeal Board decision under the rescinded Municipal Taxation Act and the 1998 MGB Board Order 33/98 are both of limited value to this appeal because of changed legislation. Amendments to the Act pertaining to ***travel trailers*** came into effect in April of 1999. The definition of a travel trailer as in 284(1)(w.1) was introduced for the first time, as was totally new criteria for determining whether a travel trailer was assessable or not under a new section 298(1)(bb).

67 The January 12, 2000 MGB decision letter regarding a Carefree Resort appeal in Red Deer County is of no value to this appeal because of the absence of findings and facts.

As to the Significance of December 31

68 The significance of December 31 in section 289(2) of the Act requires comment. The MGB's position is that the uniform statutory last day of the year is there to ensure the characteristics and physical condition of every property required to be valued at market value are fully captured in the ***assessment*** to be employed for the purposes of taxation, effective the immediate following date, once the local council passes a tax rate bylaw.

69 It must be pointed out that the assessor has a duty to determine the assessments of a given property based on its characteristics and physical condition on December 31, but valued as of July 1 of the ***assessment*** year. Having determined that ***assessment***, the assessor does not have authority to reduce an ***assessment*** in the event a property's characteristics or physical condition changes or is rendered all or partially uninhabitable during the taxation year as would be the case through fire or demolition. Pursuant to section 330(1) of the Act, the assessor only has authority to change an ***assessment*** in the tax year if it is discovered there is an error or omission in the information relating to the characteristics and physical condition of the property as of December 31 of the immediately prior ***assessment*** year.

70 The only recourse to a ratepayer for changes that have occurred to a structure's characteristic or physical condition in a tax year is to the municipal council pursuant to the following section of the Act.

> 347(1) If a council considers it equitable to do so, it
>
> may, generally or with respect to a particular taxable
>
> property or business or a class of taxable property or
>
> business, do one or more of the following, with or
>
> without conditions:
>
> (a) cancel or reduce tax arrears;
>
> (b) cancel or refund all or part of a tax;
>
> (c) defer the collection of a tax.

As to Campgrounds and ***Travel Trailers*** in Backyards

71 The debate between the parties regarding the assessability of ***travel trailers*** located in campgrounds and residential backyards requires comment.

72 It should be understood the legislation requires that any and all improvements situated on a campground as of December 31, with some exceptions, are assessable to the owner of the campground. One such exception would be a travel trailer owned by a vacationing traveller situated on a pad and plugged into electrical power within the campground on December 31. The campground owner is in the business of renting pads to itinerant travellers for short-term stay. He also derives income by offering other services, such as electrical power hook up, for a fee. Given the purpose and intent of the legislation, it would be unreasonable to conclude that such temporary arrangement would constitute a connection to electrical power provided by a public utility and therefore make the licensed and mobile travel trailer, owned or rented by a traveller, assessable to the owner of the campground.

73 Finally, it is common knowledge that the utility services provided by a public utility to a typical residential property are installed under an approved permit for the principle benefit of the residential dwelling unit on the parcel. That dwelling unit is then connected to such utility services. An ***assessment*** based on the characteristics and physical condition of the entire property as of December 31, would be conducted and taxation would typically occur in the usual manner. Again, it would be unreasonable to suggest that a travel trailer stored in the backyard of the dwelling unit, but plugged into a live electrical receptacle on December 31 should be assessable. The travel trailer in such circumstances is only connected to the public utility in the most indirect of ways. The owner of the residential property already pays property taxes on the improved property and should not be expected to be

assessed and pay tax on the travel trailer because it is simply plugged into electrical power unless it is so connected and set up to be used for seasonal or permanent habitation. If in fact it was determined the travel trailer was being used for other than infrequent habitation, there is little doubt that it would be quickly discontinued because such use would be in violation of the municipal land use bylaw. This situation is clearly quite different to that of ***travel trailers*** legally located and used or intended to be used within an approved and purpose designed Recreation Vehicle Park in which the ***travel trailers*** are the principle structure and all recreational vehicles and accessory structures are discretionary uses that would require a development permit.

CONCLUSION

74 Throughout the hearing, the Respondent emphasized that the purpose of the legislation affecting ***travel trailers*** is an attempt to create a fair and equitable municipal property tax regime between ***travel trailers*** regularly situated on parcels and occupied or intended to be occupied by persons on a more than infrequent basis, and other improvements such as vacation homes and summer cottages. The MGB concurs with this understanding. The criteria for assessability of ***travel trailers*** hinges on characteristics that connote a degree of permanency, such as being connected to at least one utility service provided by a public utility or attached or connected to a structure. If either of these conditions exist as of the last date of an ***assessment*** year, the assessor is duty bound to assess the travel trailer at a market value standard. In the case of the subject ***travel trailers***, the evidence presented plainly indicates that the power utility service was temporarily discontinued between the switch box and travel trailer through the voluntary actions of the owners. There was no evidence presented to indicate that electrical power was unavailable had the owners desired the service.

75 No costs to either party.

D. SCOTNICKI, PRESIDING OFFICER

* * * * *

APPENDIX "A"

APPEARANCES

NAME	CAPACITY
Sonya Jaeger Allan Shantz Stephen Washington	Representative for the Appellant Assessor for the Respondent Assessor for the Respondent

* * * * *

APPENDIX "B"

DOCUMENTS RECEIVED AT THE HEARING AND CONSIDERED BY THE MGB:

NO.	ITEM

Exhibit 1A Exhibit 2A Exhibit 3R Exhibit 4R	Submission of the Appellant, Jaeger Property Submission of the Appellant, Power Property Submission of the Respondent, ***Assessment*** Brief Submission of the Respondent, Image Report

End of Document

TAB 6

Taverner v. Sundre (Town)

Alberta Municipal Government Board Orders

Alberta Municipal Government Board

Edmonton, Alberta

N. Dennis (Presiding Officer), R. Scotnicki and W. Morgan (Members) and D. Marchand (Secretariat)

Heard: March 29, 2005.

Order: July 18, 2005.

Board Order: MGB 064/05

Amending Board Order: MGB 123/05

[2005] A.M.G.B.O. No. 155

IN THE MATTER OF the Municipal Government Act being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act) AND IN THE MATTER OF an appeal from a decision of the 2004 ***Assessment*** Review Board (ARB) of the Town of Sundre Between Robert C. Taverner, et. al, represented by ***Assessment*** Advisory Group, appellant, and Town of Sundre, respondent

(65 paras.)

Appearances

A. Shantz, Assessor for the Respondent

S. Washington, Assessor for the Respondent

S. Cobb, Agent for the Appellant

[Editor's note: An Amending Board Order was released December 12, 2005; the corrections have been made to the text and the amendment is appended to this document.]

W. MORGAN, MEMBER

1 Upon notice being given to the affected parties, a hearing was held in the City of Calgary, in the Province of Alberta on March 29, 2005.

2 This is an appeal to the Municipal Government Board (MGB) from a decision of the 2004 ARB of the Town of Sundre with respect to property assessments entered in the ***assessment*** roll of the Respondent municipality as follows.

Roll No.	Owner Legal Description ***Assessment*** Robert C. Taverner Blk 8 Pl 9612304 $46,970 Gordon
2608.000	& Joanne Halvorsen Lt 10 Pl 9612304 $45,860 Bruce M. Douglas, Joan P. Eldridge Lt 13 Pl
2610.000	9612304 $65,840 Jeffrey Allan and Sherry Ann Nickel Lt 16 Pl 9612304 $45,320 Marlene &
2613.000	Wayne Gilbert Lt 17 Pl 9612304 $40,880 Dennis and Bonnie Boyle Lt 18 Pl 9612304 $43,190
2616.000	Jane MacFarlane, Ann Marie McIntyre Lt 22 Pl 9612304 $35,400 Ruth Elizabeth Hunter Lt 23

Pl 9612304 $36,920 Ruth Elizabeth Hunter Lt 24 Pl 9612304 $48,730 Michael & Lynn Halket Lt 25 Pl 9612304 $48,790 William Leroy Browne Lt 27 Pl 9612304 $49,970 Carolyn Galley Lt 34 Pl 9612304 $30,640 Good Plumbing & Heating Lt 36 Pl 9612304 $39,730 Jay Murray & Margaret Linda Lt 38 Pl 9612304 $42,480 Hallworth

Earl Little, Kathy L. Bentley Lt 43 Pl 9612304 $31,170 Colleen Waters Lt 44 Pl 9612304 $34,590 Terry Drummond, Helene Marie Lt 48 Pl 9612304 $41,100 McGregor

James G. & Marilyn G Hannay Lt 50 Pl 9612304 $45,420 Raymond C. & Margaret W. Kromm Lt 51 Pl 9612304 $47,480 Ges Homes Ltd., Janet & Al Berdahl Lt 52 Pl 9612304 $25,000 Andy & Patty McLiesh Lt 54 Pl 9612304 $39,280 Gordon & Maryann Storey Lt 55 Pl 9612304 $40,350 Peter R. & Dimphena C. Vaughan Lt 58 Pl 9612304 $41,280 Daniel & Norma Goldring Lt 61 Pl 9612304 $56,470 Robert Sinclair Lt 62 Pl 9612304 $45,410 Paul M. & Myrna L. Schuck Lt 63 Pl 9612304 $44,740 Charles H. Blakey Lt 64 Pl 9612304 $45,410 Glen & Debra Mohan Lt 65 Pl 9612304 $46,580 Robert & Elizabeth Skippen Lt 67 Pl 9612304 $57,890 Benoit P. & Martha Mae Cyr Lt 69 Pl 9711313 $38,350 Ray & Sophie Shiels Lt 70 Pl 9711313 $41,160 Gerald & Myrna Isaac Lt 71 Pl 9711313 $31,670 Vernon L. & Rose C. Burlock Lt 77 Pl 9711313 $44,610 Mick, Lloyd & Valene Perdue Lt 81 Pl 9711313 $50,590 David & Beita Dalton Lt 82 Pl 9711313 $43,580 Glenn & Wendy Wyrostok Lt 83 Pl 9711313 $43,950 Daphne Werenka Lt 84 Pl 9711313 $38,160 Edward Allen Lt 87 Pl 9711313 $43,510 John & Joanne Wildfong Lt 89 Pl 9711313 $41,420 Marvin & Judy Peperkorn Lt 93 Pl 9711313 $46,240 Envirologic Systems Inc. Lt 95 Pl 9711313 $50,660 John & Katherine Kovacik Lt 97 Pl 9711313 $36,540 Karen Bentley, Jeffrey C. Neufeld Lt 98 Pl 9711313 $41,950 Merna Rasmussen Lt 101 Pl 9711313 $45,350 Claudia & Bryan Luck Lt 102 Pl 9711313 $37,420 Todd & Sharon Berling Lt 105 Pl 9711313 $41,050 Kevin and Sharon Lukeman Lt 106 Pl 9711313 $47,660 Lina Runquist, Scot & Deborah Lt 107 Pl 9711313 $51,210 McKinnon

John & Irene Thiessen Lt 115 Pl 9711313 $38,710 Beverly-Ann Bandura Lt 116 Pl 9711313 $41,460 Cliff and Alexa Nernberg Lt 121 Pl 9812180 $41,630 Patrick and Marion Coupland Lt 122 Pl 9812180 $39,950 Allan R. & Sheila M. Friesen Lt 124 Pl 9812180 $45,210 Robert & Elizabeth McKenzie Lt 128 Pl 9812180 $46,380 Frederick & Pauline Fisk Lt 136 Pl 9812180 $49,770 Dwight & Lori McKague Lt 138 Pl 9812180 $62,070 Ronn & Jewel Nielsen Lt 140 Pl 9812180 $46,920 John & Maureen Kingsbury Lt 157 Pl 9812180 $45,480 Eroca Rosenar Lt 166 Pl 9812525 $37,400 Robert & Janice Campbell Lt 174 Pl 9812525 $43,560 Jim and Florence Garside Lt 186 Pl 9812536 $44,560 Harold & Hilda Ager Lt 199 Pl 9812536 $47,590 Patricia & Vince Ryan Lt 202 Pl 9812536 $52,240 Vickie & Darrel Koester Lt 205 Pl 9812536 $56,960 Brian D. & Marjorie A. Jeannotte Lt 206 Pl 9812536 $44,510 Richard & Roseanne Adams Lt 208 Pl 9812536 $44,620 Max & Patricia Rudneu Lt 212 Pl 9812536 $46,200 Helmut & Beverley Deisinger Lt 214 Pl 9812536 $44,880

2808.000
2812.000
2814.000

PRELIMINARY MATTERS

3 The following two properties were included in the original appeal application, however the owners withdrew from this group appeal. Neither the Respondent nor the Appellant had any objection to these properties being dropped from the group appeal.

Roll No.	Owner	Legal Description	***Assessment***
2745.000	Earl & Edith Ohlhauser	Lt 145 Pl 9812180	44,070
2760.000	Ken and Grace Jesse	Lt 160 Pl 9812733	42,630

4 The parties agreed that the appeals on all roll numbers should be conducted as a single hearing. Further, all parties agreed that, given the number of owners present at the hearing, any factual clarifications required could be provided as direct evidence from the owners.

OVERVIEW

5 This is an ***assessment*** appeal as to whether or not the 67 subject ***travel trailers*** situated on individual condominium lots are assessable. The sole issue is whether or not the trailers should be, pursuant to section 298(1)(bb)(i) of the Act, considered "connected to any utility services provided by a public utility" and therefore no longer satisfy the requirements to be non-assessable property. All parties concede that the subject trailers satisfy the other requirements needed to be non-assessable property as outlined in the legislation. Similarly, the ***assessment*** of the land and other improvements is not at issue.

6 The Appellant submitted that the ***travel trailers*** are not assessable for six reasons. First, the Appellant noted that the nature of the subject trailers satisfied the intent behind the trailer exemption legislation; they are temporary mobile vacation units and not analogous to permanent residences. The by-law restrictions in operation for the RV park that require the trailers to be mobile and equipped for travel were reviewed to provide this context. Second, the seasonal access each trailer has to power, water and sewer does not mean the trailer is "connected" to a public utility and therefore the exemption in section 298(1)(bb) of the Act applies. Third, in the alternative, the exemption applies as the access to water, power and sewer is though Condominium Association (Association) and therefore the utilities in question are private, not public. Fourth, the trailers could not access the utilities on December 31, 2003, which is the condition date set by the Act for a 2004 ***assessment***. Fifth, the Town of Sundre (Town) is estopped from assessing the trailers as it stated in a letter to the developer in 1997 that the trailers were not assessable. Sixth, the assessor's direction that owners who temporarily moved their trailers on December 31, 2003 would not be assessed is unfair and inequitable. The appropriate remedy is that all the similar trailers should not be assessed, regardless if they were absent on one set day or not.

7 The Respondent maintains that the properties are connected to a public utility and must therefore be assessed. The Respondent cited the recently released Board Order MGB 024/05, which held that two other trailers within the RV Park were assessable, for support.

BACKGROUND

8 Riverside RV Village consists of 214 units registered in five phases as bare land condominiums. Improved sites generally have a travel trailer and may have adjoining open verandas, living areas or bedrooms. Units 1 through 12 have deep town water and sanitary sewer, natural gas and electrical power utility services. The remaining units,

including all the properties under appeal, are serviced with electrical power and shallow fresh water and sanitary sewer.

9 Water is obtained through a hose attachment. Trailers also have the ability to access a seasonal sewer system that is owned and operated by the Association by way of an outlet on each lot provided by the Association. The trailers are not charged for water and sewer based on individual usage, but the overall cost is included in the condo fee. The Association also shuts off access to these services to prevent freezing over from mid-September or October to mid-May, as the water and sewer pipes are shallow in the ground.

10 Electricity is available by plugging a three-prong plug into an electrical box. This use is metered and property owners are individually charged. Neither disconnect nor reconnect fees are charged by the public utilities when the property owners start or discontinue usage as the utility lines remain electrified year-round. From approximately mid-September or October to mid-May, the owners generally and voluntarily turn off power at the meter panel, which is not on the lot but within the RV Village common property. The underground conduit that protects the wires that run from the meter panel to the individual lots is not energized when the power is turned off at the panel. Typically owners unplug and store their surface power cords when not in use. Owners who desire access to electrical power during the winter months remain free to do so, provided annual property occupancy does not exceed 240 days. Access to the panel as well as the individual lots may be a problem during the winter months.

11 The RV Village is classified as a Recreation Vehicle Direct Control District (RV-DC) under the Town's Land Use Bylaw. The general purpose of this District is "To provide for and control the placement of seasonal recreational vehicles in areas of unique character or special environmental concern which, in the opinion of Council, requires specific regulations unavailable in other land use districts. The area is to be connected to municipal sewer and water systems".

12 The trailers are subject to a number of restrictions from the Association and the Town. The Association limits occupancy by owner or other tenant to a total of 240 days per year. Further, the trailers must be licensed, have wheels and a hitch and remain capable of relocation. Concrete foundations or other permanent structures are prohibited. The Town by-laws similarly provide that the trailers must remain licensed and travel ready, including maintaining wheels and a hitch.

13 In light of the above by-laws and restrictions, as well as documentary and oral evidence provided at the hearing which supported that the trailers complied with the restrictions, it was agreed that all the trailers were, for the purposes of this hearing, licensed and equipped to travel on a road. It was further conceded that, while some trailers have adjoining structures there is a gap between the structures and their respective trailers. As a result, it is agreed that the trailers are not attached to any structure.

14 In their February 27, 1997 letter the Town of Sundre addressed the issue of Recreation Vehicle Taxation to the Condo Association. The assessor's position at that time, based on legislation that has since changed, was "Vacation trailers are not assessable, however a park model would be assessable as an improvement and is taxable. Each lot is also assessable and taxable". No ***assessment*** was placed on the ***travel trailers*** until ***assessment*** year 2003.

15 The Association executive was advised via a letter from the assessor dated September 18, 2003 of their intent to "review any assessable improvements and if owners did not wish improvements (trailers) assessed for taxation purposes for 2004 they would have the opportunity to remove them prior to December 31, 2003". The letter was distributed at the fall Association general meeting at the end of September 2003. According to the assessor there were two to four instances where trailers were removed and one to two were added. The assessor also agreed that in some cases trailers are taken off the lots for vacation and then returned for the balance of the season, including December 31.

16 As of December 31, 2003 all ***travel trailers***, if on their lot, were assessed.

MGB 024/05

17 On February 23, 2005 the MGB rendered Board Order MGB 024/05. This order held that two trailers in the same RV Park as in the current appeal were assessable, as they did not meet the exemption criteria in section 298(1)(bb) of the Act. Specifically, the MGB held that while the trailers were not attached to any other structures, they were connected to a public utility: power. The MGB stated that the year-round availability and owner accessibility to a dedicated electrical power supply, regardless of whether or not owners used the power year round, satisfied the requirement of connectedness. The MGB found that the trailers were not, however, connected to water and sewer for the purposes of section 298(1)(bb). The MGB distinguished the water and sewage connections, because of the nature of the shallow connections, they could not be used during cold weather.

ISSUES

1. Are the subject improvements, defined as ***travel trailers***, assessable or non-assessable under section 298(1)(bb) of the Act?

   (i) How should "connected" be interpreted as stated in section 298(1)(bb)(i)?

   (ii) As of December 31, 2003 were the subject ***travel trailers*** connected to any utility services provided by a public utility?

   (iii) Is the Town estopped from assessing the trailers because of its 1997 position?

LEGISLATIVE BACKGROUND

18 The Municipal Government Act directs a municipality to annually prepare an ***assessment*** for property contained in the municipality. The ***assessment*** is to reflect the characteristics and physical condition of the property as of the previous 31st of December.

> 285 Each municipality must prepare annually an ***assessment*** for each property in the municipality, except linear property and the property listed in section 298.
>
> > 289(2) Each ***assessment*** must reflect (a) the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10 in respect of the property, ...

19 Property for the purposes of ***assessment*** is defined in the Act to include land and improvements. Improvements are further defined to include, among other structures, designated manufactured homes. ***Travel trailers***, namely trailers intended to provide accommodation for vacation use and which are licensed and equipped to travel on a road, are included in the definition of designated manufactured homes. As ***travel trailers*** are property as defined in the Act, they are prima facie assessable. ***Travel trailers*** that meet both the definition of travel trailer and the exemption criteria set out in section 298, however, are not assessable. To meet this exemption criteria, the subject trailer can neither be connected to any utility services provided by a public utility nor be attached or connected to any structure.

> 284(1) In this Part and Parts 10, 11 and 12, (r) "property" means
>
> (i) a parcel of land,
>
> (ii) an improvement, or (iii) a parcel of land and the improvements to it; ... .
>
> 284(1) In this Part and Parts 10, 11 and 12, (j) "improvement" means
>
> (i) structure,
>
> (ii) any thing attached or secured to a structure, that would be transferred without special mention by a transfer or sale of the structure, (iii) a designated manufactured home, and ... .
>
> 284(1) In this Part and Parts 10, 11 and 12, (f.1) "designated manufactured home" means a manufactured home, mobile home, modular home or travel trailer; ... . (w.1) "travel trailer" means a

trailer intended to provide accommodation for vacation use and licensed and equipped to travel on a road; ... .

298(1) No ***assessment*** is to be prepared for the following

property:

(bb) ***travel trailers*** that are

(i) not connected to any utility services provided by a public utility, and (ii) not attached or connected to any structure.

20 Public utilities are defined as:

1(1)(y) "public utility" means a system or works used

to provide one or more of the following for

public consumption, benefit, convenience or

use:

(i) water or steam;

(ii) sewage disposal;

(iii) public transportation operated by or on behalf of the municipality;

(iv) irrigation;

(v) drainage;

(vi) fuel;

(vii) electric power;

(viii) heat;

(ix) waste management;

(x) residential and commercial street lighting, and includes the thing that is provided for public consumption, benefit, convenience or use; ... .

SUMMARY OF APPELLANT'S POSITION

Legislative Intent

21 The Appellant submitted that the temporary nature of the subject trailers satisfied the legislative intent behind the exemption in section 298(1)(bb). The Appellant noted that the RV Village is located on water-saturated land on a flood plain. As a result, the Association and the Town have enacted restriction on the trailers ensuring they remain non-permanent in nature. The general effect of the Town and the Association by-laws is to ensure that the trailers are only available for seasonal usage and are at all times capable of mobility and equipped and licensed for road travel.

22 The intent of the statute is to ensure that a "mobile home" type of permanent residence does not escape being taxed as an improvement to the real property on which it sits. The intent of the legislation is not to include ***travel trailers*** that cannot be used as a permanent residence, are or can be easily moved from time to time, and do not have the services normally attached to a permanent residence. The occupancy limit imposed by the Association further distinguishes these trailers from other assessable residences.

"Connection" to a utility

23 The Appellant submitted that the utility hook-ups were temporary in nature and indicated that a purposive

interpretation of the phrase "not connected to any utility services provided by a public utility" contemplated a much more permanent structure and arrangement than the situation under appeal. Specifically, the access to water, sewer and power is seasonal and the connections are temporary: a garden hose, an unattached sewer outlet and a plug-in respectively. The fact that during periods of the year the owners of the trailers have some access to water, sewer and power does not mean that they are connected to a utility service provided by a public utility in the same sense as any normal residence.

24 The exemption outlined by section 298(1)(bb) clearly reveals a legislative intent that only some ***travel trailers*** should be assessable. The Appellant suggested that the intent is to assess those ***travel trailers*** that have transformed from chattels to realty. This interpretation is consistent with the general division between realty and personal property for ***assessment*** purposes in the Act. Trailers become realty when they are incorporated by way of attachment to permanent structures or through permanent connections to public utilities. The intent of the Act is to capture those dwellings, which, while purportedly ***travel trailers***, have actually become permanent residences. The intent is not to capture true ***travel trailers*** maintained for seasonal recreational usage.

Condition Date

25 The valuation of the subject properties is, per section 289(2) of the Act, based on the characteristics and physical condition of the properties on December 31, 2003. The trailers are, every year, disconnected from all utilities and unoccupied for the winter. Therefore, the condition of the trailers as of the condition date qualifies them for the exemption.

"Public" utility

26 The Appellant submitted that the power, water and sewage are not provided by a public utility and therefore the exemption set out in section 298(1)(bb) operates to make the trailers not assessable. The power, water and sewer at issue do not go directly to the property owners from the Town. Instead, the Association operates and maintains the individual access for trailer owners to these services. The argument is that the Association is the provider of these services and that takes these services out of the definition found for public utilities in the Act.

Estoppel

27 The Appellant relied on the February 1997 letter from the Town to the RV park developer for an estoppel argument. The letter stated, "***travel trailers*** are not assessable" and did not clarify that this position was either temporary or contingent on legislation staying the same. The purchasers of the subject properties have relied on this promise ever since. The MGB, as a tribunal charged with fairness and equity, must therefore hold the Town to its promise and prohibit the enforcement of the new ***assessment***.

Fairness and Equity

28 The Appellant submitted that the letter from the Town to the travel trailer owners dated September 18, 2003, which indicated that those trailers that were moved from their lots on December 31, 2003 would not be assessed, created an inequity. The inequity arises as the assessor is treating substantively similar properties differently because of an irrelevant difference, namely being absent from the park for one specified date. The Appellant submitted the appropriate remedy was to treat all the trailers as if they were non-assessable.

SUMMARY OF RESPONDENT'S POSITION

Introduction

29 The Respondent submitted that the issues and facts under appeal were the same as in MGB Board Order 024/05. The trailers currently under appeal are non-distinguishable from the previous trailers: they are similarly set-up in the same RV Park with the same conditions and restrictions. What was applicable to those two trailers should

apply in this appeal. Therefore, this order confirms the Town's position that the ***travel trailers*** are attached to a public utility by virtue of the year-round availability of electricity and are assessable and taxable. It would be incorrect and inappropriate for the MGB to now treat these trailers differently than the way it treated the previous trailers.

30 The Respondent similarly conceded the findings in the above order that are adverse to the Town's position. As a result, the Respondent did not advance arguments that the trailers were connected to structures or were otherwise not ***travel trailers*** for the purposes of section 298(1)(bb).

Intent of Legislation

31 The subject trailers fall under the definition of an improvement under section 284(1)(j) and are either a structure or a manufacture home. They do not, however, satisfy the requirement for the subset of ***travel trailers*** as outlined in section 298(1)(bb) and therefore cannot qualify for non-assessable status.

32 First, the assessor clarified that flooding or water-saturation of the land was not relevant as only a small portion of the common property was affected by 1:100 year flood-plain. As the actual trailer sites remain unaffected by the flood plain and the type of restrictions normally found for flood-plains do not apply, the issue raised the Appellant should have no impact on the decision.

33 The subject trailers do not satisfy the legislative intent behind the provision for non-assessable ***travel trailers***. Regardless of whether or not the units are equipped with wheels and technically remain mobile, the majority of them are stationary, built into their respective sites permanently and there is no intention for vacation or road travel use. This is further evidenced by the number of improved sites with adjoining, although not technically attached, open verandas, living areas, bedrooms and separate detached sleeping quarters. To qualify as a travel trailer, the subject trailers would have to be removed prior to December 31st of every year.

34 The intent of the travel trailer exemption is to exempt trailers parked in back yards or kept in storage and then towed to various locations for annual vacation. The intent is not to exempt those recreational properties which are limited to recreational, as opposed to vacation, use. These ***travel trailers*** are used in the same capacity as a summer cabin or cottage and should likewise be assessed as an improvement. Additionally, many seasonal vacation properties are, by necessity, shut down for the winter; this does not change the fact that they constitute an improvement and are assessable. Finally, this intent is consistent with the progressive tightening of ***assessment*** legislation relating to ***travel trailers***.

35 In particular, the Respondent reviewed MGB 33/98, which dealt with the assessibility of a number of ***travel trailers*** located in the Carefree Resort RV Park. The Act at that time did not have the current s. 298(1)(bb) requirements regarding attachment to a structure and connection to a utility. Instead, the Act only required that mobile units be "intended for vacation use and licensed and equipped to travel on a public highway". The decision in MGB 33/98 was that 18 trailers were assessable as they did not establish that they were licensed; 3 were assessable because, at 12 feet wide, they were not equipped to travel without extensive preparation and 1 was assessable as it did not provide evidence on its characteristics. The remaining 19 trailers, however, were not assessable. The Respondent in that case argued that attachments to structures and seasonal connections to utilities should make all the trailers assessable, even though there were no explicit provisions to that effect in the Act. The Respondent here, then, suggests that the addition of the these explicit provisions in the Act was intended to capture trailers like the ones in MGB 33/98 and like the ones currently under appeal - namely, mobile unites that are established upon recreational lots that are connected to utilities, in the same fashion as cabins and cottages.

36 The Respondent also provided a copy of a Notice of Decision issued by the MGB on January 12, 2000 confirming an oral decision of the MGB regarding the assessibility of a travel trailer in Red Deer County. This decision, under the same legislative provisions as are relevant to this appeal, held that "The Board is satisfied that the travel trailer does not meet the condition set out in section 298(1)(bb) of the Municipal Government Act in that

the trailer was connected to utility services" and that the travel trailer was assessable. This Notice of Decision only contained brief reasons confirming the oral decision and did not contain background factual information.

37 As a result of re-examining the legislation and the subject properties, the assessor distributed a letter on September 18, 2003 notifying owners of the intention to assess all trailers present on December 31, 2003; the Town requests a confirmation of the subsequent assessments.

"Connection" to a utility

38 The Respondent submitted that a plain language approach to section 298(1)(bb) is appropriate. The term "connected", therefore, simple means physically joined, or attached. There is nothing to indicate that a plain reading of the term "connected" is repugnant to the intent of the legislation. The subject properties are clearly joined to water, sewer and power and therefore do not qualify for the exemption. While the connections at issue may neither be year-round or permanent, these are not requirements expressly found in the Act and it is inappropriate for the MGB to read them in. The Respondent reviewed a number of photographs for the trailers under appeal to demonstrate that they are in fact physically connected to the utilities in question.

39 The Town's interpretation is supported by MGB Board Order 024/05. This Board Order was rendered regarding two other ***travel trailers*** from the same RV Park; what is applicable to these two trailers is applicable to the properties currently under appeal. This Order confirms the Town's position that the ***travel trailers*** are attached to a public utility and are assessable and taxable.

Condition Date

40 The Respondent submitted that the condition date provided in section 289 of the Act, namely December 31, 2003, was the relevant date to use to determine if the subject properties were assessable. This is consistent with the assessor's direction by way of letter to the property owners advising that trailers not present on December 31 would not be assessed.

"Public" utility

41 The Respondent maintained that the water, sewage and power provided were from a public utility as the original source was clearly a public utility. This is not negated merely by the Association operating and maintaining individual access for each lot.

Estoppel

42 The Town's position in 1997 is neither binding nor relevant to a 2004 ***assessment*** that is based on different legislation. Additionally, the advance notice given to the property owners of the Town's intent to re-evaluate the trailers' assessibility adequately addressed any implied promise.

Fairness and Equity

43 As the Respondent maintained that December 31 was the legislated condition date for determining the applicability of section 298, no inequity arises by consistently applying the condition date to all trailers, even if different outcomes result.

FINDINGS

44 Upon hearing and considering the representations and the evidence of the parties shown on Appendix A, and upon having read and considered the documents shown on Appendix B attached, the MGB makes the following findings.

1. Determining assessibility pursuant to section 298 is not limited to the condition of the property on December 31 of the year prior to the taxation year.
2. Connection to a utility for the purposes of section 298(1)(bb) requires a degree of permanency.
3. For the purposes of section 298(1)(bb), the subject trailers are not connected to any utility services.
4. The Town is not estopped from assessing the trailers because it indicated the trailers were non-assessable in 1997.
5. The water, power and sewer provided to the trailers are public utilities.

45 In consideration of the above, and having regard to the provisions of the Act, the MGB makes the following decision for the reasons set out below.

DECISION

46 The appeals in respect to the 67 properties are allowed and the ***travel trailers*** under appeal are non-assessable pursuant to section 298(1)(bb) of the Act.

47 The revised assessments, reflecting the value of the land and other improvements, are shown below.

Roll No.	Owner Legal Description	***Assessment***
2608.000	Robert C. Taverner Blk 8 Pl 9612304	$34,520
2610.000	Gordon & Joanne Halvorsen Lt 10 Pl 9612304	$30,290
2613.000	Bruce M. Douglas, Joan P. Eldridge Lt 13 Pl 9612304	$39,940
2616.000	Jeffrey Allan and Sherry Ann Nickel Lt 16 Pl 9612304	$25,000
2617.000	Marlene & Wayne Gilbert Lt 17 Pl 9612304	$25,000
2618.000	Dennis and Bonnie Boyle Lt 18 Pl 9612304	$25,000
2622.000	Jane MacFarlane, Ann Marie McIntyre Lt 22 Pl 9612304	$25,000
2623.000	Ruth Elizabeth Hunter Lt 23 Pl 9612304	$25,000
2624.000	Ruth Elizabeth Hunter Lt 24 Pl 9612304	$30,650
2625.000	Michael & Lynn Halket Lt 25 Pl 9612304	$32,390
2627.000	William Leroy Browne Lt 27 Pl 9612304	$36,070
2634.000	Carolyn Galley Lt 34 Pl 9612304	$27,800
2636.000	Good Plumbing & Heating Lt 36 Pl 9612304	$28,370
2638.000	Jay Murray & Margaret Linda Lt 38 Pl 9612304 Hallworth	$30,760
2643.000	Earl Little, Kathy L. Bentley Lt 43 Pl 9612304	$26,530
2644.000	Colleen Waters Lt 44 Pl 9612304	$25,000
2648.000	Terry Drummond, Helene Marie Lt 48 Pl 9612304 McGregor	$29,960
2650.000	James G. & Marilyn G Hannay Lt 50 Pl 9612304	$34,030
2651.000	Raymond C. & Margaret W. Kromm Lt 51 Pl 9612304	$33,740
2652.000	Ges Homes Ltd., Janet & Al Berdahl Lt 52 Pl 9612304	$25,000
2654.000	Andy & Patty McLiesh Lt 54 Pl 9612304	$30,200

2655.000	Gordon & Maryann Storey Lt 55 Pl 9612304	$29,620
2658.000	Peter R. & Dimphena C. Vaughan Lt 58 Pl 9612304	$25,000
2661.000	Daniel & Norma Goldring Lt 61 Pl 9612304	$34,320
2662.000	Robert Sinclair Lt 62 Pl 9612304	$29,210
2663.000	Paul M. & Myrna L. Schuck Lt 63 Pl 9612304	$31,070
2664.000	Charles H. Blakey Lt 64 Pl 9612304	$32,470
2665.000	Glen & Debra Mohan Lt 65 Pl 9612304	$30,960
2667.000	Robert & Elizabeth Skippen Lt 67 Pl 9612304	$41,160
2669.000	Benoit P. & Martha Mae Cyr Lt 69 Pl 9711313	$25,000
2670.000	Ray & Sophie Shiels Lt 70 Pl 9711313	$25,000
2671.000	Gerald & Myrna Isaac Lt 71 Pl 9711313	$26,890
2677.000	Vernon L. & Rose C. Burlock Lt 77 Pl 9711313	$27,340
2681.000	Mick, Lloyd & Valene Perdue Lt 81 Pl 9711313	$30,410
2682.000	David & Beita Dalton Lt 82 Pl 9711313	$27,060
2683.000	Glenn & Wendy Wyrostok Lt 83 Pl 9711313	$27,800
2684.000	Daphne Werenka Lt 84 Pl 9711313	$24,530
2687.000	Edward Allen Lt 87 Pl 9711313	$31,120
2689.000	John & Joanne Wildfong Lt 89 Pl 9711313	$28,770
2693.000	Marvin & Judy Peperkorn Lt 93 Pl 9711313	$33,370
2695.000	Envirologic Systems Inc. Lt 95 Pl 9711313	$28,890
2697.000	John & Katherine Kovacik Lt 97 Pl 9711313	$25,000
2698.000	Karen Bentley, Jeffrey C. Neufeld Lt 98 Pl 9711313	$25,000
2701.000	Merna Rasmussen Lt 101 Pl 9711313	$30,850
2702.000	Claudia & Bryan Luck Lt 102 Pl 9711313	$25,000
2705.000	Todd & Sharon Berling Lt 105 Pl 9711313	$25,000
2706.000	Kevin and Sharon Lukeman Lt 106 Pl 9711313	$36,350
2707.000	Lina Runquist, Scot & Deborah Lt 107 Pl 9711313 McKinnon	$27,660
2715.000	John & Irene Thiessen Lt 115 Pl 9711313	$25,000
2716.000	Beverly-Ann Bandura Lt 116 Pl 9711313	$27,740
2721.000	Cliff and Alexa Nernberg Lt 121 Pl 9812180	$29,060
2722.000	Patrick and Marion Coupland Lt 122 Pl 9812180	$25,000
2724.000	Allan R. & Sheila M. Friesen Lt 124 Pl 9812180	$28,900
2728.000	Robert & Elizabeth McKenzie Lt 128 Pl 9812180	$27,680
2736.000	Frederick & Pauline Fisk Lt 136 Pl 9812180	$34,530
2738.000	Dwight & Lori McKague Lt 138 Pl 9812180	$35,480
2740.000	Ronn & Jewel Nielsen Lt 140 Pl 9812180	$29,730
2757.000	John & Maureen Kingsbury Lt 157 Pl 9812180	$25,000
2766.000	Eroca Rosenar Lt 166 Pl 9812525	$27,670
2774.000	Robert & Janice Campbell Lt 174 Pl 9812525	$27,680
2786.000	Jim and Florence Garside Lt 186 Pl 9812536	$27,500
2799.000	Harold & Hilda Ager Lt 199 Pl 9812536	$27,500
2802.000	Patricia & Vince Ryan Lt 202 Pl 9812536	$38,210

2805.000	Vickie & Darrel Koester Lt 205 Pl 9812536	$37,650
2806.000	Brian D. & Marjorie A. Jeannotte Lt 206 Pl 9812536	$27,500
2808.000	Richard & Roseanne Adams Lt 208 Pl 9812536	$27,500
2812.000	Max & Patricia Rudneu Lt 212 Pl 9812536	$27,500
2814.000	Helmut & Beverley Deisinger Lt 214 Pl 9812536	$27,500

48 It is so ordered.

REASONS

49 The MGB is satisfied that the ***travel trailers*** under appeal satisfy the requirements for non-assessable property set out in section 298(1)(bb). While the trailers possess some qualities akin to assessable property, express provisions in the Act, not analogies, govern their assessibility. Of concern in this appeal is the provision that trailers are assessable if they are connected to a public utility. The MGB finds that the temporary, seasonal access the subject trailers have to water, power and sewer do not constitute a connection pursuant to section 298(1)(bb).

Condition Date

50 Determining that a property is non-assessable under section 298 of the Act is separate from the provision in section 289 that states that assessments must reflect the characteristics and physical condition of the property on December 31 of the year prior to the taxation year. In other words, the date of December 31 has no special significance in whether or not a property is non-assessable pursuant to section 298.

51 This interpretation is consistent with a straightforward reading of the two sections. Section 298(1) states that no ***assessment*** is to be prepared for the properties listed in that section. Therefore the direction that assessments must reflect the condition date in section 289 does not apply for those properties as no ***assessment*** is prepared for them. The section 298 determination must take place first and is independent of the condition date.

52 This interpretation also is consistent with the legislative presumption that interpretation avoids creating absurdities. If solely a one-day snapshot determines the application of section 298, an absurd result would follow. ***Travel trailers***, for instance, that were otherwise connected to public utilities or to structures, could, for this one day un-attach and move off their lot, thereby becoming non-assessable for the entire year. This creates a number of problems. One, fairness and equity suffer as substantively similar ***travel trailers*** are treated differently - one is assessable because it travelled on the road in, for example, June, while the other travelled for the same amount of time but including December 31 is not assessable. Two, property owners would be encouraged to expend effort to move their trailers solely to benefit from a formal distinction that does not substantively change the nature of the trailers. This is an undesirable result.

Application of section 298(1)(bb)

53 The central question of this appeal is whether or not the trailers are connected to any utilities, specifically power, water and sewer. The term "connected" is undefined in the Act and in interpreting it the MGB considered its ordinary meaning within the context of the legislative intent of the section. The term "connected" is capable of grammatically sustaining a spectrum of meanings in a plain language approach. Connected could, for instance, mean any physical connection, no matter how fleeting. Alternately, the section could be read so as to require constant permanent connection to the utilities in question.

54 In interpreting the term "connected", the MGB therefore adopted a purposive approach, and considered the intent of the section as well as its plain meaning. All parties agreed that a starting point for the intent behind section 298(1)(bb) was that the legislature did not intend all ***travel trailers*** to be assessable. Further, it was agreed that the legislature did not intend ***travel trailers*** become assessable if they only briefly accessed a utility. For example, both parties agreed that ***travel trailers*** stopping briefly in campgrounds during their owners' annual two-week vacation

were not intended to be assessable - whether or not they plugged into an electrical outlet during that time. From this common starting point, the MGB was presented with two different suggestions.

55 The Respondent suggested that the intent was to distinguish between trailers used for "vacation use" and those used for "recreation use". The difference between these two uses was travel. The Respondent invoked the analogy of motor homes as "vacation use" property that was not assessable and summer cottages that were "recreation use" property and assessable.

56 Alternately, the Appellant suggested that the intent was to ensure that those ***travel trailers*** that had become like residences were assessed. Namely, the two requirements in s. 298(1)(bb), connection to a utility and attachment to a structure, were two legislated objective criteria to determine if a travel trailer was sufficiently permanently situated to be assessed.

57 The MGB prefers this second interpretation. The Act does not mention the phrase "recreation use" and the MGB does not accept that vacation uses precludes vacationing in the same spot annually. Further, the mobility requirements implied by the Respondent in this distinction are much more clearly and directly dealt with in the definition of ***travel trailers*** in section 1 of the Act. In other words, the Act clearly indicates that the capacity to be mobile, not actual mobility, is what distinguishes ***travel trailers***. The MGB therefore accepts that the Act, through section 298(1)(bb) intends for trailers to be assessable if they, by way of connection to a utility or attachment to a structure, have become effectively fixed in their position.

58 The question before the MGB then, is if the connections at issue are sufficiently permanent to consider the trailer effectively attached its location. The MGB considered the permanency of the connection, the ease of disconnecting and the length of time the connection was in place during the ***assessment*** year in answering this question. The MGB further acknowledges that determining where a connection factually fits in the spectrum is difficult. In the end, however, the MGB has determined the connections at issue are similar to other vacation use connections and therefore should not make the trailers assessable. The nature of the connections seen here are no different than the water, power or sewage connections available to trailers passing through campsites on a transitory basis. The connections are also, on the evidence, generally seasonal. Despite the fact that electricity is available year-round, the evidence shows that the trailers generally do not avail themselves of this opportunity in the winter months. In any event, the most the trailers can be used for is 240 days a year. Moreover, the connections are extremely easy to disconnect. Unplugging a plug or unscrewing a hose is all that is required to disconnect them. No permanent damage or change to the physical structure of the trailers results from the disconnection. As a result, the MGB concludes the trailers are not connected to power, water or sewer for the purposes of s. 298(1)(bb).

59 The MGB placed no weight on the Appellant's argument that the water saturation and flooding problems faced in the area should be relevant to a determination of assessibility. In particular, the MGB accepts the Respondent's clarification that the individual trailer lots are not affected by the flood-plain restrictions.

"Public" utility

60 The definition of a public utility in section 1(1)(y) of the act is quite broad and includes the utilities in question. First, the water, power and sewer certainly come from a system designed to provide these utilities for public consumption. Simply because the Association, arguably a private entity, acts as an intermediary does not mean that these utilities are no longer public. Second, the definition of "public utility" includes the "thing that is provided for public consumption, benefit, convenience or use". Therefore, even if the actual system of water, sewer and power were not part of a public utility, the actual water and electricity provided to the Association and distributed to the trailers remain a public utility, as does the access to the municipal sewer system.

Estoppel

61 The MGB rejects the argument that the Town is estopped from assessing the trailers. ***Assessment***, as set out in the Act, is an annual process. No municipality is bound to continue a particular treatment of a property merely by

past treatment or by past statement of practice. Further, even if the legislative scheme for ***assessment*** in Alberta permitted the use of the equitable doctrine of estoppel based on past assessments, the 1997 letter falls far short of the necessary requirements for promissory estoppel. The Appellant has submitted that the letter should be read to imply a promise that the Town would never assess the trailers, regardless of changes in legislation. The far more reasonable interpretation of the letter is that the assessor was stating the current position of the Town. Further, it is insufficient to merely demonstrate that there has been a benefit to the property owners. Instead, detrimental reliance must be shown; namely, the property owners must have been induced to buy the subject trailers because of the letter and have been damaged as a result. Finally, the fairness and equity this board is charged with requires first and foremost that all assessable property be similarly assessed at market value.

Fairness and Equity

62 There was no evidence presented that any trailers actually "escaped" ***assessment*** as a result of moving them off the lot for December 31, 2003. The position of an assessor is insufficient to lay a claim of fairness and equity; instead, inequity must be shown relative to an actual similar property - not merely a hypothetical one. As a result, the MGB did not give credence to this argument of the Appellant.

MGB 024/05

63 The MGB carefully considered this previous Board Order and acknowledges that this decision departs from the result arrived at in Board Order MGB 024/05. In rendering a different decision on apparently similar facts, the MGB considered both the importance of consistency as a tribunal and the MGB's mandate to hear and decide each appeal on its own merits, bound only by decisions of higher courts. As stated by Macaulay and Sprague in Practice and Procedure Before Administrative Tribunals (updated May, 2005), "Decisions of administrative agencies do not create precedents for anyone, including the agency. They are, at best, persuasive. While agencies should strive for consistency they are not bound by a mechanistic application of earlier administrative decisions. Rigid adherence to consistency can discredit an agency's ability to improvise or adapt." (p. 6-6 to 6-7)

64 Therefore, while MGB 024/05 was persuasive, this decision departs in two key ways. First, this decision clarifies that the application of section 298 is not dependant on a property's characteristics solely as of December 31 of the year prior to which the tax is imposed. Second, this decision makes a different factual finding on the trailers' connection to power. While both Orders agree that a degree of permanency is required in order to find that a trailer is connected to a utility, this Order finds that the year-round availability of electrical power, which can be accessed for any 240 days of a year at the discretion of the owner, as well as the presence of an electrical outlet on a lot is not a sufficiently permanent connection to a trailer to satisfy the requirement in section 298(1)(bb).

65 No costs to either party.

W. MORGAN, MEMBER

* * * * *

APPENDIX "A"

APPEARANCES

NAME	CAPACITY

A. Shantz	Assessor for the Respondent
S. Washington	Assessor for the Respondent
S. Cobb	Agent for the Appellant

* * * * *

APPENDIX "B"

DOCUMENTS RECEIVED AT THE HEARING AND CONSIDERED BY THE MGB:

NO.	ITEM
Exhibit 1A Exhibit 2A Exhibit 3R Exhibit 4R Exhibit 5R	Submissions of the Appellant Map of Town of Sundre Photos of the Subject Properties Submissions of the Respondent Photos of the Subject Properties and MGB 33/98

* * * * *

AMENDING BOARD ORDER

Board Order MGB 123/05

Released: December 12, 2005

WHEREAS it has come to the Municipal Government Board's attention that Board Order MGB 064/05, dated July 18, 2005 was missing a roll number.

THEREFORE Municipal Government Board Order MGB 064/05 is hereby amended by:

Deleting "Glenn & Wendy Wyrostok" for Roll No. 2689.000 on pages 2 and 14 of 19 and

Inserting in the listing of ***assessment*** appeals on page 2 of 19 the following:

"Roll No. 2683.000	Glenn & Wendy Wyrostok
Lt 83 Pl 9711313	$43,950

and in the Decision on page 14 of 19 inserting between Roll Nos. 2682.000 and 2684.000 the following:

"Roll No. 2683.000	Glenn & Wendy Wyrostok
Lt 83 Pl 9711313	$27,800"

And further this Board Order shall be read in conjunction with Board Order MGB 064/05.

End of Document

TAB 7

BOARD ORDER: MGB 109/07

IN THE MATTER OF THE *Municipal Government Act* being Chapter M-26 of the Revised Statutes of Alberta 2000 (Act).

AND IN THE MATTER OF AN APPEAL from a decision of the 2006 Assessment Review MGB (ARB) of the Town of Sundre.

BETWEEN:

Various Owners, represented by Charles Blakey, Agent - Appellants

- a n d -

Town of Sundre, represented by Reynolds Mirth Richards & Farmer LLP - Respondent

BEFORE:

Members:

P. Petry, Presiding Officer
J. Fleming, Member
L. Patrick, Member

D. Marchand, Case Manager
A. Turcza-Karhut, Case Manager

Upon notice being given to the affected parties, a hearing was held in the City of Calgary, in the Province of Alberta on March 6 and 7, 2007.

This is an appeal to the Municipal Government Board (MGB) from the decisions of the Assessment Review Board (ARB) of the Town of Sundre dated September 13, 2006 with respect to 62 property assessments. In this Order, the property owners are referred to as the "Appellants", as they have appealed the decisions of the ARB where the assessments were upheld. It must be noted that although the Town of Sundre is referred to as the "Respondent", the Town of Sundre has appealed the ARB decisions where the assessment value was reduced.

The Appellants have appealed the decisions of the ARB with respect to the assessments entered in the assessment roll of the Respondent municipality as follows.

Assessments appealed to the MGB by the Appellants

Roll Numbers	Lot	Owners	Assessment Under Appeal
2604.000	4	L. Gaglardi	$69,320
2606.000	6	K. & L. Friesen	$60,320
2610.000	10	J. & E. Scheper	$48,430
2613.000	13	B. Douglas & J. Eldridge	$65,950
2617.000	17	M. & W. Gilbert	$43,120
2621.000	21	S. & R. Maarasco	$59,790
2623.000	23	K. & C. Chaloner	$41,520
2625.000	25	M. & L. Halket	$49,860
2627.000	27	E. Lundman	$51,540
2633.000	33	C. Galley	$63,950
2639.000	39	D. Brown	$44,420
2640.000	40	D. & W. Teare	$44,210
2650.000	20	J. & M. Hannay	$47,020
2651.000	51	B. & P. Squires	$45,880
2653.000	53	B. & L. Mcallister	$51,570
2660.000	60	J. Pedersen	$47,890
2662.000	62	R. & B. Turner	$54,710
2664.000	64	C. Blakey	$47,340
2667.000	67	R. & E. Kippen	$57,910
2676.000	76	L. Runquist	$51,720
2681.000	81	M., L. & V. Purdue	$47,780
2682.000	82	D. & B. Dalton	$45,620
2705.000	105	T. & S. Berling	$43,400
2706.000	106	J. & J. Bayko	$49,210
2708.000	108	L. Murphy & C. Burgess	$39,820
2709.000	109	S. MacLeod	$48,020
2726.000	126	J. & L. Mugleston	$51,490
2736.000	136	F. & P. Fisk	$50,540
2737.000	137	R. & L. Haskell	$42,470
2738.000	138	D. & L. McKaque	$62,430
2739.000	139	D. & M. Fisk	$35,920
2749.000	149	R. & D. Gerber	$46,840
2787.000	187	P. & R. Grossi	$42,310
2792.000	192	P. & G. Tallerico	$65,960
2802.000	202	D. Fraser	$51,720
2805.000	205	V. & D. Koester	$63,150
2809.000	209	D. & P. Grose	$48,030
2812.000	212	M. & P. Rudneu	$47,840

The Respondent has appealed the decisions of the ARB with respect to the assessments entered in the assessment roll as follows.

Assessments Appealed to the MGB by the Respondent

Roll Numbers	Lot	Owners	Assessment Under Appeal
2615.000	15	B. Howe	$29,000
2624.000	24	R. Hunter	$34,330
2629.000	29	C. Pichette	$34,990
2634.000	34	C. Galley	$31,690
2638.000	38	J. Murray	$34,130
2654.000	54	A. & P. Mcliesh	$31,580
2677.000	77	V. & R. Burlock	$31,160
2697.000	97	J. & K. Kovacik	$30,370
2707.000	107	L. Runquist	$33,880
2710.000	110	P. Axsel	$29,000
2721.000	121	C. & A. Nernberg	$33,240
2722.000	122	P. & M. Coupland	$29,000
2724.000	124	A. & S. Friesen	$33,030
2725.000	125	G. & S. Van Tornhout	$30,710
2728.000	128	R. & E. Mckenzie	$31,600
2743.000	143	M. & B. Hildebrand	$30,930
2762.000	162	N. & L. Boychuk	$29,000
2774.000	174	R. & J. Campbell	$32,830
2777.000	177	M. & K Stewart	$29,000
2786.000	186	J. & F. Garside	$29,000
2799.000	199	H. H. Ager	$29,000
2810.000	210	N. Hogg	$29,000
2813.000	213	M. & J. Dubois	$29,000
2814.000	214	B. H. Deisigner	$29,000

OVERVIEW

The main issue in these appeals is whether or not the trailers situated on each of the units (lots) should be subject to assessment. Pursuant to the Act, trailers are non assessable if they meet the definition of travel trailers in section 284(1)(w.1) and the conditions enumerated in section 298(1)(bb). The assessment placed on the land is not at issue in these appeals.

It was the Appellants' position that the intent of the Act is to ensure that travel trailers which are required to remain mobile, cannot be used as permanent residences, and which do not have access to services normally available to permanent residences are non assessable. The Appellants argued that the subject trailers meet the definition of travel trailers in section 284(1)(w.1) of the

Act. Furthermore, the Appellants submitted that the subject trailers are not connected to any utility services provided by a public utility and are not attached or connected to any structures. Accordingly, it was the Appellants' position that the subject trailers are non assessable.

The Respondent, who has also appealed the ARB decisions where the assessment value was reduced, submitted that some of the subject trailers did not meet the definition of travel trailers found in the Act, and that all of the trailers under appeal were connected to utility service provided by a public utility. Moreover, the Respondent argued that many of the trailers under appeal were attached or connected to a structure. Consequently, it was the Respondent's position that all of the subject trailers are assessable pursuant to the Act.

The parties agreed that the appeals for all of the roll numbers should be heard as a single hearing.

BACKGROUND

This is an appeal with respect to the assessment of 62 trailers located in Riverside RV Village (Riverside RV), 200 4th Avenue SW, Sundre, Alberta. Riverside RV consists of 214 units registered in five phases as bare land condominiums. Improved sites generally have travel trailers and may have adjacent accessory structures, including open verandas, living areas or bedrooms. Units 1 through 12 have access to utilities, including water, sewer, power and gas. Water and sewage services for units 1 through 12 are available year round. The remaining units, with shallow services, have access to water, sewer and power seasonally. The water and sewer services for the remaining units are shut off by the Condominium Association during the off season. Accordingly, the remaining units do not have access to water and sewage services from mid September or October to mid-May.

All units in Riverside RV have individually metered power service, provided by EPCOR Utilities Inc. Electricity is available to all units throughout the year by plugging a three-prong plug into an electrical box. If a property owner wishes to discontinue the service, he must make the necessary arrangements with EPCOR, in which case a connection fee will be charged upon reconnection.

Pursuant to the Town bylaws and the bylaws of the Condominium Association, the travel trailers are subject to a number of regulations. The Condominium Association limits occupancy to a total of 240 days per year. In addition, the trailers must have wheels and a hitch, and retain their travel availability. The Town bylaws also provide that the trailers must retain their travel ability, including maintaining wheels and a hitch.

MGB 024/05 and 064/05

In 2005, the MGB issued Orders 024/05 and 064/05. At issue in both appeals was whether trailers in Riverside RV were non assessable.

In Board Order MGB 024/05, the MGB held that the two trailers under appeal were assessable, as they did not meet the criteria set out in section 298(1)(bb) of the Act. The MGB found that the two trailers were connected to power, a public utility provided by EPCOR Utilities Inc. Electricity could be accessed year round by simply switching on the power at the meter panel or switch box and plugging in the trailer's power cord to the receptacle on the lot. The MGB found that the owners, through voluntarily unplugging the power from the outdoor receptacle and turning off the switch at the meter, did not disconnect themselves from a utility service that was otherwise available. The MGB concluded that if either of the conditions in section 298(1)(bb) exists as of the last date of the assessment year, the travel trailer is assessable at a market value standard.

Subsequently, in Board Order 064/05, the MGB held that 67 travel trailers in Riverside RV were exempt from assessment pursuant to section 298(1)(bb). In that case, both parties agreed that the travel trailers were not attached or connected to any structure. Accordingly, as both parties agreed that the criteria set out in section 298(1)(bb)(ii) was met, the main issue before the MGB was whether the travel trailers were connected to any utility services provided by a public utility.

The MGB found that year round availability of electrical power, which could be accessed for any 240 days of the year at the discretion of the owner, as well as the presence of an electrical outlet on a lot did not constitute a sufficiently permanent connection. Accordingly, the MGB held that the condition set out in section 298(1)(bb)(i), which requires that a travel trailer not be connected to any utility services provided by a public utility, has been met, and therefore the travel trailers were non assessable. The MGB noted that the connection at issue was similar to other vacation use connections and that the nature of the connection was not different from connections available to trailers passing through campsites on a transitory basis. Furthermore, the MGB found that the connection was seasonal, used for a maximum of 240 days a year, and extremely easy to disconnect.

In Board Order 064/05, the MGB was asked to determine how section 298(1)(bb) of the Act should be interpreted in light of subsection 289(2) of the Act. Pursuant to section 289(2), each assessment must reflect the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10. In its decision, the MGB held that the date of December 31 is irrelevant when determining whether a property is non assessable pursuant to section 298(1) of the Act. Section 298(1) states that no assessment is to be prepared for the properties listed in that subsection. Accordingly, the direction that assessments must reflect the condition date in section 289(2) does not apply for those properties, as no assessment is prepared for them. The MGB found that the determination under section 298(1) must take place first, and is independent of the condition date set out in section 289(2) of the Act.

In determining the outcome of this appeal, the MBG has considered the Board Orders 024/05 and 064/05.

ISSUES

1. Are the units under appeal “travel trailers”, as defined in section 284(1)(w.1) of the Act?

2. In order to be non assessable pursuant to section 298(1)(bb), do travel trailers need to be both not connected to a utility service provided by a public utility and not attached or connected to any structure?

3. Are any or all of the subject units not connected to any utility services provided by a public utility pursuant to section 298(1)(bb)(i) of the Act?

    i. What is the correct interpretation of the word “connected” in section 298(1)(bb)(i)?

4. Are any or all of the subject units not attached or not connected to any structure pursuant to section 298(1)(bb)(ii) of the Act?

5. How does section 289(2) of the Act, which requires that assessments reflect the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed, effect the determination of whether a travel trailer is assessable?

LEGISLATIVE BACKGROUND

The *Municipal Government Act* directs each municipality to annually prepare an assessment for property contained in the municipality, except property listed in section 298.

285 Each municipality must prepare annually an assessment for each property in the municipality, except linear property and the property listed in section 298.

Pursuant to the Act, property for the purposes of assessment is defined to include land and improvements. Improvements are further defined to include, among other structures, designated manufactured homes. The definition of designated manufactured homes includes travel trailers. Accordingly, as travel trailers are property as defined in the Act, they are *prima facie* assessable.

However, travel trailers that meet the definition of travel trailers in section 284 of the Act, and the exemption criteria set out in section 298 of the Act are non assessable. To meet the exemption criteria set out in section 298, the subject travel trailer must not be connected to any utility service provided by a public utility, and must not be attached or connected to any structure. Only if the travel trailer meets both of the exemption criteria set out in section 298(1)(bb) of the Act, and is therefore both not connected to any utility service provided by a public utility and not attached or connected to any structure, will it be non assessable under the Act.

284(1) In this Part and Parts 10, 11, and 12,

(r) "property" means

(i) a parcel of land,

(ii) an improvement, or

(iii) a parcel of land and the improvements to it; … .

284(1) In this Part and Parts 10, 11, and 12,

(j) "improvement" means

(i) structure,

(ii) any thing attached or secured to a structure, that would be transferred without special mention by a transfer or sale of the structure,

(iii) a designated manufactured home, and … .

(u) "structure" means a building or other thing erected or placed in, on, over or under land, whether or not it is so affixed to the land as to become transferred without special mention by a transfer or sale of the land; … .

284(1) In This Part and Parts 10, 11, and 12,

(f.1) "designated manufactured home" means a manufactured home, mobile home, modular home or travel trailer; … .

(w.1) "travel trailer" means a trailer intended to provide accommodation for vacation use and licensed and equipped to travel on a road; … .

298(1) No assessment is to be prepared for the following property:

(bb) travel trailers that are

(i) not connected to any utility services provided by a public utility, and

(ii) not attached or connected to any structure.

Public utilities are defined as:

1(1)(y) "public utility" means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:

(i) water or steam;

(ii) sewage disposal;

(iii) public transportation operated by or on behalf of the municipality;

(iv) irrigation;

(v) drainage;

(vi) fuel;

(vii) electric power;

(viii) heat;

(ix) waste;

(x) residential and commercial street lighting

and includes the thing that is provided for public consumption, benefit, convenience or use; … .

The Act directs that each assessment must reflect the characteristics and physical condition of the property on December 31 of the previous year.

289(2) Each assessment must reflect

(a) the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax imposed under Part 10 in respect of the property, … .

SUMMARY OF THE APPELLANTS' POSITION

"Travel trailers" as defined in s. 284(1)(w.1) of the Act

Pursuant to section 284(1)(w.1) of the Act, a "travel trailer" means a trailer intended to provide accommodation for vacation use and licensed and equipped to travel on a road. The Appellants submitted that based on the definition of "travel trailer" in the Act, all of the trailers under appeal are travel trailers, as they are intended to provide accommodation for vacation use and are licensed and equipped to travel on a road.

The nine owners that testified at the MGB hearing indicated that they owned the trailers for vacation purposes, and that they occupied the trailers for at total of 14 to 40 days per year. Of the nine owners that testified before the MGB, eight gave evidence that their trailers were licensed, and one indicated that he obtained a license from the previous owner of the trailer.

The agent for the Appellants stated that the trailers were licensed by the Province, with no requirement of renewal. It was submitted that all of the subject trailers in the RV Village are capable of being licensed, and that the MGB should make the reasonable assumption that all of the subject trailers were licensed when they travelled to the RV Village.

Furthermore, the Appellants argued that the onus to ask for proof of licensing should be placed on the assessor. In the present matter, the assessor did not make any inquiries as to whether the trailers were licensed, and he did not advise the owners that they should display their license plates. Although Mr. Dalton advised the MGB that some of the owners remove the licence plates to prevent their theft while the trailers are parked in the RV Village, the Appellants submitted that it cannot be assumed that trailers which did not display license plates when the assessor was inspecting the RV Village were not licensed.

The Appellants submitted that as a result of the owners' compliance with the bylaws of the Town of Sundre and the Condominium Association, all of the trailers are capable of travelling on a road. Pursuant to the bylaws of the Town of Sundre and the bylaws of the Condominium Association, the subject trailers must maintain their wheels and hitches, and cannot be placed on concrete foundations. In this case, the assessor has been unable to show that hitches or wheels have been removed from any of the subject trailers, and could not state whether the subject

trailers were mobile at any time during the assessment year. Therefore, the Appellants submitted that the units under appeal are "travel trailers", as defined in section 284(1)(w.1) of the Act.

Connected to a utility service provided by a public utility and attached or connected to any structure

The Appellants submitted that section 298(1)(bb) of the Act should be interpreted to read that assessments should be prepared for travel trailers that are connected to a utility service provided by a public utility and attached or connected to any structure. The Appellants noted that the letter from Mr. Cust, who assisted with the drafting of the Act, supports their position that travel trailers are assessable only if both criteria enumerated in section 298(1)(bb) are met. Accordingly, travel trailers which are connected to a utility service provided by a public utility, but not attached or connected to any structure are non assessable. Moreover, travel trailers which are attached or connected to any structure but are connected to a utility service provided by a public are also non assessable.

The Appellants stated that the intent of section 298(1)(bb) of the Act was to ensure that travel trailers which are utilized as permanent residences do not escape assessment. Furthermore, it was argued that it was not the intent of the Legislature to allow municipalities to assess travel trailers which are required to remain mobile, cannot be used as a permanent residence, and do not have access to services normally available to permanent residences. The Appellants expressed the opinion that based on the actual use and the restrictions on the use of the travels trailers in the RV Village, it is the Legislature's intent that such trailers be non assessable.

Connected to any utility services provided by a public utility

The Appellants submitted that the travel trailers under appeal are not connected to any utilities provided by a public utility, and therefore, the subject trailers are non assessable.

The Appellants brought the MGB's attention to the fact that all services in the RV Village are owned by the Condominium Association. Based on the evidence of Mr. Dalton, the water and waste water system is operated and maintained by the Condominium Association, not a public utility as contemplated by the Act.

Although the Appellants conceded that Lots 1 through 12 have access to the water and waste water system throughout the year, it was argued that pursuant to the Appellants' interpretation of the word "connected", the travel trailers on the aforementioned lots are not permanently connected to utilities, as they are required by the Town and Condominium bylaws to remain mobile.

The Appellants supported their argument by citing the decision of the MGB in Board Order 064/05, where the MGB held that the connections connecting the travel trailers to public utilities were similar to other vacation use connections and therefore should not make the travel trailers

assessable. The MGB found that the connections were seasonal, and akin to campsite connections available to trailers on a transitory basis. Furthermore, the MGB noted that it was easy to disconnect the trailers from the utilities without permanent damage or change to physical structure. The Appellants submitted that based on the decision of the MGB in Board Order 064/05, the MGB should find that the travel trailers presently under appeal are not connected to any utility services provided by a public utility, as contemplated by section 298(1)(bb)(i) of the Act.

Interpretation of the word "connected" in Section 298(1)(bb)(i)

The Appellants argued that to meet the criteria of section 298(1)(bb)(i) of the Act, a travel trailer must have a permanent connection to a utility service provided by a public utility. Since the trailers under appeal are not permanently connected to utility services provided by a public utility, there is no connection as contemplated by section 298(1)(bb)(i) of the Act. The MGB was asked to find that simply using utility services provided by a public utility does not make a travel trailer assessable. Furthermore, the Appellants asserted that if the Respondent's interpretation of section 298(1)(bb)(i) is accepted by the MGB, any travel trailer that plugs its power plug into an electrical source would be assessable pursuant to the Act. According to the Appellants, the Respondent's interpretation of the word "connected" would lead to an absurdity.

The Appellants submitted that the Act fails to provide any guidance with respect to the interpretation of the word "connected" in section 298(1)(bb)(i). Therefore, the Appellants asserted that the MGB should take a purposeful approach when interpreting the section 298(1)(bb)(i), and interpret the word "connected" to mean permanently connected. More specifically, in determining whether a travel trailer was connected pursuant to section 298(1)(bb)(i), the MGB should consider whether the travel trailers were connected through a fulltime connection and whether the availability of the services provided by a utility was unrestricted.

Gas

Both parties agreed that Units 1 through 12 have access to gas. The Appellants submitted evidence that trailers parked on Unit 6 and Unit 10 were not actually connected to gas. Furthermore, the owners that appeared before the MGB stated that a permanent connection of gas to a trailer would in their opinion violate the Town and Condominium bylaws which require the trailers to remain mobile while parked in the RV Village. The Appellants argued that the fact that gas is available to the trailers parked on Units 1 through 12 does not mean that those trailers are connected to a utility as contemplated by section 298(1)(bb)(i) of the Act.

Water and waste water system

Witnesses for the Appellants submitted evidence that the trailers obtain water through a temporary garden hose attachment. The Appellants argued a temporary garden hose cannot be

held to constitute a connection pursuant to section 298(1)(bb)(i) of the Act. It was emphasized that this form of connection can be distinguished from water connections to mobile homes, as mobile homes do not utilize garden hoses, and do not expose their water connections to the elements. Furthermore, the Appellants expressed the opinion that unlike mobile homes, the subject trailers cannot be occupied during the winter months.

The waste water system in the RV Village is operated and maintained by the Condominium Association on a restricted seasonal basis. It was the Appellants' position that the trailers are not connected to the waste water system for the purposes of section 298(1)(bb)(i), based on the fact that the service is unavailable during a significant portion of each calendar year.

The Appellants relied on MBG Board Orders 024/05 and 064/05, where the MBG found that trailers in the RV Village were not connected to water and waste water services, to further support their position that the subject trailers were not connected to utility services provided by a public utility for the purposes of section 298(1)(bb)(i) of the Act.

Electricity

Witnesses for the Appellants testified that the owners of each unit can elect to obtain electricity services from EPCOR Utilities Inc (EPCOR). Electricity is available to the trailers through plugging a three prong plug into an electrical box, however the Appellants asked the MGB to consider that the electricity available to the trailers is insufficient to power many appliances. Furthermore, the owners of the trailers testified that although it would be possible to cancel the electrical services provided by EPCOR each winter, it would be uneconomical to do so, based on the resulting reconnection fee.

The Appellants submitted that non permanent and limited access to electricity should not be interpreted as a connection to a public utility for the purposes of section 298(1)(bb)(i) of the Act. Placing a plug in an electrical outlet box is only a temporary arrangement, as the owners of the trailers can at any time choose to pull the plug, and disconnect their trailer from electricity. Moreover, the electrician's report submitted by the Appellants indicates that the electrical connections to the trailers can be distinguished from electrical connections to residential dwellings. The Canadian Electrical Code requires that travel trailers be wired to allow for temporary power by means of a plug that can be disconnected by each individual owner, whereas all residential dwellings must be permanently wired. Additionally, although the Appellants conceded that electricity is available to each lot, they asked the MGB to consider that the assessor did not present any evidence indicating that each unit was in fact connected to electricity services.

The Appellants relied on the MGB's decision in Board Order 064/05 to further support their argument that the trailers are not connected to electricity for the purposes of section 298(1)(bb)(i) of the Act. In particular, the Appellants noted that in Board Order 064/05 the MGB found that the although electricity is available year round, the trailers do not avail themselves of electricity

in the winter months and that the connections are extremely easy to disconnect without permanent damage or change to the physical structure of the trailers.

Attached or connected to any structure

The Appellants argued that all of the units under appeal are not attached or connected to any structure for the purposes of section 298(1)(bb)(ii) of the Act. Furthermore, the Appellants submitted that the Respondent's focus on accessory structures is misplaced, as it is the mobility of the trailers that is at issue in the present appeal. While the owners who testified at the hearing indicated that they keep their trailers mobile, the assessor acknowledged that he did not know whether any or all of the units have moved since the time he inspected the site.

Pursuant to the bylaws of the Town of Sundre, the trailers are required to maintain their mobility, and as such, cannot be connected or attached to a structure. The Appellants contended that if there is a breach of Town bylaws, it should be the bylaw officer and not the assessor who takes action. Additionally, while there may exist a temporary seal between the trailers and adjacent structures made from sponge rubber, foam, tape or vinyl trim material, such a seal does not connect or attach the trailers to the accessory structures, as contemplated by section 298(1)(bb)(ii) of the Act as it is not permanent.

The Appellants argued that the circumstances of adjacent structures in the RV Village are unique, and can be distinguished from circumstances were a trailer is permanently incorporated into a building. Moreover, witnesses for the Appellants gave evidence that connecting trailers to structures would result in physical damage to the trailers, as the ground on which the trailers are parked has the propensity to shift.

Lastly, the Appellants asserted that there is evidence that nearby recreational vehicle parks operate under similar circumstances as the RV Village, and that trailers in those parks are not assessed as improvements by the Town of Sundre.

<u>The subject trailers were in a state of storage on December 31, 2005</u>

Pursuant to section 289(2), each assessment must reflect the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10. The Appellants asserted that on December 31, 2005 the subject trailers were unused, had their wheels and hitches intact and in state of storage, and therefore were non assessable pursuant to section 298(1)(bb) of the Act. Furthermore, the Appellants suggested that in the case of travel trailers, an inspection by the assessor on one day of year does not reflect the condition of the travel trailers during the remainder of the year.

SUMMARY OF THE RESPONDENT'S POSITION

It was the Respondent's position that all of the trailers under appeal are assessable, as all of the trailers are connected to utility services provided by a public utility. Furthermore, the Respondent submitted that many of the subject trailers are also attached or connected to a structure, and are therefore assessable for that reason.

"Travel trailers", as defined in Section 284(1)(w.1) of the Act

The Respondent submitted that many of the subject trailers are assessable, as they do not meet the criteria of "travel trailers" enumerated in section 284(1)(w.1) of the Act. Pursuant to section 284(1)(w.1) of the Act, a "travel trailer" is a trailer intended to provide accommodation for vacation use and licensed and equipped to travel on a road. Accordingly, if a trailer is not licensed to travel on a road, it does not qualify as a travel trailer for the purposes of the Act.

It was the Respondent's position that 28 of the units under appeal were not licensed, and therefore did not meet the definition of travel trailers in section 284(1)(w.1) of the Act. The assessor submitted evidence that 28 of the units under appeal did not display their licenses. Although the Appellants submitted evidence that the aforementioned travel trailers were in fact licensed, the Respondent argued that their evidence should be rejected by the MGB as the licenses were not purchased until after the assessment year. Moreover, it was submitted that there is no duty or onus upon the assessor to confirm with each owner that their trailer is in fact licensed. If the owners of a property which has been assessed wish to challenge the assessment, they have the burden of proving that the assessment was incorrect. If the Appellants cannot meet that burden, the MGB should presume that the assessment is correct.

Additionally, pursuant to section 284(1)(w.1) of the Act, the Respondent submitted that a travel trailer must be equipped to travel on a road. The Respondent brought the MGB's attention to MGB Board Order 33/98, where the MGB held that travel trailers which have become more or less permanent fixtures are not equipped to travel on the road. The Respondent submitted that 53 of the trailers under appeal, including Park Models, as well as other models which are not capable of being moved without significant effort, for example without the use of a bobcat, are not equipped to travel on a road, and are therefore assessable.

Not connected to a utility service provided by a public utility and not attached or connected to a structure

The Respondent submitted that in order to be exempt from assessment, trailers must both fit the definition of a travel trailer in section 284(1)(w.1), and meet the criteria enumerated in section 298(1)(bb) of the Act. Pursuant to section 298(1)(bb), a travel trailer is not assessable if it is not connected to any utility service and is not attached or connected to any structure. If either of the criteria in s. 298(1)(bb) are met, the trailers are assessable. It is only in the event that a trailer is

not connected to any utility service and not attached or connected to any structure, that the trailers will not be assessable.

The Respondent relied on legislative history to support its interpretation of section 298(1)(bb) of the Act. It submitted that when the Legislature transitioned from the *Municipal Taxation Act* (MTA) to the current *Municipal Government Act* (Act) and utilized "plain language drafting", the revision resulted in the unintended exemption from assessment of a significant amount of mobile units which were previously assessable. The Respondent argued that this result was unforeseen by the Legislature, and that the Act was further amended to ensure that mobile units or travel trailers would be assessable if they were not being used strictly for vacation travel.

The Respondent submitted that the Legislature, in making the amendment, was responding to the previous MGB decisions with the intent that the provision related to the assessment of travel trailers be read inclusively, rather than exclusively. In other words, the amendment was remedial in nature and was intended to make travel trailers assessable, unless the exemption was clearly applicable.

Connected to any utility services provided by a public utility

The Respondent submitted that all of the subject travel trailers are connected to utility services provided by a public utility. Accordingly, it was submitted that all of the subject trailers are assessable. The Respondent noted that all of the owners who testified provided evidence that they had utility services placed on their unit specifically for the use with their trailers. Moreover, the assessor provided the MGB with evidence that each owner had their own account with EPCOR Utilities Inc. (EPCOR), who provided the units with electricity throughout the year. There was no indication that any of the owners had terminated the electricity services provided by EPCOR at any time during the assessment year.

<u>Interpretation of the word "connected" in Section 298(1)(bb)(i)</u>

It was the Respondent's position that MGB Board Order 064/05, where the MGB held that travel trailers, while connected to electricity, were not connected enough to be considered assessable, was decided incorrectly. The Respondent submitted that the MGB "read in" a term to the effect that the travel trailer must be "substantially" or "permanently" connected to a utility.

The Respondent submitted that words must be interpreted in their natural and ordinary meaning, unless the statute indicates to the contrary. The "golden rule" of statutory interpretation is that the grammatical, natural and ordinary meaning of the statute must be utilized unless that interpretation creates an absurdity, repugnancy, or inconsistency with the rest of the enactment. Accordingly, when interpreting legislation, the MGB should only add or subtract words if there is absurdity or repugnance or inconsistency with the rest of the enactment, and in those cases, only to the extent of avoiding absurdity, repugnance or inconsistency.

Counsel for the Town of Sundre argued that the Appellants have not suggested that the plain language interpretation of section 298(1)(bb) results in absurdity, repugnancy, or inconsistency with the enactment. Instead, the Appellants have put forward hypothetical consequences based upon their interpretation of what the legislative intention actually was. The Respondent directed the MGB's attention to the decision of Re Regional Assessment Commissioner, Region No. 3 et al. and Graham et al [1993] 106 D.L.R. (4th) 577 (O.N.C.A.), where the Ontario Court of Appeal stated that merely suggesting different consequences which could result is insufficient to justify an interpretation which is contrary to the plain language of the statute.

Furthermore, the Respondent argued that if the Legislature had intended that travel trailers be exempt from assessment if they were only connected to a utility service for a short period of time, or were to be assessed only in the event that the connection was of a more permanent, or fixed nature, the Legislature would have said so, as they have elsewhere in the Act. The Respondent noted that similar types of qualifying words are used elsewhere in section 298. It was submitted that where the Legislature had wished to create an exception, they specifically included words of limitation to indicate their intent.

Accordingly, the word "connected" in section 298(1)(bb) should be interpreted in its natural and ordinary meaning.

Attached or connected to any structure

It was the Respondent's position that some of the trailers in question are attached or connected to other structures for the purposes of section 298(1)(bb)(ii). It was noted that the trailers are connected or attached by various means including foam sealants, rubber seals, weather stripping flaps, roofs, and siding. Furthermore, the Respondent submitted that based on the photographic evidence, and the testimony of the owners, the majority of the adjacent structures function with the trailer as one unit. With the exception of Mr. Purdue, all of the owners who testified before the MGB confirmed that there is no access to the trailer except through the door in the adjacent structure. Additionally, if the trailer is removed, the adjacent structure is open to the elements and subject to water damage.

Although the owners of the trailers testified that in their view, adjacent structures were not attached or connected for the purposes of section 298(1)(bb)(ii) of the Act, as they were not attached to the trailer using screws and nails, the Respondent submitted that the MGB should consider the plain meaning of the words "connected" and "attached". The word "attached" means to fasten affix or join. The word "connected" means joined in sequence, related or associated. Furthermore, the Respondent asked the MGB to consider the definition of the word "join", which means to connect or bring together, physically or otherwise; to place in contiguity; … to become connected. Based on the aforementioned definitions, it was the Respondent's position that some of the trailers under appeal are attached or connected to other structures, and therefore assessable.

The condition date of December 31 in section 289(2)

Pursuant to section 289(2), each assessment must reflect the characteristics and physical condition of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10. It was the Respondent's position that the condition date of December 31 does not determine assessability. Furthermore, it was submitted that owners of trailers cannot move their trailer off the property for one day in order to avoid assessment.

FINDINGS

Upon hearing and considering the representations and the evidence of the parties shown on Appendix A, and upon having read and considered the documents shown on Appendix B, the MGB makes the a number of findings which are found below. These findings have been applied to each trailer under appeal individually in Appendix C.

1. Thirty-one trailers under appeal, as itemized in Appendix C, do not meet the definition of a travel trailer found in section 284(1)(w.1) of Act. Trailers which do not meet the definition of a travel trailer in section 284(1)(w.1) are assessable pursuant to the Act.

2. In order to be non assessable pursuant to section 298(1)(bb) of the Act, travel trailers need to be both not connected to a utility service provided by a public utility and not attached or connected to any structure.

3. All of the travel trailers under appeal, as itemized in Appendix C, are connected to utility services provided by a public utility and therefore not exempt from assessment pursuant to section 298(1)(bb)(i) of the Act.

4. The correct interpretation of the word "connected" in section 298(1)(bb)(i) of the Act its ordinary meaning.

5. Based on the MGB's findings with respect to Issues 2 and 3 above, it is not necessary to determine whether the trailers under appeal are attached or connected to a structure.

6. Section 289(2) of the Act must be considered when determining whether or not travel trailers are assessable.

In consideration of the above, and having regard to the provisions of the Act, the MGB makes the following decision for the reasons set out below.

DECISION

Appendix C to this order details the MGB's decision with respect to whether each unit under appeal meets the definition of a travel trailer in section 284(1)(w.1) of the Act and the exemption criteria enumerated in section 298(1)(bb) of the Act.

The appeals by the Appellants are denied and the assessments are set as follows.

Roll Numbers	Lot	Owner	Assessment
2604.000	4	L. Gaglardi	$69,320
2606.000	6	K. & L. Friesen	$60,320
2610.000	10	J. & E. Scheper	$48,430
2613.000	13	B. Douglas & J. Eldridge	$65,950
2617.000	17	M. & W. Gilbert	$43,120
2621.000	21	S. & R. Maarasco	$59,790
2623.000	23	K. & C. Chaloner	$41,520
2625.000	25	M. & L. Halket	$49,860
2627.000	27	E. Lundman	$51,540
2633.000	33	C. Galley	$63,950
2639.000	39	D. Brown	$44,420
2640.000	40	D. & W. Teare	$44,210
2650.000	20	J. & M. Hannay	$47,020
2651.000	51	B. & P. Squires	$45,880
2653.000	53	B. & L. Mcallister	$51,570
2660.000	60	J. Pedersen	$47,890
2662.000	62	R. & B. Turner	$54,710
2664.000	64	C. Blakey	$47,340
2667.000	67	R. & E. Kippen	$57,910
2676.000	76	L. Runquist	$51,720
2681.000	81	M., L. & V. Purdue	$47,780
2682.000	82	D. & B. Dalton	$45,620
2705.000	105	T. & S. Berling	$43,400
2706.000	106	J. & J. Bayko	$49,210
2708.000	108	L. Murphy & C. Burgess	$39,820
2709.000	109	S. MacLeod	$48,020
2726.000	126	J. & L. Mugleston	$51,490
2736.000	136	F. & P. Fisk	$50,540
2737.000	137	R. & L. Haskell	$42,470
2738.000	138	D. & L. McKaque	$62,430
2739.000	139	D. & M. Fisk	$35,920
2749.000	149	R. & D. Gerber	$46,840
2787.000	187	P. & R. Grossi	$42,310
2792.000	192	P. & G. Tallerico	$65,960

2802.000	202	D. Fraser	$51,720
2805.000	205	V. & D. Koester	$63,150
2809.000	209	D. & P. Grose	$48,030
2812.000	212	M. & P. Rudneu	$47,840

The appeals by the Respondent, Town of Sundre are allowed, and the assessments are set as follows.

Roll Numbers	**Lot**	**Owners**	**Assessment**
2615.000	15	B. Howe	$42,700
2624.000	24	R. Hunter	$50,440
2629.000	29	C. Pichette	$48,980
2634.000	34	C. Galley	$40,800
2638.000	38	J. Murray	$44,510
2654.000	54	A. & P. Mcliesh	$49,730
2677.000	77	V. & R. Burlock	$46,540
2697.000	97	J. & K. Kovacik	$40,610
2707.000	107	L. Runquist	$55,030
2710.000	110	P. Axsel	$43,690
2721.000	121	C. & A. Nernberg	$52,150
2722.000	122	P. & M. Coupland	$42,160
2724.000	124	A. & S. Friesen	$52,330
2725.000	125	G. & S. Van Tornhout	$48,770
2728.000	128	R. & E. Mckenzie	$48,230
2743.000	143	M. & B. Hildebrand	$44,480
2762.000	162	N. & L. Boychuk	$39,770
2774.000	174	R. & J. Campbell	$47,050
2777.000	177	M. & K Stewart	$50,980
2786.000	186	J. & F. Garside	$44,060
2799.000	199	H. H. Ager	$47,850
2810.000	210	N. Hogg	$36,110
2813.000	213	M. & J. Dubois	$53,740
2814.000	214	B. H. Deisigner	$47,080

It is so ordered.

REASONS

Interpretation of the Relevant Provisions of the Act

In order to determine the outcome of this appeal, the MGB considered the parties submissions regarding the correct interpretation of the relevant provisions of the Act.

As per section 285, each municipality must annually prepare an assessment for each property in the municipality unless the property is non-assessable pursuant to section 298(1). The definition of property in the Act includes land and improvements. Improvements are further defined to include, among other structures, designated manufactured homes. The definition of designated manufactured homes includes travel trailers. Accordingly, as travel trailers are property as defined in the Act, the MGB finds that they are *prima facie* assessable. In other words, travel trailers are assessable unless there is a specific provision in the Act which says differently. In this case section 298(1) specifically directs the manner in which travel trailers are to be treated.

Section 298(1)(bb) provides that "no assessment is to be prepared" for certain properties, including travel trailers that are (i) not connected to any utility services provided by a public utility, and (ii) not attached or connected to any structure. As “travel trailer” is a defined term for the purposes of Part 9 of the Act, in order to determine whether a particular trailer is non assessable as per section 298(1), it must first be determined whether the subject trailer meets the definition of a “travel trailer” found in section 284(1)(w.1). Accordingly, to be exempt from assessment, a trailer must be intended to provide accommodation for vacation use and licensed and equipped travel on a road. This definition appears to capture the essence of the typical holiday or vacation trailer commonly seen traveling on Alberta highways or parked in campgrounds or on private property throughout the province.

Furthermore, to be exempt from assessment, pursuant to section 298(1)(bb) of the Act, the subject travel trailer must not be connected to any utility service provided by a public utility, and must not be attached or connected to any structure. Only if the travel trailer meets both of the exemption criteria set out in section 298(1)(bb) of the Act, and is therefore both not connected to any utility service provided by a public utility and not attached or connected to any structure, will it be non assessable under the Act. On the other hand, where either one of the exemption criteria set out in section 298(1)(bb) do not apply to a travel trailer, then an annual assessment must be prepared.

When all of the references to travel trailers in the Act are analyzed as to what is intended respecting the assessability of travel trailers, it becomes clear that conventional travel trailers as defined in section 284(1)(w.1) of the Act are not to be assessed unless they become so affixed to a specific location that they are either connected to a utility service provided by a public utility or attached or connected to any structure.

The Appellants argued that section 298(1)(bb) of the Act should be interpreted to read that assessments should be prepared only for travel trailers that are connected to a utility service provided by a public utility and attached or connected to any structure. The MGB finds this interpretation to be flawed. Section 298(1) lists properties which are exempt from assessment, not properties which are to be assessed if the criteria enumerated in the Section are met. Travel trailers which meet only one of the criteria in section 298(1)(bb) are assessable. Accordingly, travel trailers that are connected to any utility service provided by a public utility but not connected or attached to a structure are assessable. Similarly, travel trailers that are connected or

attached to a structure, but are not connected utility service provided by a public utility are also assessable.

Therefore, the MGB concludes that a travel trailer must meet all of the tests or criteria enumerated in section 284(1)(w.1) and both of the exemption criteria enumerated in section 298(1)(bb) of the Act in order to be non assessable pursuant to the Act.

"Travel trailers", as defined in Section 284(1)(w.1) of the Act

In order to be exempt from assessment, the subject trailers must meet the threshold test based on the definition of a "travel trailer" found in the Act. Pursuant to section 284(1)(w.1) of the Act, a "travel trailer" means a trailer intended to provide accommodation for vacation use and licensed and equipped to travel on a road. It was not disputed that the subject trailers are intended to provide accommodation for vacation use, therefore the MGB concluded that the parties agreed that all of the units under appeal were intended for vacation use.

To meet the definition of a travel trailer pursuant to section 284(1)(w.1) of the Act, the subject trailer must be licensed during the assessment year. Accordingly, the evidence of the Appellants that some of the aforementioned trailers were in fact licensed is rejected, as the licenses for those units were not obtained until after the assessment year. Furthermore, the argument of the Appellants that all of the units under appeal are capable of being licensed is of little relevance, as the Act defines travel trailers as trailers that are licensed, not trailers simply capable of being licensed.

Based on the evidence presented at the hearing, the MGB finds that 28 of the units under appeal were not licensed during the assessment year. These 28 units do not meet the definition of a travel trailer in section 284(1)(w.1) of the Act. Accordingly, these 28 units cannot be exempt from assessment.

Lastly, the definition of a travel trailer requires the trailers to be equipped to travel on a road. In other words, to be defined as a travel trailer, a trailer must possess whatever equipment is necessary to travel on a road while complying with Alberta law. The Respondent suggested that 53 of the units under appeal were not equipped to travel on a road, as they were not capable of being moved without significant effort, or, alternatively, have become more or less permanent fixtures. Although whether significant effort is required to move a trailer may support a finding that the trailer does not very often travel on a road, the MGB finds that the amount of effort required to move a trailer away from the objects that surround it should be given little or no weight in determining whether a trailer possesses the necessary equipment to enable it to travel on a road.

The Appellants submitted that as a result of the owners' compliance with the bylaws of the Town of Sundre and the Condominium Association, all of the trailers are capable of travelling on a road. Pursuant to the bylaws of the Town of Sundre and the bylaws of the Condominium

Association, the subject trailers must maintain their wheels and hitches, and cannot be placed on concrete foundations. It was the Appellants' position that in this case, the assessor did not show that hitches or wheels have been removed from any of the subject trailers, and could not state whether the subject trailers were mobile at any time during the assessment year. Therefore, the Appellants submitted that the units under appeal are equipped to travel on a road, as required by section 284(1)(w.1) of the Act.

The MGB finds that there is insufficient evidence to alter the ARB finding that 11 of the units under appeal, as itemized in Appendix C, were not equipped to travel on a road, as required by section 284(1)(w.1) of the Act. The onus is on the Appellants to provide the MGB with sufficient evidence to show the assessment is incorrect, and therefore, to show that these specific units were equipped to travel on the road. The MGB does not accept that the requirements of the Town's bylaws determine whether or not the subject units are equipped to travel on a road. This determination must be based on physical evidence related to the characteristics of each unit. On a balance of probabilities there is no conclusive evidence for the MGB to conclude that the 12 units were equipped to travel on a road. Accordingly, the Appellants have not discharged the onus of proof to show the assessment was wrong, and the MGB cannot disturb the ARB's finding.

With respect to the remaining units, which the ARB found are equipped to travel on road, the MGB finds that on a balance of probabilities there is insufficient evidence to alter the finding of the ARB. Accordingly, the Respondent, who in this case was appealing the decision of the ARB has not discharged the onus of proof to show that the ARB's finding was incorrect, and the MGB finds that the ARB finding that the remaining units are equipped to travel on a road cannot be disturbed.

<u>The meaning of the word "connected" in Section 298(1)(bb)(i)</u>

The MGB agrees with the Respondent that the ordinary meaning of the word "connected" must be applied when interpreting section 298(1)(bb). Where the legislature wished to create an exception and add to the ordinary meaning, they specifically included qualifying words to indicate their intent. In particular, section 298(1) includes the following examples of qualifying language:

(a)(b) *… that is owned by the Crown…*
(b.1) *… and used primarily to provide a domestic water supply service;*
(c) *… but not including any residence or the land attributable to the residence;*
(e)(iii) *… but not for the generation of electric power;*
(g)(h) *… but not including any improvement designed and used for…*
(i) *… but not including a road right of way that is…*
(i.1) *… but not including a street lighting system owned by a…*
(j) *… unless the property is located in…*
(k) *… but not including the following…*

(l) *… but not including any residence…*
(r) *… but not including gas conveyancing pipelines owned by rural gas co-operative associations,"… .*

While the Legislature has included qualifying words elsewhere in section 298, there is nothing in either the section or the Act as a whole which indicates that the word "connected" should be interpreted to mean "permanently connected" or "connected throughout the year", as proposed by the Appellants.

The fact some of the units under appeal receive water and sewage utility services through a shallow utility connection does not alter the finding that that the trailers are connected to a public utility service as contemplated by section 298(1)(bb)(i) of the Act. The utility services available to the trailers under appeal have been specifically planned, designed and approved for the particular trailer that has been placed on the lot. Moreover, the testimony of the nine owners who testified is consistent with the finding that the relationship between the utilities and the units under appeal does not change. All of the nine owners who testified before the MGB indicated that unless they have replaced the original unit with another trailer, their units have not been moved from their location in Sundre RV since their original placement on the lots.

Accordingly, the MGB is not convinced that there is any reason to depart from the ordinary meaning of word "connected." As emphasized by the Respondent, the ordinary meaning of the word "connected" is: joined in sequence, related or associated. Furthermore, "join" means to connect or bring together, physically or otherwise; to place in contiguity; to couple; to combine; to associate … to become connected.

Connected to utility services provided by a public utility

Based on the evidence submitted by the parties, the MGB finds that all of the trailers under appeal are connected to utility services provided by a public utility for the purposes of section 298(1)(bb)(i). Specifically, the MGB finds that all of the trailers under appeal are connected to electricity services provided by a public utility.

<u>Connected to electricity services provided by a public utility</u>

The Appellants argued that because the connection is made by placing a plug in an electrical outlet box, and because the 30 amp service is insufficient to run some household appliances, the trailers are not connected to electricity for the purposes of the Act.

Based on the Appellants' submissions, the MGB is not convinced that there is any reason to depart from the ordinary meaning of word "connected." The Act does not require the connection to be akin to that of an ordinary residential dwelling, nor does it specify that the connection should enable those occupying the trailers to power all appliances. Furthermore, rejecting the Appellants' interpretation and accepting that of the Respondent does not result in absurdity.

With respect, the fact that some of the units under appeal receive 30 amp service is of little relevance. The Act does not qualify that 30 amp electricity service is insufficient to be considered a utility service for the purposes of section 298(1)(bb)(i). The Act merely specifies that in order to be non assessable, the trailers cannot be connected to a utility service provided by a public utility. The MGB accepts the Respondent's evidence that each owner had their own account with EPCOR, and that EPCOR supplied the units with electricity throughout the year. Accordingly, the MGB finds that all of the trailers under appeal were connected to electricity.

The MGB does not accept that turning off the switch at the meter or unplugging the cable from the panel would result in the trailers being disconnected from electricity, where electricity is otherwise available. Such actions are analogous to turning off a switch or a breaker at an ordinary residential dwelling, and would not result in a disconnection for the purposes of section 298(1)(bb)(i) of the Act. Furthermore, the fact that the meter does not register any power consumption during the off season does not result in the termination of the connection for the purposes of the Act. It merely means that the electricity has not been accessed or used during the off season. There is no concept of seasonality in the Act.

Based on the finding that all units are connected to an electric public utility, all of the trailers under appeal are assessable pursuant to the Act.

Connected to water and sewage services provided by a public utility

Although the MGB based its decision on the finding that all of the units under appeal are connected to the electricity services provided by a public utility, the MGB notes that based on the ordinary meaning of the word "connected", all of the units under appeal are connected to water and sewage, utility services provided by a public utility. Additionally, the MGB notes that the trailers placed on Units 1-12 are connected to gas, a utility service provided by a public utility.

Attached or connected to any structure for the purposes of section 298(1)(bb)(ii)

Based on the MGB's finding that only if a travel trailer is both not connected to any utility service provided by a public utility and not attached or connected to any structure, will it be non assessable under the Act, and on the finding that all of the trailers under appeal are connected to electricity services provided by a public utility, the MGB finds that it is not necessary to determine whether each unit under appeal is attached or connected to a structure.

Effect of section 289(2) on the assessment of travel trailers

It was the Appellants' position that because the trailers under appeal were unoccupied as at December 31, pursuant to section 289(2) of the Act, the trailers were exempt from assessment. Section 289(2) states that each assessment must reflect the characteristics and physical condition

of the property on December 31 of the year prior to the year in which a tax is imposed under Part 10.

With respect, the MGB does not agree. The fact that the trailers were not being used on December 31 does not affect the determination of whether they are assessable.

Although the fact that the trailers are not being used or occupied on December 31 does not effect the determination of whether they are assessable, section 289(2) dictates that each assessment must reflect the characteristics and physical condition of the property on December 31. The conditions that are found in section 298(1)(bb) of the Act, "not connected to a utility service provided by a public utility", and "not attached or connected to any structure", are aspects of the physical conditions and characteristics referred to in Section 289(2).

SUMMARY

The MGB concludes that pursuant to the Act, a travel trailer must meet all of the tests or criteria enumerated in Section 284(1)(w.1) and both of the exemption criteria enumerated in section 298(1)(bb) of the Act in order to be non assessable.

As detailed in Appendix C to this order, the MGB finds that some of the units under appeal are not licensed. Furthermore, the MGB finds that there was insufficient evidence to disturb the ARB's decision that certain units under appeal, as identified in Appendix C of this order, were equipped to travel on a road. As the units which are not licensed and the units which are not equipped to travel on a road do not meet the definition of a travel trailer found in section 284(1)(w.1) of the Act, pursuant to the Act, these units are assessable.

The MGB finds that all of the units under appeal are connected to utility services provided by a public utility for the purposes of section 298(1)(bb)(i). Specifically, the MGB finds that all of the trailers under appeal are connected to electricity services provided by a public utility. Accordingly, pursuant to the Act, all of the trailers under appeal are assessable.

Based on the MGB's finding that pursuant to the Act, a travel trailer must meet all of the tests or criteria enumerated in section 284(1)(w.1) and both of the exemption criteria enumerated in section 298(1)(bb) of the Act in order to be non assessable, and on the finding that all of the trailers under appeal are connected to electricity services provided by a public utility, the MGB finds that it is not necessary to determine whether each unit under appeal is attached or connected to a structure.

The details of the MGB's decision as to whether each unit under appeal met the definition of a travel trailer in section 284(1)(w.1) of the Act, and the exemption criteria enumerated in section 298(1)(bb) of the Act are found in Appendix C to this order.

No costs to either party.

Dated at the City of Edmonton, in the Province of Alberta, this 27th day of August 2007.

MUNICIPAL GOVERNMENT BOARD

_____

(SGD.) J. Fleming, Member

APPENDIX "A"

APPEARANCES

NAME	CAPACITY
C. Blakey	Agent for the Appellants
D. Dalton	Witness for the Appellants
C. Galley	Witness for the Appellants
B. Brown	Witness for the Appellants
M. Purdue	Witness for the Appellants
D. Grose	Witness for the Appellants
M. Rudneu	Witness for the Appellants
H. Ager	Witness for the Appellants
J. Garside	Witness for the Appellants
C. Burgess	Witness for the Appellants
S. Galley	Observer for the Appellants
H. Ager	Observer for the Appellants
B. Dalton	Observer for the Appellants
W. Barclay	Legal counsel for the Respondent
A. Shantz	Assessor for the Respondent
S. Washington	Observer for the Respondent

APPENDIX "B"

DOCUMENTS RECEIVED AT THE HEARING AND CONSIDERED BY THE MGB:

NO.	ITEM
Exhibit A-1	Hearing Brief of the Appellants
Exhibit A-2	Appellants' table listing trailers appealed by the Respondents displaying licenses
Exhibit A-3	Appellants' table listing trailers appealed by the Appellants displaying licenses
Exhibit A-R1	Rebuttal Submissions of the Appellants
Exhibit A-S1	Closing Submissions of the Appellants
Exhibit R-4	Submissions of the Respondent
Exhibit R-5	Assessment Brief of the Respondent
Exhibit R-R1	Rebuttal Submissions of the Respondent
Exhibit R-S1	Closing Submissions of the Respondent
Exhibit R-S2	Respondent's table listing the assessment amount attributable to the travel trailer component of each property under appeal

BOARD ORDER: MGB 109/07

APPENDIX "C"

MGB'S DECISION AS TO WHETHER EACH UNIT UNDER APPEAL MET THE DEFINITION OF A TRAVEL TRAILER IN SECTION 284(1)(W.1) OF THE ACT AND THE EXEMPTION CRITERIA ENUMERATED IN SECTION 298(1)(BB) OF THE ACT.

			284(1)(w.1) "Travel Trailer"			**298(1)(bb)(i)**	
Roll. Number	**Lot**	**Assm't under appeal**	**Not** intended for Vacation Use	**Not** Licensed	**Not** Equipped to travel on a road	**Connected** to a utility service provided by a Public Utility	**MGB Decision**
2604.000	4	$ 69,320		X	N/A	N/A	**Confirm**
2606.000	6	$ 60,320				X	**Confirm**
2610.000	10	$ 48,430				X	**Confirm**
2613.000	13	$ 65,950		X	N/A	N/A	**Confirm**
2615.000	15	$ 29,000				X	**Set at $ 42,700**
2617.000	17	$ 43,120				X	**Confirm**
2621.000	21	$ 59,790		X	N/A	N/A	**Confirm**
2623.000	23	$ 41,520		X		N/A	**Confirm**
2624.000	24	$ 34,330		X		N/A	**Set at $ 50,440**
2625.000	25	$ 49,860				X	**Confirm**
2627.000	27	$ 51,540				X	**Confirm**
2629.000	29	$ 34,990				X	**Set at $ 48,980**
2633.000	33	$ 63,950			N/A	N/A	**Confirm**
2634.000	34	$ 31,690				X	**Set at $ 40,800**
2638.000	38	$ 34,130				X	**Set at $ 44,510**
2639.000	39	$ 44,420		X		N/A	**Confirm**
2640.000	40	$ 44,210		X		N/A	**Confirm**
2650.000	50	$ 47,020		X		N/A	**Confirm**
2651.000	51	$ 45,880		X		N/A	**Confirm**
2653.000	53	$ 51,570				X	**Confirm**
2654.000	54	$ 31,580				X	**Set at $ 49,730**
2660.000	60	$ 47,890				X	**Confirm**
2662.000	62	$ 54,710		X		N/A	**Confirm**
2664.000	64	$ 47,340				X	**Confirm**
2667.000	67	$ 57,910				X	**Confirm**
2676.000	76	$ 51,720		X	N/A	N/A	**Confirm**
2677.000	77	$ 31,160				X	**Set at $ 46,540**
2681.000	81	$ 47,780		X		X	**Confirm**
2682.000	82	$ 45,620				X	**Confirm**
2697.000	97	$ 30,370		X		N/A	**Set at $ 40,610**
2705.000	105	$ 43,400		X		N/A	**Confirm**
2706.000	106	$ 49,210				X	**Confirm**
2707.000	107	$ 33,880		X		N/A	**Set at $ 55,030**

BOARD ORDER: MGB 109/07

2708.000	108	$ 39,820			X	**Confirm**
2709.000	109	$ 48,020			X	**Confirm**
2710.000	110	$ 29,000	X		N/A	**Set at $ 43,690**
2721.000	121	$ 33,240	X		N/A	**Set at $ 52,150**
2722.000	122	$ 29,000			X	**Set at $ 42,160**
2724.000	124	$ 33,030	X		N/A	**Set at $ 52,330**
2725.000	125	$ 30,710			X	**Set at $ 48,770**
2726.000	126	$ 51,490			X	**Confirm**
2728.000	128	$ 31,600			X	**Set at $ 48,230**
2736.000	136	$ 50,540	X	N/A	N/A	**Confirm**
2737.000	137	$ 42,470	X		N/A	**Confirm**
2738.000	138	$ 62,430		N/A	N/A	**Confirm**
2739.000	139	$ 35,920	X	N/A	N/A	**Confirm**
2743.000	143	$ 30,930	X		N/A	**Set at $ 44,480**
2749.000	149	$ 46,840			X	**Confirm**
2762.000	162	$ 29,000	X		N/A	**Set at $ 39,770**
2774.000	174	$ 32,830			X	**Set at $ 47,050**
2777.000	177	$ 29,000			X	**Set at $ 50,980**
2786.000	186	$ 29,000			X	**Set at $ 44,060**
2787.000	187	$ 42,310	X	N/A	N/A	**Confirm**
2792.000	192	$ 65,960	X	N/A	N/A	**Confirm**
2799.000	199	$ 29,000			X	**Set at $ 47,850**
2802.000	202	$ 51,720	X		X	**Confirm**
2805.000	205	$ 63,150		N/A	N/A	**Confirm**
2809.000	209	$ 48,030			X	**Confirm**
2810.000	210	$ 29,000	X		N/A	**Set at $ 36,110**
2812.000	212	$ 47,840			X	**Confirm**
2813.000	213	$ 29,000	X		N/A	**Set at $ 53,740**
2814.000	214	$ 29,000			X	**Set at $ 47,080**

TAB 8

Citation: C&C Holdings v. Assessor Area #04-Nanaimo-Cowichan
2003 BCSC 230

Date: 20030211
Docket: L022486
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

C & C HOLDINGS INC.
DUKE POINT REMAN LTD. AND
MID-ISLAND REMAN INC.

APPELLANTS

AND:

ASSESSOR OF AREA #04 - NANAIMO-COWICHAN

RESPONDENT

AND IN THE MATTER OF THE DECISION OF THE BOARD DATED THE 3RD DAY OF JULY, 2002, IN SUCH APPEAL

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE PITFIELD

Counsel for the Appellants: Brian J. Wallace, Q.C.
James D. Fraser

Counsel for the Respondents: John E.D. Savage

Date and Place of Hearing: December 10, 2002
Vancouver, B.C.

INTRODUCTION

[1] This is an appeal by stated case under s. 65 of the *Assessment Act*, R.S.B.C. 1996, c. 20 from a decision of the Property Assessment Appeal Board regarding the classification of certain lumber manufacturing facilities for property taxation purposes. The appellants say that the principle of equitable assessment applicable to properties within the same taxing jurisdiction should be extended to properties in different taxing jurisdictions.

[2] The Board states the question of law as follows:

> Did the Board err in law by misinterpreting or misapplying s. 9 of the *Assessment Authority Act*, R.S.B.C. 1996, c. 21; the *Assessment Act*, and in particular, s. 57(1)(a); the *Prescribed Classes of Property Regulation,* B.C. Regulation 438/81; and the *Exemption from Industrial Improvements Regulation,* BC Regulation 97/88, in finding that the Board cannot ensure the equitable assessment, and in particular the equitable classification, of the property that is the subject of the appeal, relative to properties outside of the municipality or rural area where the property is located?

[3] The background to this appeal is the following.

[4] Duke Point Reman Ltd. and Mid-Island Reman Inc. operate lumber remanufacturing plants in the City of Nanaimo. Other companies that are not parties to this appeal carry on lumber remanufacturing businesses in the adjacent District of North

Cowichan. The City and the District are separate taxing jurisdictions for property tax purposes.

[5] In 1999, the Area Assessor classified the Duke Point and Mid-Island plants as property in Class 4 (major industry), as opposed to Class 5 (light industry). Both plants were assessed as Class 4 properties in 2000 and 2001.

[6] Mid-Island successfully appealed its 1999 assessment to a Property Assessment Review Panel resulting in the reclassification of its plant as property in Class 5 in that year.

[7] Duke Point appealed its 1999 property tax assessment on the basis that there were inequities in the classification of its plant and that of Mid-Island. Duke Point and Mid-Island both appealed their 2000 and 2001 assessments on the basis that similar remanufacturing plants located in the District of North Cowichan had been classified as properties in Class 5. Although they are separate taxing jurisdictions, Nanaimo and the District of North Cowichan are part of the same assessment area described as Area #04 - Nanaimo-Cowichan.

[8] The Board concluded that there must be consistency in the assessment of the Duke Point and Mid-Island plants because both were situated in the City of Nanaimo. The Board was

powerless to alter the 1999 Mid-Island assessment because it was not under appeal. To ensure equitable assessment, the Board reclassified the Duke Point plant as property in Class 5 for 1999. The Board affirmed the Assessor's classification of each plant in Class 4 for 2000 and 2001, stating that it could only be concerned with equitable assessment within a particular municipal district or rural area, but not as between municipal districts and rural areas, even those included in the same assessment area. Duke Point and Mid-Island complain that the Board erred in law and this stated case, is the result.

[9] The Board reached its decision for 1999, 2000 and 2001 on the following basis. Each of the Duke Point and Mid-Island plants were "industrial improvements" within the meaning of s. 20(1)(f) of the *Assessment Act*. As such, the plants were properties in Class 4 (major industry) unless exempt from that classification in accordance with the *Exemption from Industrial Improvements Regulation*, B.C. Reg. 97/88, in which case, they would be included in Class 5 (light industry).

[10] The *Regulation* describes the exemption applicable to plants of the kind operated by Duke Point and Mid-Island as follows:

Plant	Capacity
Remanufacturing plants, not part of a sawmill, which manufacture lumber or other wood products for rough lumber or cants, but not raw logs	24 million fbm [foot board measure] per year based on 480 shifts a year of 8 hours each shift

[11] The Board held that the term “capacity” in the *Regulation* means design capability or that which a plant is capable of producing, not that which a plant actually produces, and that production potential should be measured by reference to input rather than output. The determination of input potential must reflect operating anomalies such as a requirement that some raw material be processed through a part of the plant more than once, thereby reducing overall plant capacity.

[12] Having interpreted the *Regulation* in a manner that is unobjectionable, the Board concluded that the capacity of the Duke Point and Mid-Island plants was greater than the specified minimum in 1999, 2000 and 2001. That finding resulted in an inequity in 1999 that had to be cured.

[13] The Board was advised that there were five lumber remanufacturing plants in the District of North Cowichan, three of which were assessed as properties in Class 4 and two as Class 5. The Board was advised that the Area Assessor was investigating the classification of one of the Class 5 plants

with a view to reclassification to Class 4. Having decided that assessments in other jurisdictions were irrelevant, the Board declined to consider the question whether either of the Class 5 properties in the District of North Cowichan was entitled to exclusion from Class 4 because of the *Regulation*.

THE SIGNIFICANCE OF CLASSIFICATION

[14] The classification of property is material in the assessment of property tax. Separate municipalities levy different rates of tax on different classes of property. The provincial government prescribes the rate of school tax payable under the *School Act*, R.S.B.C. 1996, c. 412 by properties in each class. The provincial government also prescribes and collects an assessment levy payable on each class of property. The rates of school tax and assessment levy vary in amount by class, but apply uniformly to all properties of the same class wherever situated in the province.

[15] Generally, the rates of school tax and assessment levy are greater for properties in Class 4 than for those in Class 5. The evidence in this case established that approximately 25% of the total tax bill paid by Duke Point and Mid-Island represented school tax and the assessment levy collected by the provincial government.

[16] It follows that if the Area Assessor has not treated the remanufacturing plants in the District of North Cowichan and the City of Nanaimo in the same manner resulting in the different classification of plants with capacity in excess of the minimum specified by the *Regulation*, the operators in the City of Nanaimo will pay a greater school tax and assessment levy tax than their competitors in the neighbouring district, resulting in a significant competitive disadvantage. A similar result arises if the *Regulation* is applied differently by different area assessors in other parts of the province.

[17] It is an accepted principle of property taxation that taxing authorities must deal even-handedly with all taxpayers in a municipality or rural area and that all taxpayers within a class be treated in the same way: *Assessor of Area 09 – Vancouver v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218 at 253, applied in *Assessor of Area 09 – Vancouver v. Lount*, [1994] B.C.J. No. 1332 (S.C.), aff'd (1995), 10 B.C.L.R. (3d) 92 (C.A.). The issue is whether taxpayers in different taxing jurisdictions, but within the same class, must be treated in the same way.

RELEVANT LEGISLATION

[18] The following provisions of the *Assessment Authority Act* and the *Assessment Act* are relevant to the determination.

Assessment Authority Act, R.S.B.C. 1996, c. 21

Purpose of the authority

9 The purpose of the authority is to establish and maintain assessments that are uniform in the whole of British Columbia in accordance with the *Assessment Act*.

Assessment Act, R.S.B.C. 1996, c. 20

2 Before October 31 of each year, the commissioner must supply to each municipality

(a) an estimate of the total assessed value of each property class in the municipality, and

(b) for each property class specified for the purpose of this section by regulation of the Lieutenant Governor in Council, estimates of the distribution of value changes that have occurred in the property class in the municipality since the authentication of the previous assessment roll and the completion of any supplementary roll.

3(1) On or before December 31 of each year, the assessor must

(a) complete a new assessment roll containing a list of each property that is in a municipality or rural area and that is liable to assessment, and

(b) mail a notice of assessment to each person named in the assessment roll.

19(1)In this section:

"actual value" means the market value of the fee simple interest in land and improvements;

31(1)The minister must appoint property assessment review panels to review and consider the annual

assessments of land and improvements in British Columbia.

32(1)Subject to the requirements in section 33, a person may make a complaint against an individual entry in an assessment roll on any of the following grounds:

(a) there is an error or omission respecting the name of a person in the assessment roll;

(b) there is an error or omission respecting land or improvements, or both land and improvements, in the assessment roll;

(c) land or improvements, or both land and improvements, are not assessed at actual value;

(d) land or improvements, or both land and improvements, have been improperly classified;

(e) an exemption has been improperly allowed or disallowed.

38(1)A review panel may review and consider the assessment roll and the individual entries made in it to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality or rural area.

(2)For the purpose of subsection (1), a review panel

(a) may investigate the assessment roll and the individual entries made in it, whether or not the investigation is based on a complaint or an assessor recommendation,

(b) must adjudicate the matters set for its consideration under section 36,

(c) when considering whether land or improvements are assessed at actual value,

must consider the total assessed value of the land and improvements together, and

(d) may direct amendments to be made to the assessment roll, subject to the requirements of subsections (4) to (6).

50(1)Subject to the requirements of subsections (2) to (4), a person may appeal to the board if the person is dissatisfied

(a) with a decision of a review panel, or

(b) with an omission or refusal of the review panel to adjudicate a complaint made under section 33(1).

(2)The appeal must be based on one or more of the grounds referred to in section 32(1).

57(1)In an appeal under this Part, the board

(a) may reopen the whole question of the property's assessment to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality or rural area, and

(b) when considering whether land or improvements are assessed at actual value, must consider the total assessed value of the land and improvements together.

(2)Nothing in subsection (1)(a) empowers the board to determine an assessment of a property other than the property that is the subject of the appeal, except to the extent permitted under subsection (3).

[19] When considering the meaning and effect of the legislation to which I have referred, I must respect the fundamental modern rule of statutory interpretation framed by

E.A. Driedger in his text, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67, as follows:

> Today there is only one principle or approach, namely, 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.

The Supreme Court of Canada declared the modern rule to be the preferred rule in *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41.

[20] Duke Point and Mid-Island say that uniformity in assessment is the objective of the *Assessment Act* and say further that equity in classification, a fundamental common law assessment principle, is not confined to properties within a taxing jurisdiction, but must be achieved province-wide.

[21] Section 9 of the *Assessment Authority Act* contemplates uniformity of assessment, but specifies that uniformity is to be achieved in accordance with the *Assessment Act*. The Board reasoned as follows in relation to the question of its capacity to ensure equitable assessments as between municipalities or rural districts:

> [65] In *Brewers 2000* the Board held that the phrase "applied in a consistent manner" applies to both "accuracy", which includes classification, and to "actual value". The phrase "in the municipality or rural area", must also modify

> both "accuracy" and "actual value" thereby requiring the consistent application and valuation principles within the municipality or rural area, but not necessarily outside the municipality or rural area.
>
> [66] That consistency is required within a municipality or rural area is reinforced by other sections of the *Assessment Act*. An assessment roll is made for a municipality or rural area (section 3). The Assessor must provide a copy of the assessment roll to the appropriate taxing jurisdiction (section 7). A local government may make a complaint against all or part of the completed assessment roll relating to property within its taxing jurisdiction (section 32(3)). The review panel may review and consider the assessment roll and the individual entries made in it to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality or rural area (section 38(1)). The completed assessment roll as confirmed and authenticated by a review panel is, unless changed under another provision of the *Act*, the assessment roll of the municipality or rural area as the case may be, until a new roll is revised, confirmed and authenticated by the review panel (section 11).

[22] With respect, I do not agree with the Board's conclusion that the phrase "in the municipality or rural area" modifies the word "accuracy" in s. 57(1) which permits the Board to "reopen the whole question of the property's assessment to ensure accuracy and that assessments are at actual value applied in a consistent manner in the municipality or rural area".

[23] The text of s. 57(1) is not precise. One part of the direction is to “ensure accuracy”. Another part is to “ensure… that assessments are at actual value applied in a consistent manner”. It is difficult to identify the text to which the word “applied” relates but it appears to be a reference to the words “actual value” although actual value is determined rather than applied. The intent must have been to permit the Board to ensure that actual value was *determined* in a consistent manner. Construed in that manner, the direction is to ensure consistency of determination of actual value in a municipality or rural area. In my opinion, it strains the wording of the section to suggest that the phrase “in the municipality or rural area” also modifies the word “accuracy”.

[24] It follows that if the Board’s decision is to prevail, it must be justified by reference to the purpose and scheme of the *Act*.

THE PURPOSE AND SCHEME OF THE ACT

[25] The Board is a creature of statute. As such, it may only make a decision of a kind specifically authorized by the statute. Section 57(1), directed to assessments and actual value, does not directly permit the Board to interfere with the classification of property. At the same time, s. 50 of the *Act* specifies that a taxpayer who is dissatisfied with a

review panel's decision in relation to a matter appealed to the review panel, may appeal to the Board. Section 32 provides that one of the issues that may be appealed to a review panel is the classification of property.

[26] To give effect to the scheme of the *Assessment Act*, the question of accuracy must encompass the classification of property because classification is a factor in the determination of value. That result follows from the fact that s. 19(3)(f) requires the assessor to give consideration to the selling price of comparable land and improvements in the determination of actual value. Comparable land and improvements must be those of the same class. I would also remark that s.20 of the *Act* provides specific rules for the determination of the actual value of Class 4 properties. Those rules are different from the general rules in s. 19 applicable to Class 5 properties.

[27] Since classification affects the determination of actual value and, therefore the amount of the assessment which is defined as the valuation of property for taxation purposes, s. 57 must be construed to require the Board to ensure consistency of classification within a municipality or rural area. That being the statutory direction, any common law requirement that could be said to require consistency as

between municipalities and rural areas has been expressly overruled or constrained by statute. In that regard, one must not lose sight of the fact that the root of the consistency and fair treatment principle is found in *Jonas v. Gilbert* (1881), 5 S.C.R. 356 in which the Supreme Court of Canada observed that the requirement of equality and fairness as between classes of taxpayers was subject to legislative override. It is also noteworthy that in *Jonas*, the Court applied the statement of general principle to taxpayers within a single taxing jurisdiction.

[28] The conclusion that the common law principles of equity and consistency in classification are to be considered within a municipality or rural area and not across boundaries is consistent with the scheme of the *Assessment Act* and its purpose, quite apart from statutory interpretation. In that regard, I adopt the reasoning of the Board in para. [66] of its reasons, *supra*, to which I would add the following.

[29] The appellants claim that there should be consistency as between adjacent taxing jurisdictions within the same assessment area because of the principle of uniformity in s. 5 of the *Assessment Authority Act*. Were their position to prevail, there is no reason why a taxpayer should be denied the opportunity to appeal an assessment on the basis of inter-

jurisdictional inconsistency, however geographically remote the location of the inconsistently classified property might be. Entitlement of that kind would be inconsistent with the scheme of the *Assessment Act* which recognizes the individuality of municipal or rural area taxing jurisdictions and would create an unacceptably burdensome review and appeal process.

[30] In this case, the thrust of the appellants' concern, which is competitive disadvantage because of errors in classification, can be cured through appeals by the owners of Class 4 plants in the adjacent rural district directed at ensuring consistency of classification in their district just as Duke Point appealed its assessment and obtained consistency, relative to Mid-Island, for the 1999 taxation year.

[31] For the foregoing reasons, the answer to the question stated by the Board is "No". The respondent is entitled to costs.

"I.H. Pitfield, J."
The Honourable Mr. Justice I.H. Pitfield

February 17, 2003 – ***Corrigendum to the Reasons for Judgment*** issued by Mr. Justice I.H. Pitfield advising that the word "against" should be deleted from paragraph [3].

Paragraph [10] should read as follows:

> [10] The *Regulation* describes the exemption applicable to plants of the kind operated by Duke Point and Mid-Island as follows:
>
> | Plant | Capacity |
> |---|---|
> | Remanufacturing plants, not part of a sawmill, which manufacture lumber or other wood products for rough lumber or cants, but not raw logs | 24 million fbm [foot board measure] per year based on 480 shifts a year of 8 hours each shift |

The reference to paragraph [11] should be deleted.

Former paragraph [12] will be renumbered [11] and the paragraph numbering changed thereafter consecutively.

Paragraph [23] formerly [24] should read:

> … The intent must have been to permit the Board … in a consistent manner …

TAB 9

LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Fort Hills Energy Corp. v Provincial Assessor, 2024 ABLPRT 149

Date: 2024-03-21
File No. DIP19/FORT/WILS-01; DIP20/FORT/WILS-01; DIP21/FORT/WILS-01
Decision No. LPRT2024/MG0149

In the matter of 2019/2020/2021 Designated Industrial Property Assessment Complaints filed by Wilson Laycraft on behalf of Fort Hills Energy Corp.

BETWEEN:

Fort Hills Energy Corp.
(as represented by Wilson Laycraft LLP)

Complainant,

-and-

The Provincial Assessor
(as represented by Brownlee LLP)

Respondent,

- and -

The Regional Municipality of Wood Buffalo
(as represented by Harper Lee Law)

Intervenor.

BEFORE: H. Williams, Presiding Officer
W. Johnston,
D. Mullen,
D. Roberts,
L. Yakimchuk
(the "Panel")

Attending: D. Graham, Case Manager

APPEARANCES AND WRITTEN SUBMISSIONS

For the Complainant:	Counsel, Wilson Laycraft LLP G. Ludwig, KC B. Findlater A. Louie B. Dell
For the Respondent:	Counsel, Brownlee LLP A. Kozak G. Plester
For the Intervenor:	Counsel, Harper Lee Law A.P. Frank H.L. Overli, KC

ORGANIZATION OF THIS DECISION

This decision is organized as follows:

SECTION 1 – Procedural Background

SECTION 2 – Complaint Background and Requested Assessment

SECTION 3 – Issues

SECTION 4 – Decision and analysis for issues.

SECTION 5 – Summary of Witness testimony provided by the Complainant

SECTION 6 – Summary of Witness testimony provided by the Respondent

SECTION 7 – Interim decision and direction to the parties.

SECTION 1 - PROCEDURAL BACKGROUND

[1] The hearing occurred using virtual technology, on the following dates:

July 18 - July 21, 2023
July 24 – August 4, 2023
August 7 – August 24, 2023
September 12 – September 15, 2023
October 4 – October 6, 2023
November 7 – November 10, 2023

[2] A number of Preliminary and Procedural matters were raised by the Complainant, Respondent, and Intervenor prior to the commencement of the merit hearing. The disposition of those matters occurred based on a letter to the participants with reasons to follow or were contained within a decision on those matters. A table outlining those matters is as follows:

Hearing Date	Issue(s)	Date Parties Advised of Decision	Written Decision Date	Decision Number
22-Feb-22	Postponement request and disclosure schedule	25-Feb-22	25-Feb-22	LPRT2022/MG0350
12-Apr-22	Role of the Intervenor, confidentiality protocols, merit hearing location, and merit hearing schedule.	29-Apr-22	29-Apr-22	LPRT2022/MG0583
21-Jun-22	Presiding officer, clarification of reference term, role of the Intervenor, and confidentiality protocols.	24-Jun-22	24-Jun-22	LPRT2022/MG0912
21-Jun-22	Presiding officer, clarification of reference term, role of the Intervenor, and confidentiality protocols. - Decision with reasons.	24-Jun-22	04-Oct-22	LPRT2022/MG1333
11-Jul-22	Request for postponement	14-Jul-22	24-Oct-22	LPRT2022/MG1333
23-25 May-23, 9-Jun-23, 12-Jun-23	Respondent request to compel settlement agreements, Respondent request to exclude Complainant's rebuttal disclosure, Intervenor request to make submissions, Parties' proposed scope of expert witnesses	07-Jun-23 20-Jun-23	17-Jul-23	LPRT2023/MG0389
06-Jul-23	Panel direction on PCNs and hearing schedule.	06-Jul-23	17-Jul-23	LPRT2023/MG390
14-Jul-23	Sur-sur-rebuttal	31-Aug-23		Inc. in Merit Decision

[3] The July 14, 2023 decision was delivered by a letter dated August 31, 2023. The reasons for this decision are included in this decision in Appendix "A".

[4] Other preliminary or procedural matters raised during the merit hearing are also included in Appendix "A", including the decision, reasons for decision, and findings of the Panel.

SECTION 2 – COMPLAINT BACKGROUND AND REQUESTED ASSESSMENT

Background

[5] Fort Hills Energy Corp. ("Fort Hills", "FHEC", or the "Complainant") is the owner of the subject property, (the "Fort Hills Project"). The Provincial Assessor ("PA" or Respondent") is the assessor and the Regional Municipality of Wood Buffalo ("RMWB" or the "Intervenor") is the taxation authority to whom property taxes are paid by Fort Hills.

[6] The Fort Hills Project is a mine-based oil sands extraction and processing project, designed to produce 194,000 barrels/day of bitumen. The project, in its current configuration, was originally contemplated in the late 1990s, and was restarted in 2010 with a new Design Basis Memorandum ("DBM"). The project continued into Front End Execution and Design ("FEED") in 2011 and the project was fully sanctioned by the partners in 2013. Construction commenced in mid-2013 and the first oil for sale was achieved in 2018.

[7] The subject property includes land, buildings and structures ("B&S"), and machinery and equipment ("M&E"). There is no disagreement between the parties with respect to the land value. Additionally, the differences with respect to buildings and structures have been agreed to. The sole area of disagreement lies with machinery and equipment.

[8] In the property assessment scheme in Alberta, certain properties have been categorized as Designated Industrial Property ("DIP"). These properties are some of the largest assessed properties in the Province. Effective January 1, 2018, the *Municipal Government Act* was amended and DIPs were delegated to the PA to conduct the assessment, unlike other properties where the local municipal assessor would conduct the assessment. Prior to 2018, the RMWB prepared the assessment of Fort Hills.

[9] The manner in which M&E is assessed is not based on a market value approach, rather it is a regulated assessment. In order to conduct the assessment of M&E, the following assessment legislation and regulations are considered:

i. The *Municipal Government Act* ("*MGA*"),
ii. The *Matters Relating to Assessment and Taxation Regulation* ("MRAT"),
iii. The *Alberta Machinery & Equipment Assessment Minister's Guidelines* ("*Minister's Guidelines*"), and
iv. The *Alberta 2005 Alberta Construction Cost Reporting Guide* ("CCRG").

[10] The *MGA* provides the overall direction, rules, and definitions regarding preparing a property assessment. *MGA* section 292(2) provides that the assessment must reflect:

(a) the valuation standard set out in the regulations; and
(b) the specifications and characteristics of the property as specified in the regulations.

[11] *MRAT* provides the valuation standard for M&E. *MRAT* section 12(1) states "the valuation standard for machinery and equipment is that calculated in accordance with the applicable procedures set out in the Alberta Machinery and Equipment Assessment *Minister's Guidelines*." *MRAT* section 12(2) states "in preparing an assessment for machinery and equipment, the Assessor must follow the applicable procedures referred to in subsection (1)". A final factor in the regulated M&E assessment is the statutory level of 77%. *MRAT* section 12(3) states the M&E assessment "must reflect 77% of its value", which results in a regulated 23% reduction for all regulated M&E assessments. This 23% reduction is not used for other property types and is unique to M&E assessments.

[12] The steps taken by the assessor include the calculation of the components of the assessment:

Assessed Value = "Schedule A" X "Schedule B" X "Schedule C" X "Schedule D" X 77%

Where:

"Schedule A" is the base cost ascribed to the asset. The base cost includes the actual costs and excludes certain costs allowed for in the *CCRG*;

"Schedule B" is the assessment year modifier which measures the asset from 2005 to the current year;

"Schedule C" is the regulated depreciation factor. The regulated depreciation factors are truncated by starting at 75% (25% immediate deprecation) and ending at 40% to reflect Government of Alberta policy;

"Schedule D" is the additional depreciation for values not captured in the Schedule "C" depreciation factors; and

77% is the regulated reduction identified above.

The calculation is depicted as follows:

[13] Fort Hills and the PA (the "Parties") submitted that they agree on the methodology to calculate the M&E assessment. They also agree that Schedule "A" is the prescribed base cost. The disagreement between the Parties lies in determining the base cost.

[14] The legislation provides that the property owner is responsible for providing the actual cost of construction to the assessor. The legislation allows the property owner to claim certain excluded costs which reduces the prescribed base cost (Schedule "A"). In this matter, Fort Hills has proposed a number of costs it contends should be excluded as abnormal costs. On some of those costs the PA has agreed, and on others, the PA does not accept the proposed exclusion. The refusal of certain of Fort Hills proposed exclusions is the subject of this complaint.

Requested Assessment

[15] The complaints which are the subject of this appeal relate to the assessments for tax years 2019, 2020, and 2021, or assessment years 2018, 2019, and 2020. For ease of reference in this decision any reference to the year will refer to the tax year. Although all three (3) years are under complaint, this decision deals primarily with 2019, as that will determine the prescribed base cost for the property. Both 2020 and 2021 will then use the same prescribed base cost with any applicable addition or deletions considered.

[16] During the hearing there were various iterations of what the requested assessment should be. Towards the conclusion of the hearing, the Panel requested the Parties provide their respective requested assessments for each category of property. The following depicts the Parties' positions at the conclusion of the hearing:

2019 TY	**Original Assessment**	**Complainant Initial Request**	**Complainant Revised Request**	**Respondent Requested Assessment**
	$	**$**	**$**	**$**
Land	25,520,930	25,520,930	25,520,930	25,520,930
Building & Structures	782,705,610	787,966,483	784,209,633	784,209,633
Machinery & Equipment	4,534,840,680	3,254,396,787	3,129,490,990	5,139,383,533
Total	**5,343,067,220**	**4,067,884,200**	**3,939,221,553**	**5,949,114,096**

[17] As noted previously, the differences between the Parties relate to certain abnormal cost exclusions included in the prescribed base cost. The following is a summary of the total costs, excluded or agreed to costs, and the respective Parties' positions on the disputed costs (Complainant Exhibit 70-C and Respondent Exhibit 67-R):

2019TY M&E Project Cost $13,110,200,455	Complainant Revised Project Cost $	Respondent Revised Project Cost $
Machinery & Equipment comprised of	13,110,200,455	13,110,200,445
Joint Recommendations	3,969,442,416	3,969,442,416
Linear Portion	73,272,724	73,272,724
Proposed Assessable	5,403,053,051	8,904,394,507
	9.445,768,191	12,947,109,647
Proposed Exclusions	3,664,432,264	163,090,808

[18] The table above represents values that are described as follows:

M&E Project costs – the value of total construction costs provided by Fort Hills

Joint Recommendations – the amount that the Parties have mutually agreed on as proposed exclusions in an agreement finalized in March 2022

Linear Portion – assessed separately and agreed to by the Parties

Proposed Assessable – the value ascribed by each Party as to what is assessable

Proposed Exclusions – the value ascribed by each Party as to what should be an excluded cost

[19] As identified above, the Complainant considers $3.664 billion in excluded costs, whereas the Respondent proposes $163 million. The calculation referred to in paragraph 12 would then be applied to the Proposed Assessable cost to arrive at the assessed value for M&E.

SECTION 3 - ISSUES

[20] Initially, it was contemplated by the Parties that the hearing would determine whether specific Project Change Notices ("PCNs") might be accepted or rejected as abnormal costs. The Parties were able to propose a joint recommendation on a few of these; however, the remaining volume of proposed PCNs was significant and it would be impossible or at least highly impractical for the Panel to provide specific direction on each individual PCN.

[21] As a practical solution, the Panel found it would be most beneficial to focus on the broad areas of significant disagreement, to provide an interim decision focusing on those issues, and to provide direction to the Parties to facilitate agreement on the remaining PCNs.

[22] The Panel identified three issues based on the material and submissions before it.

Issue #1 – Should the Panel accept the Joint Recommendation where the Parties had agreed on the determination of several PCNs?

Issue #2 – Should all abnormal construction costs be adjusted by allowing the benchmarking of abnormal construction costs ("adjustment") in order to create a balanced market for all properties in Alberta? The adjustment is referred to as the Edmonton Area Adjustment ("EAA").

Issue #3 – What should the actual construction costs be compared to in order to determine abnormal costs?

[23] The Panel is aware that the Parties had discussions before the hearing on grouping PCNs by category; however, they were unable to reach consensus. The Panel observes that discussion is a necessary and extremely important part of the assessment process. Fort Hills has a duty to provide information; however, there is a duty by the PA to explain what information it needs when it determines the information provided is inadequate. The Complainant submits (Exhibit 40-C, page 5, para 8(e)-Response):

> The Complainant has satisfied its evidentiary onus and otherwise made any and all relevant information available to the Assessor. The Assessor must not lie in the weeds or be silent on what the Assessor believes is missing, then complain later at the eleventh hour that it has not been provided what it requires. A meaningful opportunity must be afforded to the Complainant to remedy any information problem and defend itself. The Assessor had the Complainant's initial filings, which contained much of the information which the Complainant refiled in May of 2022, as early as 2018. The Assessor cannot neglect its duty to review such information, or review such information, identify a deficiency, and provide no comment for approximately 4 years and then use such as a way to deny the legitimate filing position of the Complainant.

The Complainant based its submission on an Alberta Court of Appeal decision, ***Boardwalk REIT LLP v Edmonton City, 2008 ABCA 220*** *(Boardwalk)*, at paras 164 and 165. The Panel concurs. Although *Boardwalk* dealt with an application to dismiss a complaint owing to failure to produce information, which is not the case here, it highlights that the Assessor has a duty to deal fairly with taxpayers through open communication about what is required. While the PA submits that it has done as much as possible with respect to considering the PCNs, the Panel finds that the Parties require additional meetings to better understand one another's position.

SECTION 4 – DECISION and ANALYSIS for ISSUES 1, 2, and 3

Issue #1 – Should the Panel accept the Joint Recommendation where the Parties had agreed on the determination of several PCNs?

The Parties have provided a Joint Recommendation to amend the M&E portion of the prescribed base costs of construction by $3,969,442,416 and request that the Panel accept the Joint Recommendation.

Decision on Issue #1 – The Panel accepts the Parties' Joint Recommendation.

Party Positions:

Complainant

[24] The Complainant summarized its understanding of the Joint Recommendation in the report of Mr. Matthews (Exhibit 14-C, pages 15-16, para 53). Mr. Matthews confirmed the agreed-upon excluded abnormal costs totaled $3,969,442,416 (Exhibit 70-C, lines D28 and E28, and Exhibit R-20, para 62) . His report provided a listing of the areas agreed upon.

Respondent

[25] The Respondent also summarized the items agreed upon in the Joint Recommendation, and confirmed the amount (Exhibit 20-R, page 31, para 62).

Intervenor

[26] The Intervenor did not take a position with respect to the Joint Recommendation.

Reasons for Decision on Issue #1

[27] The Panel is satisfied that the Parties have mutually resolved certain aspects of the excluded abnormal costs and confirms the Joint Recommendation in the amount of $3,969,442,416.

Issue #2 – Should all abnormal construction costs be adjusted by allowing the benchmarking of abnormal construction costs ("adjustment") in order to create a balanced market for all properties in Alberta? The adjustment is referred to as the Edmonton Area Adjustment ("EAA").

Decision on Issue #2 – The Panel finds that the *Construction Cost Reporting Guide* ("*CCRG*"), while not explicit, intends that the Edmonton Area Adjustment should be allowed.

Party Positions

Complainant

[28] The Complainant's position is that historically the EAA has been considered when assessing DIP in Alberta. The purpose of the EAA was to consider a balanced market in Alberta by bench-marking costs for all regulated properties to an area of Edmonton and 50 kilometres surrounding Edmonton. By doing so, it ensured that all regulated properties were assessed consistently. It further considered that by applying an adjustment, all regulated property would be assessed on a similar basis. The salient features of the EAA were to consider the following (Exhibit 18-C, page 4, para 4):

a) a balanced market in order to identify abnormal costs associated with unbalanced market productivity losses; and
b) a central Alberta location in order to identify abnormal costs associated with remote location productivity losses.

[29] The Complainant's position is that the application of the EAA not only complies with the *CCRG*, but the *Special Property Assessment Guide* ("SPAG") which was a predecessor to the *CCRG* explicitly

included the EAA. When the *CCRG* was being adopted, there was nothing to suggest that the EAA would no longer be included. In addition, there have been recent discussions concerning an updated version of the *CCRG*, which has been provided a working group name of "Regulated Industrial Property Assessment Guide" ("RIPA"). Mr. Matthews was a participant in the RIPA working group discussion and provided a copy of a draft form of the proposed amendment, showing the document specifically allows for the EAA (Exhibit 37-C page 398). Mr. Matthews confirmed that RIPA is not currently legislated and continues in a discussion stage; however, it is evident that SPAG and RIPA both consider the EAA and it would be reasonable to consider that the *CCRG* would permit the EAA as well. Therefore, absent any legislative change there is no principled reason to depart from the historical practice (Exhibit 18-C, page 4, para 5).

[30] In support of the Complainant's position that the EAA should be applied, Mr. Fluney also confirmed the application of the EAA to the assessments of many of his client's province-wide and across numerous municipalities. Mr. Fluney stated that property owners and assessors have interpreted that the EAA has continued from SPAG to the *CCRG*. He also was of the opinion that if the EAA was not applied to Fort Hills, Fort Hills would be the only major oilsands project assessed without the benefit of the EAA (Exhibit 39-C, page 4, para 9).

[31] The Complainant's position was that any departure from the EAA would result in an incorrect application of the *CCRG* principles. The intent of the legislation is to provide consistency amongst regulated property in Alberta. The longstanding practice of applying the EAA to other DIP assessments demonstrates that the practice of applying the EAA is consistent, and historically has been negotiated, applied, and accepted by assessors across the province. Mr. Matthews stated that the *Minister's Guidelines* do not distinguish among regions for M&E; therefore, the intent of the *CCRG* is to also use the EAA as a benchmark.

[32] The Complainant noted that several CARB Decisions clearly show that the EAA adjustment was provided. It acknowledges that these decisions are not binding on the Panel; however, they demonstrate the understanding of both the property owner and the assessor that the application of the EAA was included. Mr. Matthews showed that the reductions approved in a large number of 2017 CARB Decisions[1] matched the amount considered when applying the EAA. In addition, certain parts of the 2017 CARB Decisions specifically contain a reference to the EAA (Exhibit 14-C (Unredacted), page 537, para 10). This was a rebuttal of the testimony of Mr. Minard who stated that he was unable to ascertain any instances where the EAA was applied.

[33] Mr. Iliev also provided examples of a breakdown of the components of labour productivity, all of which are included in the *CCRG* (Exhibit 9-C, page 8, para 25). Mr. Iliev stated that he attempted to incorporate these types of inclusions where the PA had already applied them; however, not all the EAA adjustments were captured by the PA.

Respondent

[34] The Respondent relied on the plain wording of the *CCRG* and stated that the EAA is only provided for Transportation Costs. It also stated that the *CCRG* required the assessment to be based on the actual

[1] The 2017 CARB Decisions were complaints against the 2014 and 2015 assessments by RMWB and included Suncor, Syncrude, Stat Oil, Nexen, Cenovus, Meg Energy, Conoco Phillips, Athabasca Oil, CNRL and Imperial Oil. The complaints are found in Exhibit 14-C (Unredacted), Appendices 34 to 50 inclusive.

cost of construction. Its opinion was that if the legislation was intended to consider an EAA, it would have explicitly included that.

[35] The Respondent also stated that the *CCRG* represents a deliberate policy decision to depart from the previous practices, and specifically SPAG. The PA emphasized that the intent of the *CCRG* was to apply the EAA only for Transportation Costs. The EAA was included in SPAG, however SPAG is no longer in effect. The Respondent also noted that SPAG was never a legislated document; rather it was a guideline. The *CCRG*, on the other hand, is a legislated policy which deliberately allows the EAA only for Transportation Costs.

[36] The Respondent's witnesses (Pickering, Driscoll, and Young) all confirmed that it was never the intent to include the EAA into the *CCRG*, and that robust discussion occurred when the *CCRG* working group met to discuss the adoption of the *CCRG*. In response to the suggestion that RIPA included the EAA, the Respondent noted that it was simply a working group document, which has not been adopted as legislated, and therefore has no authority.

[37] The Respondent also stated that it has adopted the RMWB interpretation of the *CCRG* which was encapsulated in a document referred to as the RMWB Blue Book.

[38] Another of the Respondent's witnesses, Dr. Thompson, also stated that the *CCRG* is clear that the prescribed base cost calculation is based on costs in the local municipality (RMWB) and not an EAA.

[39] The Respondent addressed the Complainant's position with respect to consistency. It was the Respondent's opinion that there is nothing inconsistent with incorporating typical local costs and noted that the *CCRG* is clear that "typical is hard to define…" (*CCRG*, section 2.5000).

[40] The PA stated that it was unaware of any proof or evidence that the EAA is being applied to any regulated properties. In response to the Complainant's submission that Suncor Energy Corp. ("Suncor") is receiving the EAA on certain of its properties, the PA submitted that there are some outliers.

[41] With respect to the 2017 CARB Decisions, the Respondent submitted that these were negotiated settlement agreements and that they were not principled nor based on legislative requirements. Its testimony was that the PA discussed the nature of the settlements with Mr. Schofield, who worked for RMWB as an assessor at the time of the settlements and found the agreements were to reach a settlement to finalize property tax payments.

[42] Dr. Thompson stated that with regard to the 2017 CARB Decisions, he was unable to "reverse engineer" the amounts reported to be the EAA. Dr. Thompson stated that the amount was likely an unproductive labour deduction, which although similar to the proposed adjustment, did not match it entirely.

Intervenor

[43] The Intervenor referred to the 2017 CARB Decisions, which were based on joint recommendations. It was its position that the entire matter concerning the settlement agreements could have been determined if Suncor, the parent company of Fort Hills, had produced copies of the settlement agreements. Suncor refused to do so, and as a result, the Intervenor submitted that the Panel should assume an adverse inference with respect to how the settlement agreements formed a part of the 2017 CARB Decisions.

Reasons for Decision on Issue #2

[44] The Panel finds that the wording of the *CCRG* in respect of the application of the EAA is not explicit. It is clearly stated that the EAA is applied to Transportation Costs. Because the wording is not explicit to the remaining sections of the CCRG, the Panel turned to examine the context and purpose of the legislation to interpret whether *CCRG* intends the EAA to be applied more broadly.

[45] The Panel finds that it was apparent there was considerable discussion surrounding the EAA in the *CCRG* working group discussions during the development of the *CCRG*. There are opposing views between the Respondent's witnesses (Pickering, Driscoll, and Young) and other participants (Matthews and Fluney), whether the EAA was specifically left out of the *CCRG*. The Respondent also cites the RMWB Blue Book as confirming the EAA was excluded in its interpretation. Notwithstanding the Respondent's views, others have interpreted the EAA as being maintained in the *CCRG* as evidenced within the transcripts of the working group meetings. The working group discussion was that the *CCRG* was not straying too far from SPAG and was attempting to get away from other cost-based manuals for other types of improvements; however, there was no expectation that the EAA was being removed.

[46] The Panel also considered the chronological history of the development of the *CCRG*. There does not appear to be any disagreement amongst the Parties that SPAG was a predecessor document to the *CCRG*. Nor is there disagreement amongst the Parties that the *CCRG* is a legislated document, whereas SPAG was simply a guide. While SPAG was not legislated, the evidence was that SPAG's guidelines incorporated the EAA and assessors commonly applied it to property assessment when determining costs excluded from the prescribed base cost. Notwithstanding the testimony of the PA that he was unable to locate any assessments where the EAA was applied, the Panel accepts the testimony of Messrs. Matthews and Fluney that the practice of assessors in applying the EAA continued until at least 2018, and for some Suncor properties specifically, after that date as well. The Panel finds that the EAA was viewed as being normally applied by industry participants and therefore the EAA was continued when determining the abnormal excluded cost. The Panel also finds that industry working group discussion with regard to RIPA, which is proposed as an update to the *CCRG*, had within a draft version contemplated the continued use of the EAA. Therefore, the predecessor to the *CCRG* and the potential replacement of the *CCRG* both considered applying the EAA. This contextual background tends to favour an interpretation of the *CCRG* as intending the continued application of EAA.

[47] The Panel acknowledges the specific reference in the *CCRG* to the EAA being applied to Transportation Costs and the Respondent's submission that the *CCRG's* silence as to application of the EAA to other costs shows it is specifically excluded with respect to other costs. However, given that the EAA was applied in the predecessor guide (SPAG), the Panel would expect more explicit wording in the replacement document if the intent were to eliminate it; further, it would not have been reasonable to eliminate it without some form of advance notice or discussion to signal a decision that it was being removed. The Panel finds that this would have represented a significant change in practice and a bulletin or discussion would have been issued to alert assessors and industry members. The 2013, 2014, and 2015 CARB decisions, as well as the 2017 CARB Decisions, and evidence of Suncor's assessments demonstrate that the EAA continues to be applied to at least the late 2010 period.

[48] The Respondent cites the *CCRG* as being developed to promote consistency. The Panel concurs with that concept; however, does not agree with the Respondent that "typical and normal" can promote consistency within a localized municipality. The Panel accepts the Complainant's argument that by applying a consistent benchmark, the EAA would promote consistency in regulated properties across Alberta. The Panel specifically notes that within section 2.500 of the *CCRG*, the last bullet states that an

example of abnormal costs is "a cost that is excluded to maintain consistency among regulated properties." The Panel finds that applying the EAA promotes that consistency province-wide.

[49] The Respondent also submits that the assessment should reflect regional costs that would have a different market value for different regions. The Panel finds that this argument appears to introduce elements of the "market value" concept to assessments using regulated rates. This is contrary to the use of regulated rates, which recognize that DIPs are special purpose properties that cannot be assessed on a market balance basis. Overall, it would not be logical to be self-reporting M&E costs based on regional labour rates and consider that would provide consistency to all regulated properties.

[50] The Respondent submits that other forms of regulated industrial assessment use market data to establish reproduction cost estimates (Exhibit 21-R, page 8, para 18). The Respondent fails, in the Panel's opinion, to take into consideration that the Complainant's sanctioned budget is based on market data. Dr. Thompson also cited that Suncor is a highly evolved corporation and has significant volumes of market data available to them, which would be used in the preparation of its sanctioned budget. Mr. Driscoll's testimony spoke to what occurred historically in gathering M&E costs to use in the *CCRG*. An example would be the use of union labour rates which would be consistent province-wide.

[51] The Panel also considered the Complainant's argument that singling out Fort Hills as the only plant being assessed in the manner proposed by the PA is unfair and inequitable. The Panel accepts the Complainant's argument that Fort Hills is not being assessed equitably. The PA's testimony suggests it was unable to find any property where the EAA is applied. However, the Complainant has provided a number of examples that demonstrate the PA's statement is inaccurate. The evidence suggests that there are many regulated properties being assessed using the EAA.

[52] Arguing from its premise that a correct interpretation of the *CCRG* does not require application of the EAA, the Respondent maintained the LPRT lacks authority to change the assessment because *MGA* s.499(3) prevents it from altering "… any assessment of designated industrial property that has been prepared correctly in accordance with the regulations …". Even supposing the Panel were to accept the Respondent's premise (which it does not), the Panel would still reject this argument. Rather, it finds the principle of equity is in itself a sufficient reason in this case to justify amending the assessment. Having applied the EAA in some cases, the PA would continue to be required to equitably apply the adjustment to similar M&E assessments for which complaints are filed.

[53] This finding follows from the requirement in s.293(1) of the *Act*, which states, "In preparing an assessment, the Assessor must, in a fair and equitable manner, (a) apply the valuation and other standards set out in the regulations, and (b) follow the procedures set out in the regulations." The requirement for equitable assessment generally implies that owners of similar properties are entitled to similar treatment. (***Strathcona No. 20 (County) v Alberta (Assessment Appeal Board)*, 1995 ABCA 165 (Alta. C.A.)** at para 8). Of course, in the regulated assessment context, it is possible for the legislators to override this requirement for policy reasons and specifically require different treatment of properties that would otherwise appear similar. However, even in the regulated context, different treatment of similar properties must be supported by clear legislated direction. In the absence of such direction, the assessor should apply the procedures and regulated standards fairly and consistently. If the assessor does not do so, the principle of equity implies a taxpayer who appeals their assessment is entitled to an adjustment that restores equitable treatment – i.e., treatment consistent with that received by other similar properties. This interpretation is in line with many previous authorities; see, for example, Municipal Government Board order ***MGB 075/16*** at para 67, upheld on judicial review by ***Alberta (Minister of Municipal Affairs) v Ember Resources Inc.,*** 2018 ABQB 971. In the case now before the Tribunal, the Complainant has demonstrated that equity is not

being applied. It would not be equitable to assess Fort Hills on a stand-alone basis while other M&E assessments receive the EAA adjustment.

Issue #3 – What should the actual construction costs be compared to in order to determine abnormal costs?

- **a) To what extent does the difference between the sanctioned budget and what was actually spent reflect abnormal costs?**
- **b) To what extent are design-change costs abnormal?**
  - **i. What is "typical" or "normal"?**
    1. **Budget estimates**
    2. **Market average**

Decision: The Panel finds that the sanctioned budget is an appropriate basis for establishing the baseline budget for the purpose of comparison to actual costs in this case, for all project areas excluding the Secondary Extraction ("SE") portion. For the SE project the appropriate basis for establishing the baseline budget is the Quantity Adjusted Budget ("QAB").

Party Positions:

Complainant

[54] The Complainant stated that in all its prior Suncor projects, it has used the sanctioned budget as the starting position to establish the basis to determine abnormal costs. It further submitted that historical practice continued with the subject assessment. The sanctioned budget has a number of names it identifies with including the Gate 3 budget, the Front-End Engineering Design budget ("FEED"), and the EDS.

[55] In this case, the sanctioned budget is appropriate for all project areas, except SE.

[56] Mr. Matthews stated that the policies and procedures used prior to the current PA being named the assessor for DIPs, were not well understood by the PA and this included using the sanctioned budget as the starting point for comparison to actual construction costs.

[57] The Complainant submitted that originally, the SE project sanctioned budget was estimated at $3.85 billion in 2013. The original sanctioned budget for SE was based on a lower quality review of engineering as compared to other project budgets. As a result, when the entire project was sanctioned and received the partner approval to proceed, it was known that the SE budget was not finalized and required additional scrutiny. As a result, in July 2014, the sanctioned budget for the SE was received and created a revised estimated cost ("QAB") which was used by Fort Hills in replacing the previous sanctioned budget amount. The Complainant also stated that the SE PCNs that were created were measured against the QAB budget and not the original sanctioned budget.

[58] The Complainant's position was that the accepted practice has been to use the actual project costs, subtracting any scope changes that were not excluded costs, less the sanctioned budget to form the abnormal non-scope excluded costs. The Complainant acknowledged that if the sanctioned budget contemplated abnormal costs, then those abnormal costs would also be deducted in the foregoing formula.

[59] The Complainant submitted that project changes include Scope changes, Non-Scope changes, and Budget Transfers, and are defined as follows (Exhibit 3-C, page 5, para 17):

17. Types of Project Changes include Scope Change PCNs, Non-Scope Change PCNs, and Budget Transfer PCNs. Each of these three types of Project Changes are outlined below:

a. Scope Change PCN is defined as a change in any item of work that materially alters the layout, specification process, configuration, capacity, quality, or execution strategy of a project. Scope changes represent significant alterations to the project plans not considered or funded within the approved project budget. All scope changes are subject to the PMoC ("Project Management of Change") process. Examples of what might be evaluated as a Scope Change PNC include:

i. addition or deletion of a process unit or facility;
ii. modifications to process equipment, piping to increase or restrict plant through-put;
iii. design changes resulting from changing feedstock composition or product specifications;
iv. impact of scheduling compression or extension for Owner's commercial reasons including, for example, changing market conditions; and
v. changing the technology upon which the EDS[2] design was based (i.e., replace one process unit with another of newer technology).

b. Non-scope Change PCN is defined as project changes that are not considered to be a Scope Change PCN as defined above. Non-scope PCNs will be used for all other changes which impact cost, schedule, quantities, and workforce hours. Examples of what might be evaluated as a Non-scope Change PCN include:

i. productivity increase or decrease for either of construction or engineering;
ii. bulk material or equipment cost increases or decreases from forecasts as a result of circumstances that are outside of the deemed tolerance for the current budget; and
iii. rework, schedule delays, design development beyond design allowances, wage rates, labour turnover, and commodity pricing for defined scope.

c. Budget transfer PCN is defined as a transfer of both scope and budget. An approved budget transfer within a project would have a zero-dollar net impact. An approved budget transfer between projects or areas would require a change to be initiated in each area.

[60] The Complainant advised that the sanctioned budget typically includes contingency allowances to allow for unexpected costs. Such was the case in this project; however, the Complainant submitted that those contingencies underwent a rigorous analysis by the Fort Hills Project team. It was also submitted

[2] (*) - EDS - "Engineering Design Specification"

that the expectation of the Fort Hills Project team was that contingency amounts would be spent. It was further noted that there were some PCNs which included a negative amount. That would suggest that the amount spent was less than the sanctioned budget, and that would be considered in the overall consideration of abnormal costs as well. The Complainant emphasized that it was not requesting that the contingency amounts be removed as abnormal costs.

[61] The Complainant advised that in excess of 3,000 people were involved in the creation of budgets for the Fort Hills Project. This level of involvement must be considered the "best in practice". In response to the Respondent's position that it would be prudent for the property owner to "lowball" the budget in order to achieve a lower assessed value, the Complainant stated that was simply unrealistic. The sanctioned budget was identified as a well-supported, cautious estimate, where budget amounts were conservative (higher), and were based on actual tenders which were also supported by third party estimates.

[62] Within the testimony of Mr. Matthews were detailed spreadsheets (Exhibit 14-C (Unredacted), Appendices 6, 7, 8, 9, 10, 11, 29 and 51) which formed the basis for "renditions", which were the variances between the sanctioned budget (SE – QAB Budget) and actual costs, which then determined the proposed excluded abnormal cost.

[63] It was also Mr. Matthews' testimony that the Respondent refused to meet with the Complainant to conduct a detailed review of each of the renditions and to discuss the PCNs associated with the proposed excluded cost.

Respondent

[64] The Respondent disputed using the internally prepared sanctioned budget as the document to be considered to determine abnormal costs. Its position was that the *CCRG* directs the assessor to consider actual costs compared to similar improvements in the same municipality, constructed at the same time, similar project, same industry, and of similar size.

[65] The Respondent stated that using internally prepared budgeted costs encourages the property owner to underestimate budget costs in order to reduce the assessed value and thereby reduce the property taxes paid by the property owner.

[66] In this matter, the Respondent submitted that even if one used the sanctioned budget to compare actual costs, the variance between the two is so large that it casts a lack of credibility on the entire budget process.

[67] Dr. Thompson's testimony was that the measurement of abnormal construction costs is a four-step process (Exhibit 26-R, page 21, para 43):

> a. the comparison of actual working conditions to the project specifications defined in the DBM/FEL ("FEED") documents;
> b. the measurement of deviations between actual and DBM specifications;
> c. the determination of actual additional costs as a result of any measurable impacts; and
> d. a comparison to typical construction costs in the applicable location (in this case the RMWB).

Intervenor

[68] The Intervenor took no position with respect to this issue.

Reasons for Decision on Issue #3

[69] The Panel adopted the Complainant's Project Scope, Non-scope, and Transfers Definitions (see para 59).

[70] The Panel looked for guidance in the *CCRG* for the purpose of considering abnormal cost deductions in the formula to determine the project prescribed base cost as the starting point for the assessment (Schedule "A"). The Panel's interpretation is that abnormal costs are captured if there are no market anomalies or other issues which increase costs beyond what those costs would have been if constructed in ideal conditions.

[71] As an example, the Panel finds that where design changes occur, creating additional project costs, and there is no change to the overall scope of the project, these costs must be deducted from the actual construction costs and be considered eligible abnormal expense deductions. Conversely, where specific design changes occur which create additional project costs, and the design change enhances the overall scope of the project, these costs would be ineligible abnormal expenses deductions, and would remain in the actual project construction costs.

[72] The Panel acknowledges that the *CCRG* (section 2.500 – Abnormal Costs of Construction) states:

> The determination of what constitutes "typical" or "normal" is difficult; it is subjective and it may vary over time, from one location to another and among industries. If the actual costs of an industrial facility are greater than typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded.

[73] The foregoing introduces the recognition of the selective nature of "typical" and "normal", however, contrary to the Respondent's assertion (that the actual costs must be compared to similar improvements in the same municipality, constructed at the same time, similar project, same industry and of similar size), there is no specific direction provided which supports that position.

[74] The Panel finds that the sanctioned budget, as submitted by the Complainant, is a good estimate in this matter. The Panel also finds that estimates for the sanctioned budget are based on the expectations for actual costs and actual industry pricing. This is not dissimilar to how Alberta Municipal Affairs ("MA") develops costs for M&E rates for commonly occurring improvements. The draft RIPA document, although not in effect, references the use of a draft budget as being acceptable (Exhibit 37-C, page 404).

[75] The Panel also finds the Fort Hills sanctioned budget is based on a proven and rigorous budget process. Complainant witnesses Messrs. Jackson and Imdadullah described the budget process, its comprehensive nature, and the detailed analysis that occurs. The Panel accepts their testimony, which was highly descriptive in nature, and rejects the Respondent's argument that the budget process was flawed and unreliable since there was no supporting documentation demonstrated to the Panel to support the Respondent's opinion, other than the project was extremely over budget.

[76] The Panel also considered the Respondent's testimony that the M&E *Minister's Guidelines*, like other forms of regulated industrial assessment, use market data to determine reproduction cost estimates (Exhibit 21-R, – page 8, para 19). The Panel finds that it would be consistent to follow a similar approach to determine costs in the *CCRG*. For example, the sanctioned budget estimates are based on market data and budget estimates from engineers, contractors, and others. This is consistent with the Respondent's

testimony as to what occurred historically with development of M&E costs and the *CCRG*. That testimony cited union rates, as an example, which would be used province-wide.

[77] The Panel also disagrees with the Respondent's proposition to use actual comparable costs to create the benchmark for typical costs. The Panel finds that the subject property is unique and that there is no comparable project of comparable size. The closest comparison to the subject would be the Athabasca Oil Sands Project ("AOSP") and that property is much older than the subject.

[78] The Panel noted that Dr. Thompson suggested a 4-part process for a budget estimate to be used as a starting point. The Panel finds that the proposed use of the DBM was a working assumption provided by the PA, and little justification was provided to support this assumption. Mr. Minard stated that the DBM reflects what the owner intended to build. However, the Panel finds the DBM budget was based on original concepts, which changed significantly as the design matured. The Panel was not convinced the DBM estimates form a reliable starting point to use as a benchmark.

[79] The Panel also finds that there are similar difficulties with the 19 assumptions imposed by the PA on Dr. Thompson's engagement. In his reports there was no indication that the reasons for the assumptions were supported by other evidence. The Panel finds the assumptions restricted Dr. Thompson in providing his analysis, support, and findings. Accordingly, the Panel did not place significant weight on Dr. Thompson's suggested methodology or conclusions.

[80] The Panel also finds that in this case, the PA did not discuss historical assessment practices of comparable properties with Fort Hills. The Panel finds that discussion of this nature would have benefitted the Respondent in developing a better cost estimate. The Panel does note that the PA's contention was that it did not have access to older assessment information.

[81] The Panel finds that *CCRG Interpretive Guide: Reporting of Construction Costs* allows for estimates to be used as a comparison (Exhibit 19-C, page 501, first bullet). The other bullets also support the concept that budget comparison as reported by the operator is appropriate, and encourage discussion between the assessor/taxpayer, as necessary. The concept is further supported in ***Canadian Natural Resources Limited v Regional Municipality of Wood Buffalo CARB Order CARB 001-2014*** (Exhibit 19-C, page 28, para 62) as well as in ***Canadian Natural Resources Limited v Regional Municipality of Wood Buffalo CARB Order CARB 001-2013*** (Exhibit 40-C, para 38, and para 350 of the decision). Similar wording can also be found in the draft RIPA document (Exhibit 37-C, page 396, para 6).

[82] The Panel does not accept the Respondent's position that relying on a budget encourages owners to under-budget to reduce assessment and taxation. Budgets are used for other purposes and intended to be relied on by users, including project partners, senior executives, accountants, project engineers, contractors, etc. It is not logical to consider the sole purpose of the internal budget would be to reduce the assessment and consequential taxation of the subject.

[83] Next, the Panel turned to the SE budget and found the Fort Hills sanctioned budget included SE; however, it was a placeholder, in that the SE project had issues at the sanctioned budget timing with finalizing its project design and estimated costs. The SE sanctioned budget was prepared by the Fort Hills Project team with the assistance of the primary SE contractor and was deemed reliable at the time. However, the Board accepts the Complainant's submission that when the contractor was replaced, the project team's expectations changed. The new contractor was able to create more accurate inputs following the implementation of design changes affecting the scope of the SE project. These design changes were described by Messrs. Jackson and Imdadullah in detail and were accepted by the Panel. The Panel also

notes that if the original sanctioned budget was used, it was much lower than the replacement QAB and the difference between the cost of construction and the QAB and determination of abnormal costs would be greater.

SECTION 5 - WITNESS TESTIMONY - COMPLAINANTS IN THE ORDER OF OCCURRENCE AT THE MERIT HEARING

Project Overview - Mr. Ryan Jackson (Exhibit 1-C)

[84] The background information was derived from the disclosure report of Mr. Jackson, General Manager of Projects in Suncor's Project Execution Function.

[85] The property under complaint is owned by Fort Hills Energy Corp. The Fort Hills lease has a long history and is home to the oldest oil sands processing plant in Alberta. At the time of the complaints, Suncor held 54.11% ownership in the Fort Hills Project, while Total E&P Canada Ltd. held 24.58%, and Teck Resources Ltd. held the remaining 21.31%. Suncor had the role of operator and oversaw the construction activities. During 2023, Suncor purchased the minority partners' interests and is now the 100 percent owner of Fort Hills.

[86] The Fort Hills Project is located approximately 90 kilometres north of Fort McMurray in northern Alberta. Due to its remote location, the project could not benefit from proximity to large populations and infrastructure like many other similar industry projects. The Fort Hills Project needed to build a significant amount of infrastructure including paving Highway 63, on-site water treatment, power generation and power distribution, and the construction of workforce camps. The Fort Hills Project also incurred additional costs to transport the workforce, equipment, and materials to the remote Fort Hills location. Many of these items are reflected in the non-assessable cost impacts on the Fort Hills Project, of which many are the subject of these complaints.

[87] Fort Hills is a mine-based oil sands extraction and processing project, designed to produce 194,000 bpd of bitumen. The project, in its current configuration, was restarted in 2010 with a new DBM. The project continued into Front End Execution and Design ("FEED") in 2011 and the project was fully sanctioned by the partners for execution in mid-2013 with first oil achieved in 2018.

[88] It is frequent practice in major projects to compartmentalize into smaller, manageable project areas. However, this creates the need to integrate and continuously coordinate the areas from both a technical and project management perspective. Project integration typically requires the areas to progress in unison, especially when the project area designs are technically interconnected with each other, such as the case in Fort Hills.

[89] Fort Hills, relevant to this assessment complaint, is subdivided into the following project areas: (i) Mining; (ii) Ore Processing Plant ("OPP"); (iii) Extraction and Tailings ("ET"); (iv) Secondary Extraction ("SE"); (v) Utilities and Cogeneration ("U&C"); (vi) Infrastructure; (vii) Automation, Electrical and Telecommunications ("AET"); and (viii) Facilities and Common Services ("F&CS"), (collectively the "Project Areas"). All areas except for Mining contribute to the assessment complaint of Fort Hills.

[90] Suncor has developed and executed several extremely large capital projects. This experience, along with observing other large capital projects in the region (*e.g.* the Athabasca Oil Sands Project, Syncrude

UE-1, and Imperial Kearl), led to a "rule of thumb" to keep the on-site workforce limited to approximately 5,000 persons. While not an exact number, Suncor believes that workforces exceeding this approximate level become prone to risks such as declining workforce competencies, reduced productivity, issues with logistics, on-site congestion, and a decline in safety culture, which can lead to workplace incidents.

[91] Early modelling of the Fort Hills construction execution plan indicated that the on-site workforce would see peak levels exceeding 9,000 persons. To avoid the risks associated with such large workforces, the project areas were planned in a sequence that would keep the peak workforce limited to approximately 5,000 persons. This became the basis of the final project execution plan.

[92] In the Fort Hills plan, the first wave of execution was scheduled to include Mining, OPP, ET, Infrastructure, and F&CS. As the peak of the first wave was scheduled to be nearly completed, the second wave, which was scheduled to include SE and U&C, would ramp up. AET was unique in that it interconnected to all project areas and execution of AET spanned across both the first and second waves.

[93] The Fort Hills Project was an extreme size for the Alberta labour market. As an integrated project, delays in one Project Area often led to increased costs and delays in other Project Areas. These delays resulted, in part, from design changes to the Project Areas. To alleviate some of these resulting delays, Fort Hills increased its work schedules and added night shifts and overtime for its workers. It also engaged in global suppliers in multiple locations with the intention of minimizing the delay and cost escalation impacts to the Fort Hills Project.

[94] Mr. Jackson stated that the Fort Hills Project experienced significant issues which led to construction being delayed. These issues, which are addressed in the body of Fort Hill's disclosure document, included:

- Remote location;
- Market labour constraints;
- Atypical site conditions;
- 2016 Fort McMurray wildfire;
- Rework and changes in work location; and
- Contractor performance that required changes.

Utilities and Co-Generation ("U&C") - Mr. Jeff Yarycky (Exhibits 7-C Redacted and Unredacted), Exhibit 35-C and Exhibit 54-C)

[95] The U&C information was derived from the disclosure reports of Mr. Yarycky, Director of Project Controls.

[96] Mr. Yarycky provided background information concerning the construction and construction costs associated with U&C.

[97] Mr. Yarycky was qualified primarily as a fact witness (Exhibit P16C). The Respondent agreed to the following:

> Mr. Yarycky is primarily a fact witness. He will testify in respect of the utilities and cogeneration project area. He is a Suncor technologist, on the overall Fort Hills project and what happened on the secondary extraction unit. In the course of giving his evidence he may give opinions on the impact of delays, rework or repair on productivity on project costs.

[98] Mr. Yarycky submitted his educational and work history and stated that he was Manager of Project Controls from 2012 to 2018. Subsequently, he has was elevated to Program Manager of Project Controls from 2018 to 2020 and then within Suncor as Director of Project Controls in 2020, and that is the role he currently holds.

[99] Mr. Yarycky holds a Computer Aided Design & Drafting Technology Diploma (1997), Bachelor of Commerce - incomplete (2003-05), and a Master's Certificate in Project Management (2006).

[100] Mr. Yarycky's involvement in the U&C Project was as the Project Controls Manager commencing in the FEED stage, through project sanction, detailed engineering and execution, and completing the turnover and project closeout.

[101] Mr. Yarycky provided background information that, at the outset of the project, the U&C was within the Utilities and Offsite Scope project area. This was later reduced to U&C. The U&C contract was awarded to a single Engineering, Procurement, Fabrication and Construction ("EPC") contractor.

[102] The U&C project was largely split equally between the EPC Contractor and another Swedish firm who oversaw the cogeneration portion of the overall project. None of the identified costs were attributed to the cogeneration contract.

[103] Mr. Yarycky stated that in his opinion, the U&C project experienced $453,504,965 in costs incurred as a result of design changes which reflected rework or changes. He also stated that the design changes were outside of the nameplate or scope of the U&C Project and should be excluded from the assessment.

[104] The primary causes for the design changes were summarized as follows:

(i) a lack of a complete and accurate plan and execution of that plan (the "Execution Challenges"),
(ii) a new and unproven engineering method of very high modularization (the "Engineering Challenges"), and
(iii) the EPC Contractor's inability to manage a project of this magnitude (the "Contractor Challenges").

[105] Mr. Yarycky also stated that the foregoing challenges were compounded by the EPC contractor challenges. The contractor had worked with Suncor early in the project at the EDS level, and Fort Hills was confident in its work. As a result, the EPC contract was sole sourced and was established as a fixed cost contract, which is defined as a fixed fee and fixed overhead and disbursements and engineering, which together were the "Target Price". Within that contract, the equipment, bulk material, and labour (direct and sub-contracted) were reimbursable within the Target Price. Mr. Yarycky stated that the contract value was $1.5 billion.

[106] In addition to the Target Price contract, a performance fee was also established with potential to earn portions of the incentive each year from 2014 to 2017. A cost sharing initiative was also included in the contract, where the EPC contractor would share 50% of any savings under the Target Price. The contract structure was established to drive the "right behaviours" from the contractor and incentivize them to underrun costs and maintain the planned schedule.

[107] It was the EPC contractor's intention to use a concept referred to as 3rd Generation Modularization ("3G"). The 3G concept was being used on the Shell Quest project; however, it was relatively new when

the U&C engineering started. Additionally, the EPC contractor had never used the concept before. The 3G concept was an effort to reduce field hours and the manpower required on site and the 3G modules were to include installation of steel, pipe, equipment (including smaller horsepower pumps), electrical, and instrumentation. This was to occur at the modular yards, which were a more controlled environment than in the field, and did not require travel or associated camp costs. The Quest project was much smaller than Fort Hills and was not a remote site, as was Fort Hills; however, Mr. Yarycky stated that the process was the same as used at Quest.

[108] Mr. Yarycky addressed each of the three levels of challenges faced by the U&C project, as outlined in paragraph 104, beginning with Execution Challenges, followed by Engineering Challenges and Contractor Challenges.

(i) Execution Challenges

[109] The 3G concept was that 361 modules were required and that approximately 80% would be modularized within the 3G concept. This required three (3) modular yards to be engaged as sub-contractors to construct the modules.

[110] Initially, the fabricated steel required to complete fabrication was delayed. This had compound effects as the modular yards were reluctant to begin fabrication until a satisfactory level of steel was on hand to not have the manufacture process stop and start. The effect was a two-month delay in fabrication, as the EPC contractor had not established a proper material management system. To mitigate the schedule slippage and avoid high manpower peaks in each of the module yards, a fourth module yard was engaged, and the number of modules were redistributed amongst all four (4) yards.

[111] When modular yard construction began, there were significant issues with engineering, which required change orders. Mr. Yarycky stated that there were many engineer drawings and Request for Information ("RFI") changes. Engineering revisions, according to Mr. Yarycky, are normally one or two. In the Fort Hills project, the revisions were 10-12 per module and were so much of a problem that the EPC contractor transferred engineers from its offices to reside on-site at the module yards. Engineering changes occurred in every discipline: structural, mechanical, piping, electrical, and instrumentation.

[112] As a result of the overheated market, a decision was made to expand global procurement efforts. The fabricated steel and pipe spools were procured from overseas suppliers. The fabricated material was then shipped to Edmonton, where the modules were assembled and transported to site. The steel was procured from China under a supply and fabrication purchase order. The pipe was procured from India, also under a supply and fabrication purchase order. Based on the experience these vendors had, the EPC contractor initially assigned light oversight in the vendor shops, which resulted in failure to identify material deficiencies, resulting in late deliveries of steel and pipe modules, and lower site-specific productivity.

(ii) Engineering Challenges

[113] Mr. Yarycky stated that the EPC contractor lacked the ability to meet the design challenges of the U&C project. This resulted in late engineering deliverables and the budgeted hours were almost doubled. The result was an estimated $70 million overrun in engineering, which started to erode the underrun potential before construction had even started. Much of the overrun was due to the EPC contractor having never used the 3G concept. Fort Hills management conceded that it did not understand the full ramifications of the engineering issues it faced. Later Fort Hills management learned that the early engineering impacts set off a chain reaction of other impacts that cascaded all the way through the entire project lifecycle.

[114] The EPC contractor originally levelled the fault at the steel and pipe suppliers. In the case of the Chinese supplier of fabricated steel, the EPC contractor reported monthly fabrication delays and assigned blame to the supplier. Fort Hills management, after several months, began investigating the claims and found the Chinese supplier was receiving late, incomplete, or missing issued-for-construction drawings and as such could not meet timelines. The lack of adequate drawings made the Chinese supplier hesitant to start fabrication as they could not ramp up to full capacity because the drawings kept changing. When Fort Hills brought this to the EPC contractor's attention, it dispatched an engineer to oversee the Chinese supplier. In addition, Fort Hills sent an employee to China to join the EPC contractor on-site. The EPC contractor also deployed engineering resources to the fabrication shop in Shanghai to overcome the volume of drawing changes required. Fort Hills determined the Chinese supplier was in fact producing 2,300 tons per month versus the projected 1,800 tons per month. This, however, was after they were delayed by inadequate drawings.

[115] As a result of its investigation, Fort Hills management determined that the Chinese supplier had performed $8M worth of additional engineering that should have been performed by the EPC contractor directly, and for which the EPC contractor instructed the Chinese supplier not to show as a line item on invoicing until the end of the contract.

[116] A second example of the engineering challenges was the design of 1,200 horsepower pumps which were engineered to bolt to the structural steel. After installation, it was determined that studies found the bolting onto structural steel created significant vibration. The bolt to steel concept was abandoned in favour of the traditional method of bolting to concrete pads; however, there was a design change workaround created.

[117] Another example was provided where two modules were connected by a large 18-inch pipe. When installed, the modules connected by pipe were not aligned. This connection used expansion loops; however, due to the pipe stress inflicted on the joint, the realignment was required to be completed on site, supervised by field engineering personnel. The result was to cut the pipe, adjust the equipment, refit, and reweld. This further cascaded into retesting. Mr. Yarycky described this as less than optimum conditions. If the work had been properly completed at the modular manufacturing yard, costs would have been significantly lower. In many cases, the planned work required additional scaffolding due to the location within the buildings.

[118] Lastly, modularization yards continued to experience delays in receipt of inventory of steel and pipe. In order to mitigate and attempt to keep the program as on-course as possible, air freight was used rather than shipment by ocean freight. Additionally, a further reorganization of modular yard work was made by transferring responsibly from one Alberta modular yard to another.

(iii) Contractor Challenges with EPC Contractor and Others

[119] Mr. Yarycky opined that the execution and engineering challenges were compounded by contractor challenges, specifically derived from the EPC contractor. The contractor was unable to accurately forecast either costs or schedules, and mitigation attempts by the contractor targeted the wrong assumptions and were subsequently ineffective. This resulted in repeated volatility in the contractor's costs and schedule performance.

[120] Included in Mr. Yarycky's disclosure (Exhibit 7-C (Unredacted), page 6, para 24) is a chart which demonstrates the original project cost at $1.53 billion at the initial projected completion of April 30, 2017,

compared to the reforecast cost of $1.797 billion as at October 31, 2017. Total labour hours were projected at 3,013,307 hours versus the reforecast of 6,871,571 hours.

Description	Original Contract Amounts	Forecast Amounts October 2017	Variance Value	Variance Percent	
	a	b	c = b-a	d = c/a	
Total Installed Cost ($M)	$ 1,495	$ 1,796	$ 301	20%	
Performance Fee ($M)	$ 30	$ 17	($ 13)	-43%	
Home to Hub Expenses ($M)	$ 5	$ 4	($ 1)	-20%	
Deadband Clawback ($M)	$ 0	($ 20)	($ 20)		
Total Project Cost ($M)	$ 1,530	$ 1,797	$ 267	17%	
Home Office Hours	1,313,840	1,697,487	383,647	29%	
DFL Direct Hours	1,035,042	2,649,790	1,614,748	156%	
Scaffolding Hours	350,019	676,698	326,679	93%	
Total Field Hours (Direct + Indirect)	3,013,307	6,871,571	3,858,264	128%	
Mechanical Completion (MC)	31-Mar-2017	31-Oct-2017	214	days	
Turnover Care Custody Control (TCCC)	30-Apr-2017	31-Oct-2017	184	days	

[121] Mr. Yarycky stated that the EPC contractor was provided with a very detailed scope of work and obligations. Fort Hills did not set out the "how" to complete the project and relied heavily on the EPC contractor to execute the plans. Also, there was a significant incentive to complete the project at a lower cost.

[122] Mr. Yarycky stated that from the outset, a weakness showed up when the EPC contractor struggled to set up its systems and tools to control the job. This weakness appeared primarily in the project controls and supply chain and later in construction. Mr. Yarycky opined that by not adequately setting up the proper systems and controls at the beginning, the EPC contractor eventually lost control of the quantity tracking for the project.

[123] Mr. Yarycky also submitted that there were issues from the outset with a pipe fabricator, who refused to perform any work unless the issued-for-construction documents were completed and also refused to use material take-off amounts included by the EPC contractor, as the supplier was under a unit pricing contract, and could not build without price and availability of inventory certainty.

[124] Mr. Yarycky also stated that another of the modular yard manufacturers was problematic at the outset and required Fort Hills management to intervene on a number of occasions to resolve management and structural issues with the subcontractor. This eventually resulted in a change in management with the subcontractor even before the manufacture of modules had ramped up.

[125] The EPC contractor's original delivery date for the modules to be completed and ready to ship was July 31, 2016. Recognizing the issues that arose, as well as due to the nature of the 3G modularization, construction work on-site could not commence without the modules being in place, as they formed the base structure for the buildings. It was determined that all modules needed to be set in place by October 31, 2016 to mitigate further schedule impacts and enable construction to proceed. To achieve the revised scheduling, Fort Hills was forced to allow the shipment of incomplete modules to site, and have any remaining work completed at site instead of at the module yards. This resulted in significantly higher costs due to lower productivity and higher rework. Specifically, Fort Hills had to have crews fly in-fly out and incurred camp costs, all of which would have been unnecessary if the work had been done at the modular yards. The 3G concept was to reduce field hours and transfer the labour force to the modular yards, and this did not occur.

[126] Without having the modules on site, the overall work of the project was curtailed until they arrived. The 3G modules were not only pipe racks and stair towers but formed the building walls and roof as well. There was only one conventional stick-built building within the Utilities project area, and work was already underway on it. Until the modules were set, there was no direct above-ground work that could be performed. Mr. Yarycky stated that a further challenge was that the buildings required the modules to be set in a particular sequence, like Lego blocks. The sequence was determined by the shape and levels of the building and the crane location. The most complex (mechanical and piping intensive) modules were located on the bottom floors and ended up taking the longest to complete and be ready to set in place. This complicated the module setting and resulted in deficiencies in completeness of the modules, as the bottom floor modules were required to be set in place to enable further modules to be stacked on top or beside.

[127] Another issue identified by Mr. Yarycky was the size and weight of the modular units. The engineers were to calculate the weight of the module, and after some were built it was determined they were overweight for the highway. Pieces had to be removed to deal with the overweight issue and were sent in a second truck, and then reinstalled once on-site.

[128] Mr. Yarycky stated that once the modules were shipped, the modular yard subcontractors reconciled all of its final costs. The costs of the module program had increased because of the engineering design changes that occurred. The Fort Hills team started to get indications from various reports that the final module program costs were projecting higher than what the EPC contractor was communicating to Fort Hills management. The overall result was a massive cost overrun compared to the budget.

[129] Mr. Yarycky also commented on the impact of the wildfire, as the EPC contractor was already two months delayed at the time of the fire in June 2016. The EPC contractor advised the Fort Hills team that it was still on schedule with a minimal cost increase to the target price.

[130] Mr. Yarycky then stated that in October 2016, the EPC contractor had concluded higher direct field labour costs, however no schedule impact and no cost increase. Mr. Yarycky stated that Fort Hills management did not consider the EPC contractor revised forecast lined up with what the contractor was trying to impart to Fort Hills management. For the Utilities scope that was being executed by the EPC contractor, Fort Hills had been experiencing low productivity by the craft labour for several months. It was initially thought that the project was making construction progress and the quantities installed were also increasing, with the overall total quantity amounts remaining static. Mr. Yarycky opined that when a project encounters low productivity, progress is below plan; however, where progress is at or above plan, it typically means that there is more workforce than planned on the project. Fort Hills management raised a concern and the decision was made to hold the workforce at a higher numerical level to support achieving First Froth of the entire Fort Hills Project.

[131] In March 2017, which was the original project completion date, the EPC contractor could no longer suppress the productivity information, and was obligated to advise that the project was nowhere near completion.

[132] Fort Hills management determined that during the construction process, the EPC contractor had used affiliated businesses to maximize its own direct field labour force as well as supplying small tools, consumable and construction equipment. Utilizing the affiliates provided the EPC contractor greater opportunity to make profit over and above the target price contract and greatly increased the revenue received by the EPC contractor.

[133] Mr. Yarycky also stated in the rebuttal disclosure (Exhibit 35-C, page 7, para 25) that in July 2017, Fort Hills had lost confidence in the EPC contractor, and his disclosure stated:

> Fluor's reporting was so inconsistent, and the Fluor team would either not provide information or would lie about progress status. As a result, Suncor assembled an independent team of Quantity Surveyors to walk the entire construction areas to identify what work was actually completed and what was remaining to be completed.

[134] Mr. Yarycky also provided comparison tables of how the direct field labour and sub-contractor hours were reported on the project, as well as the direct labour force hours on the project, and the scaffolding and total hours were reported in relation to the project reported progress. The tables show that significant increases were observed, especially in the hours in April 2017. When the EPC contractor provided the information, Fort Hills management submitted it had no option other than to continue working with the EPC contractor to achieve first oil production.

[135] As outlined above, several excess costs were incurred in the U&C Project area in design changes. These excess costs were incurred for a few reasons, as outlined in specific PCNs which summarized the cost increases documented in PCN logs. These increased costs derived from execution challenges, including late deliveries of steel and pipe and assembly at modular manufacturing yards, and the requirement to procure fabricated steel and pipe spools from overseas suppliers. Increased costs also arose from engineering challenges and schedule delays in the monthly production of fabrication and steel and pipe, which arose from a lack of late, incomplete, and missing issued-for-construction drawings. Also, the main EPC contractor for utilities encountered low productivity on its direct field craft labour and ultimately completed significant rework on the U&C Project.

[136] Mr. Yarycky stated that there were 30 PCNs associated with design changes, and he led the Panel through 12 of the 30. He also stated that of the three (3) categories of change, 25% were attributed to engineering challenges, 25% to modular assembly (execution challenges), and 50% to field construction productivity and rework (contractor challenges). Mr. Yarycky submitted the total reductions to the cost of the project based on the foregoing PCNs is $453,504,965.

Secondary Extraction ("SE") - Mr. Ryan Jackson, (Exhibit 2–C Redacted and Unredacted, Exhibit 30–C, and Exhibit 55-C), Mr. Shukrullah Imdadullah (Schedule B, Exhibit 2-C Redacted and Unredacted, Schedule A, Exhibit 30-C, Exhibit 50-C and Exhibit 55-C), and Mr. Krishna Pavathaneni and Ms. Mona Lisi Ghosal, (Schedule A, Exhibit 2–C Redacted and Unredacted and Exhibit 59-C)

[137] Mr. Jackson provided background information concerning the construction and construction costs associated with SE.

[138] Mr. Jackson was qualified primarily as a fact witness (Exhibit P16C, page 1, item 6). The Respondent agreed to the following:

> Mr. Jackson is primarily a fact witness, he will testify on the overall Fort Hills project, and what happened on the secondary extraction unit. He is an engineer by training and has worked in roles across Fort Hills in leadership in project development and project management. In the course of his evidence he may give opinion on project scope and contracting decisions and pre-sanction timelines, as well as post-sanction execution in the

secondary extraction project area, planning and execution, project management, and the impact of design changes and change in execution strategy on cost of the secondary extraction project area.

[139] Mr. Jackson submitted his educational and work history and stated that he is General Manager of Projects in Suncor's Project Execution Function, specializing in project development and execution of large capital and high complexity heavy industrial projects. Mr. Jackson stated that his experience included eight years of full-time involvement with the development and execution of the Fort Hills Project and that he held three sequential roles. First, as Director of Project Development (Facilities) for the Fort Hills Oil Project, he had accountability for front-end design and planning for the fixed-plant facilities (i.e., excluding the mine) and delivering the project to Sanction. Second, as General Manager of Project Execution for the Fort Hills Infrastructure and AET Project Areas, he had accountability for the design, construction, and delivery of finished assets to operations. Third, in his role as General Manager of Construction for the Fort Hills SE project, he had accountability for the site construction from approximately 40% completion status through to turnover of the finished asset to the operation group.

[140] Mr. Jackson holds a Bachelor of Science degree in Mechanical Engineering from the University of Calgary (1995); he is a Professional Engineer in the Province of Alberta (since 1997); and he has completed the General Management Program at the Harvard Business School (2021).

[141] Mr. Jackson briefly explained the function of SE. This project area receives "froth" from three "trains" or units which move product from the OPP. The product moved is the bitumen mixed in a slurry. The secondary extraction then separates the water and the bitumen through a solvent based froth treatment resulting in oil ready to market.

[142] Mr. Jackson testified that SE encountered significant design changes, alterations, and modifications (collectively "Design Changes") in the Fort Hills Project. This aspect of the project had the highest dollar value in the Fort Hills Project in determining the requested amendments to the assessment.

[143] Originally, the SE project sanction was estimated to cost $3.85 billion in 2013. The original sanctioned budget was based on a lower quality review of engineering and as a result, when the entire project was sanctioned, and received the partner approval to proceed, it was known that the SE budget was not finalized and required additional scrutiny. As a result, in July 2014, the sanctioned budget for the SE was received and created a revised estimated cost of $4.7 billion ("QAB"). The actual costs of construction reported by Fort Hills in respect of the SE project was $6.292 billion, which was $2.442 billion higher than first estimated (FEED) and $1.592 billion higher than the QAB.

[144] The QAB budget replaced the original sanctioned budget and was the revised starting point after replacing the original engineering contractor. Fort Hills management identified issues with the lack of capability and quality of work of the major engineering firm initially engaged to work on the SE project. In Mr. Jackson's opinion, the engineering firm had insufficient talent within Alberta for the project. In what Mr. Jackson submits is an almost unheard-of decision, the Alberta based engineering firm was terminated and replaced mid-project by an offshore engineering firm. This was done prior to the QAB budget completion, and before construction has been initiated on the SE project; however, many components for the project had been ordered, given the lengthy timelines to complete construction of long lead time items.

[145] Mr. Jackson also stated that the PCNs related to the QAB budget and not the sanctioned budget. Management determined that the QAB budget of $4.7 billion was the most likely budget that SE should

have had at the outset. All Fort Hill's proposed assessment changes are based on the variation to the QAB budget.

[146] Mr. Jackson opined that the increased costs and the inability to meet the planned budgets were the result of an overheated, stretched labour market. Initially this resulted in the project being out of sequence, engineering design issues, and issues with procurement of product in the early stages of the project; all of which made achieving the sanction schedule more difficult. The remainder of the Fort Hills project was being achieved, which necessitated the SE project to accelerate its project to enable start-up of production.

[147] Compounding these issues was the wildfire. At the time of the fire, the SE project was approximately 25% complete. The fire set back the work schedule and significantly altered costs associated with concrete placement, which was planned for summer conditions and led to concrete placement in the less optimum winter months.

[148] Mr. Jackson testified that there was a total of 298 PCNs associated with the SE project. Of the 298 PCNs, 165 were identified by the Complainant as being non-scope changes which in Mr. Jackson's opinion should not be assessed by the Respondent.

[149] In questioning by the Respondent, Mr. Jackson provided further clarity as to the purpose of the PCN process. Mr. Jackson stated that PCNs are a project management tool. It begins with a cost estimate and then PCNs track deviations from the estimate. PCNs are not designed with suggested changes to assessment amounts in mind.

[150] Mr. Jackson testified that the additional costs of the SE project reflecting changes and rework that did not change the nameplate or scope of the SE project and labour unproductivity impacts totaled $1,831,382,347. (Exhibit 2-C, page 3, para 6)

[151] The requested amendments to the assessment for the SE unit, based on Approved Non-Scope ("APNS") PCNs were as follows: (Exhibit 2-C, (page 6, para 16)

1)	Site specific labour productivity	$261,399,700
2)	Change in execution plan	254,160,090
3)	Change of work location to Module Yard and/or to Site	111,003,528
4)	Site specific rework or repair	182,403,286
5)	Passive fire protection rework and repair	125,485,747
6)	Labour productivity and design changes	554,516,703
	Total APNS PCNs	$1,488,969,051
7)	Rebuilt with completed engineering	272,388,870
	Total SE portion of assessment changes	**$1,761,357,921**

[152] In addition to the PCNs identified in the APNS (1-6), an additional line item (7) is shown as "Rebuilt with completed Engineering" in the amount of $272 million. This is for portions of the scope change for overbuilt components identified on the change of engineering firms, "the impact of the change would be worse than living with it".

[153] Mr. Jackson also reconciled the requested reduction in assessment as follows:

As built construction costs	$6.292 billion
Original sanctioned budget	($3,850) billion
Difference (paragraph 143 above)	$2.442 billion
Less: Assessable costs	$ .681 billion
Total Assessment changes (reconciled to paragraph 151 above)	$1.761 billion

[154] There was considerable discussion during questioning by the Respondent concerning contingency estimates and the process for using contingency and how it related to the PCN process. Mr. Jackson explained that the original budget (Gate 3 and FEED) estimated costs and then identified potential risks – both negative and positive. A risk registry is created to review what potential credible events might be, and begin the process of quantifying the risks, along with the probability of occurrence. There is a high level group review of the potential risks to determine if most risks have been identified. After this process, contingency models are developed and benchmarked. Any risks would then be reviewed to determine potential effects to the estimate.

[155] In terms of process, the amounts in contingency are used first and there would be an internal accounting allocation to remove funds from contingency and place them in the appropriate costing group. Once the contingency was fully used, then PCNs would be used to compare the actual cost to the estimate.

[156] In addition to Mr. Jackson's disclosure, additional commentary on the requested change areas identified from 1. to 6. inclusive, which totaled $1,488,969,051, was provided by Mr. Imdadullah. The report was contained in Mr. Jackson's disclosure and sur-rebuttal (Exhibit 2–C, Schedule B and Exhibit 50-C) and was supplemented with a power point presentation (Exhibit 55–C).

[157] Mr. Imdadullah was qualified primarily as a fact witness (Exhibit P16C). The Respondent agreed to the following:

> Mr. Imdadullah is primarily a fact witness who will testify on what happened in secondary extraction unit. He was involved in many of the PCNs issued for the cost escalations, and the categorization of same. A Suncor engineer, in the course of his evidence he may give opinion on project execution, project management and the impact of design changes on productivity and cost escalations on the secondary extraction project.

[158] Mr. Imdadullah submitted his educational and work history and stated that he is Manager Project Controls – CDIP, Business & Operations Services. He worked as Project Controls Manager on Fort Hills Secondary Extraction Handling Planning, Scheduling, Cost Management, and Reporting. Mr. Imdadullah is a Professional Engineer with a Bachelor of Mechanical Engineering from the University of Madras in Chennai, India and a Masters in Business Administration from the University of Alberta. He is also a Certified Cost Engineer with the American Association of Cost Engineers, as well as a member of the Project Management Institute where he is a Project Management Professional, and a Project Management Institute-Agile Certified Professional.

[159] The underlying causes of the abnormal costs incurred in the SE Project were outlined in the witness report of Mr. Jackson. Mr. Imdadullah's report provided further detail and addressed specific PCNs relevant to the increased abnormal costs in the SE Project.

[160] Mr. Imdadullah's report also discussed the PCN process used in the Fort Hills Project, which was described in paragraph 59 of this decision as Project Scope, Non-scope, and Transfers Definition.

[161] Mr. Imdadullah stated the cost impacts of each PCN are estimated as they are initially identified and as the issue is progressing, the actual amount or impact is then arrived at through invoicing with the contractor and the trend or PCN is approved.

[162] Identification and approval of the cost impacts are raised with the project management team and discussed and approved by a project committee.

[163] Mr. Imdadullah submitted that during the course of construction of the SE Project, he would follow the process described in initiating PCNs. That would include identification of scope, non-scope, and budget transfer activities. The APNS and PCN log identified at the time of construction and finalized during project close out was used for the purpose of his report.

[164] Mr. Imdadullah further stated that of the $2.442 billion (see paragraph 153 above) in the SE Project cost growth, $1.488 billion represented the amount identified as excluded costs in non-scope PCNs (see paragraph 151 above). Mr. Imdadullah opined that these excluded costs related to rework, labour scarcity, faulty construction, schedule slippage, and lack of availability of materials. He also submitted that labour coordination challenges also caused rework along with alterations and modifications in the SE Project Area. Adjustments for previously accepted non-assessable claims, such as camp and owner costs, were made to prevent any double counting.

[165] Mr. Imdadullah also stated that the costs were analyzed through reports and project team meetings and the impact was summarized through the review of the APNS and PCN log. He was personally involved in the initiation of many of the PCNs for the SE Project. He also worked with the other engineers who signed off on, and approved, the PCNs. A total of 298 non-scope PCNs were reviewed by the SE Project Control team and classified to the areas identified in paragraph 151 totaling $1.488 billion. Mr. Imdadullah did not analyze the cost of item g) Rebuilt with completed Engineering, which totaled $272,388,870.

[166] The basis for the requested changes is discussed below by each aspect of the requested change. Mr. Imdadullah also discussed a number of the PCNs in detail to provide information as to how the process worked.

1. Site Specific Labour Productivity ($261,399,700)

[167] Mr. Jackson opined that the SE experienced the highest degree of cost overruns in the Fort Hill Project. Mr. Jackson testified that the increased costs associated with site specific labour productivity were a symptom of an overheated period of business expansion (2012-2018). During that time frame, Mr. Jackson submits that the SE project experienced a shortage of resources, engineering personnel, vendors, fabricators, construction personnel, and contractors.

[168] The shortages identified above created increased labour costs in mobilization, demobilization, and in poor labour productivity, all of which manifested in rework, alterations, and modifications to the SE project. A portion of the labour productivity issue was the inability to attract qualified workers. In order to try to rectify the issue, Fort Hills increased its manpower density to try to meet the original construction schedule.

[169] Mr. Jackson stated that in mid-2016, the labour force peaked at 9,600 workers, which exceeded the planned capacity threshold of 5,000. In 2017, the workforce had reduced in size to the desired 5,000 and SE was approximately 90-95% of the total work force (4,500 workers).

[170] A further issue with the on-site labour component was the federal government implementation of the Labour Market Impact Assessment which severely restricted the ability of Fort Hills to access temporary foreign workers.

[171] In an effort to overcome labour issues, the Fort Hills project added and experienced the following:

1. Night shifts;
2. Overtime;
3. Continuous winter work;
4. Shortage of workforce with expected industry experience, including supervisory and management, led to abnormal productivity and rework; and,
5. During construction, and as labour scarcity continued, a "bowl wave" occurred which drove higher than planned levels of labour and scarcity during critical points of engineering, fabrication of modules and materials, and construction.

[172] Mr. Jackson stated that of the $2.442 billion in additional costs, the decision to terminate the engineering firm contributed approximately 80-85% of the cost. The remaining significant aspects were the wildfire and the strained workforce. Additionally, Mr. Jackson stated that the effect of removing the engineering firm and subsequent replacement with the offshore engineering firm caused the SE project to be delayed a further six (6) months. This effect of this was explained in respect of the decline in productivity, not necessarily the quality of work, but the comprehensive plan was impacted as the project became out of sequence. The revised plan attempted to return to the schedule; however, this was never achieved according to Mr. Jackson.

[173] Mr. Imdadullah stated that PCNs were created to identify the productivity loss the SE Project experienced. Those PCNs were listed in a table in his report. He summarized that these costs were due to availability of lesser skilled labour, the higher-than-expected turnover, and premiums paid to attract non-local labour in an attempt to recover from the schedule delay and achieve the first oil date. These costs are over the unproductive labour included in the sanctioned budget, as the reasons for the cost overruns were unexpected and not predicted.

[174] In summary, Mr. Jackson submits that PCNs were created to identify productivity losses. While the original sanctioned budget had forecast unproductivity, the levels of experience due to availability of a less skilled labour force, higher-than-expected turnover, and premiums paid to a non-local labour force were much higher than forecast.

2, Change in Execution Plan ($254,160,000)

[175] Both Mr. Jackson and Mr. Imdadullah stated that in an effort to rectify the SE project issues, there were four (4) key areas items which changed the execution plan:

a. Out of sequence work;
b. Development of one of three extraction "trains";
c. Removal of the original engineering contractor; and
d. Engagement of global supplier.

Further details of each are as follows:

a. Out of Sequence Work

[176] Due to the labour scarcity as well as lack of availability of modular yard shop space, the local engineering firm and procurement services provider experienced issues in sequencing, including completing engineering and ordering long lead time items, such as large vessels and settlers. These two items led to multiple cost escalations and slippage in the execution plan.

[177] In addition, in order to secure fabrication shops in the Edmonton area, multiple items had to be ordered in advance of the engineering being finalized.

[178] Mr. Jackson further stated that the concurrent engineering and fabrication issues resulted in the SE project being out of sequence. The negative effect of the concurrent activities was compounded by the continuous development of technology affecting the project quantities, and the ongoing availability of manpower and productivity challenges. Mr. Jackson also stated that these impacts were not fully mitigated until the final stages of construction.

b. Development of One of Three Extraction Trains

[179] The original design and completed project have three extraction trains. The extraction trains are the part of the project where raw material is transported from the OPP and enters the SE area. In order to attempt to meet the first oil production target of fall 2017, the decision was made to concentrate on finishing one train. The work force in 2017 was working on all three extraction trains until the fall, at which time a reduced work force was deployed to working solely on one, which reduced the labour force over the winter, when work conditions were less favourable, and improved the best and safest workplace for the workers, along with project optimization. The workers finished the first train in late 2017 and the first oil was produced. The second train was completed in March 2018 and the third train in mid-2018.

[180] In completing the second and third trains, work was impeded by having to work around other equipment as well as the operating first train.

c. Removal of the Original Engineering Contractor

[181] The front-end engineering was awarded to an Alberta firm based in Calgary and started in July 2011. Pre-sanction, the firm worked on the DBM, which was a precursor to the FEED sanctioned budget. The engineering firm continued into the early stages of the FEED process of the SE project and it was intended that the firm would complete FEED to its entirety and include the sanction process.

[182] During the FEED process, Mr. Jackson stated that project management became concerned with the engineering firm's performance, particularly in the SE and U&C project areas. Mr. Jackson further stated, "Concerns were centered around weak technical and cost estimating, which influenced key design decisions, schedule adherence, inadequate resources, and generally poor responsiveness to clients requests for corrective action."

[183] Mr. Jackson also stated that management at many levels, including the highest executive level managers of Suncor, attempted to resolve these performance issues. In the end, in mid-2013, it was decided to replace the Alberta-based engineering firm with an offshore engineering firm from Korea. The original engineering firm worked to facilitate the transfer of information to the offshore firm.

[184] The change in engineering firms midway through the FEED process required an extensive sourcing effort and resulted in the engagement of the new firm to scrutinize the work done by the Alberta-based firm and complete the FEED. As a result of the replacement of the Alberta firm, the project experienced a six-month delay, which forced the SE project to be out of sequence with the greater Fort Hills Project. At the same time, the project required partner sanctioned approval in mid-2013; however, the engineering component of the SE project was at less than desirable levels. Mr. Jackson stated that allowances were made on a best-effort basis; however, quantity and cost growth in the SE sanction became a significant factor. The decision to remove the Alberta firm was made to avert larger cost impacts from occurring.

d. Engagement of Global Supplier

[185] Mr. Jackson stated that in order to reduce cost escalations and delays, the decision was made to engage global suppliers in multiple locations to minimize the local Alberta impact for those services and goods. Fort Hills and its partners attempted to mitigate the challenging market conditions it was facing, including Alberta's scarce labour market availability, the high demand for goods and services, and the out of sequence engineering. The foregoing required a review and re-performance of project deliverables. This resulted in an extension of the SE project schedule. During the process of changing engineering firms, it was realized that the equipment, vessels, and materials already committed to the project at local shops to secure manufacturing space were not the optimal design. The project was forced to alter its design to accommodate the already ordered vessels and equipment.

[186] Mr. Jackson provided an example of this project design. The SE project Froth Settler Unit was designed at a height of 63 metres. It was determined that a lower unit height was appropriate, which would have reduced the height of the pipe racks, which would have resulted in savings on steel, piping, cable, and fireproofing quantities. In addition, this impacted scope and quantities of structural steel, piping, electrical instrumentation cables, cable trays, etc., and also affected the manpower requirements of the SE project.

3. Change of Work Location to Mod Yard and/or Site ($111,003,528)

[187] Mr. Jackson and Mr. Imdadullah stated that due to the schedule being delayed, management determined that it would be advantageous to ship incomplete modules to the project site. This resulted in the modules not arriving in the correct order and further required additional laydown yards to store the modules. Additionally, Mr. Jackson stated that module materials and parts were not shipped in an organized manner, which required a determination as to whether all the materials and components had arrived, and then required the assembly of the modules with the materials and parts.

[188] The decision required the modules to be assembled/constructed on site which increased the on-site labour costs as well as indirect costs for accommodating the labour force.

[189] Mr. Jackson summarized that the change in locations from module yard to site resulted in increased costs in the installation of components. He also stated that the cost impact of not having the modules on site was far greater than having them on site, as certain modules needed to be sequenced to allow the building to be constructed. He opined that the costs of being on site in camp, going to and from camp, mitigated the overall cost.

4. Site Specific Rework and Repair ($182,403,286)

[190] Mr. Jackson and Mr. Imdadullah advised this aspect of the claim relates to activities that were completed more than once, as well as activities that altered the original plant design through the removal of previously installed work, regardless of the scope of the original work.

[191] Many of the costs associated with this work included the cost of scaffolding, which was required to be installed to higher-than-expected height to repair damaged components. This occurred as the result of the significant height of the plant and requiring structure craftsmen to traverse the plant.

[192] Mr. Jackson also stated that contractors challenged by labour shortages incurred additional costs associated with out of sequence execution and rework.

[193] Mr. Jackson submitted that the Fort Hills project utilized a froth treatment process that was largely untested prior to the Fort Hills Project. The process uses a solvent in the extraction process, and large quantities of the solvent are required to be on site. The solvent is particularly volatile, and requires process safety hazard mitigation, including leak detection, fire detection, fire prevention, and passive fire protection "PFP"). It was not known at the time the FEED estimates were made of the installed quantities and field productivities for the installation. Mr. Jackson stated that the oversight was due to "lack of competency in the early FEED engineering phase".

[194] Mr. Jackson provided an example of engineering issues. A key architectural design in the early FEED work projected using several solvent storage vessels to store the solvent working inventory. The decision to use several bullets, as opposed to an atmospheric tank and fewer vessels was made based on an early technical and cost study. In hindsight, the study did not capture the cost and complexity of using several vessels, and the resulting design put additional pressure on passive and active fire protection and impacted field productivity and cost.

[195] Mr. Jackson cited another example where the early stages of FEED determined fire heaters (furnaces) were more appropriate rather than steam heaters for many of the heat requirements within the SE project. The decision was correct; however, the process safety implications were substantially underestimated and put on additional costs for quantities and field productivity.

5. Passive Fire Protection (PFP) – Rework and Repair ($125,485,747)

[196] Mr. Jackson noted that the Respondent had accepted many of the proposed changes to PFP.

[197] Mr. Jackson and Mr. Imdadullah stated that given the hazardous nature of the secondary extraction process, extensive fire protection was required. This protection was applied to the modules in the module yards and then shipped to the project site. Mr. Jackson further stated that the fire protection experienced issues during transport to the work site and repairs were required. Additionally, due to the EPC contractor's inexperience in the frigid northern Alberta climate, the protection was not able to withstand the harsh winters, requiring further additional rework and repairs. Additional scaffolding was required to repair all the protection for it to meet safe standards.

[198] As discussed in paragraph 194, the FEED process failed to address the additional fire protection requirements for the solvent storage vessels and the SE process, which involves mixing the bitumen froth with a solvent under pressure, which can create a risk of jet fire. Mr. Jackson stated that jet fire can occur when an accidental release of pressurized hydrocarbon fuel ignites. To mitigate this risk, the SE Project determined that a protective fireproof coating should be applied to certain steel structures that support the equipment and piping. In the event of a jet fire, protective fireproof coating would enable the Structural

Steel to withstand fire and damage and allow workers to escape safely. As noted in paragraph 197, the protective fireproof coating was first applied to the SE Project structures in June of 2015 prior to shipping, and between October 2016 and March 2017, project staff observed cracking in the coating on the structural steel, an unexpected health and safety risk to employees and contractors.

[199] Mr. Jackson submitted that the SE project incurred higher costs to engage additional contractors, travel costs, costs of labour and camp costs, and overtime, as well as additional materials costs to contain, repair, and re-fireproof portions of structural steel. Also, the project incurred costs to assign personnel to manage and supervise the abnormal repair work, and additional costs to engage in ongoing investigations into the failures of the fireproof coating. The project also experienced increased indirect costs due to the delay in the completion of the fireproofing work, the overall extended project schedule, and costs of materials, equipment, and rentals kept in place to facilitate the repair work, including scaffolding which would otherwise not have been required.

6. Labour Productivity and Design Changes ($554,516,703)

[200] Mr. Jackson and Mr. Imdadullah stated that the category changes for labour productivity and design changes were the result of the prior five categories where PCN log numbers could be tracked and amounts applied to the five categories.

[201] The sixth category includes PCN changes that did not fall within the first five categories, but were proposed reductions to the assessment and fell within the following categories:

a) Indirect Budget transfer PCNs from Contingency relating to escalation of costs due to execution challenges that are not related to scope;
b) Related to fees, overhead, and other indirect increases to various vendors and contractors for changes in other non-scope categories such as delay and out of sequence work;
c) Design changes and modifications at field and in module yards that did not affect the scope and cost escalations related to changes because of unforeseen site conditions. Site conditions included a higher than typical water table, frost conditions, change in soil conditions. Remedies included reworking underground containment and additional excavation;
d) Costs related to other non-scope changes in the original design:
e) Materials incorrectly supplied which needed to be replaced, or lost or stolen materials that were not covered under insurance;
f) Stoppages due to unforeseen site-specific conditions; and,
g) Increases in market rates over and above the escalation budgeted due to the heated market conditions for procurement and construction activities.

[202] Mr. Jackson stated that many of the amounts identified in item 6. were built into the revised forecast around mid-2016 of $5.2 billion. Mr. Jackson also confirmed that in his opinion there is no double-counting within PCNs.

7. Rebuilt with Completed Engineering ($272,388,870)

[203] The Fort Hills project report concerning the rebuild with completed engineering quantification was based on a report that was authored by Mr. Pavathaneni and Ms. Ghosal. Their report was contained in Mr. Jackson's disclosure (Exhibit 2–C, Schedule A) and was supplemented with a power point presentation (Exhibit 59–C). The report was prepared solely for the assessment appeal.

[204] Mr. Pavathaneni and Ms. Ghosal were qualified primarily as fact witnesses (Exhibit P16C and P17). The Respondent agreed to the following:

> Mr. Pavathaneni is primarily a fact witness, a Suncor engineer who will explain his analysis undertaken to explain the quantities and costing used in his replacement cost model of the secondary extraction unit. In the course of his testimony, he may give opinion evidence on cost estimating industrial projects, and the impact of design changes.
>
> Ms. Ghosal is fact witness, and a Suncor estimating technician who assisted Mr. Pavathaneni on estimating cost of replacement cost model of secondary extraction unit.

[205] Mr. Pavathaneni submitted his educational and work history and stated that he is Director Engineering - Projects & Specifications Business & Operations Services. Mr. Pavathaneni holds a Bachelor of Science, Civil Engineering from Punjab University in India, and a Master of Science, Civil Engineering from Concordia University in Montreal. Ms. Ghosal also provided her educational and work history. She is presently a Project Controls Manager – Estimating. She holds a Bachelor of Technology in Industrial Electronics from the University of Nagpur in India.

[206] Mr. Pavathaneni stated that his report conducted a replacement cost engineering analysis to identify excess costs in the SE unit of Fort Hills, once quantities are adjusted. In questioning by the Respondent, Mr. Pavathaneni confirmed the deficiencies were determined in hindsight; however, the deficiencies in the original engineering were beyond normal elements.

[207] Mr. Pavathaneni submitted that SE underwent significant design changes as a result of the procurement of long lead items which were not ideal in terms of size, quantity, location, and function. He further elaborated that this resulted in a form of hybrid construction, with components from earlier engineering being made to fit subsequent engineering and design that was undertaken by the offshore engineers who replaced the Alberta based engineers. Mr. Pavathaneni stated that the end result has embedded quantities and components in place that would not be necessary in a rebuild or replacement project, and his report identifies excess quantities, their source, and location.

[208] In Mr. Pavathaneni's opinion, his report was an analysis to compare and cost replacements within the SE project that would represent typical dimensions, components, and costs. It was intended to provide a secondary line of analysis for the calculation of abnormal costs incurred for property tax purposes. As a result of the analysis, he opined that the excess costs associated with the SE project were $272,388,870, and that this estimate was very conservative. This reflects the cost difference had the plant initially been designed with adequate engineering and completed prior to ordering long lead items that added additional complexity, quantities, and costs to the SE project.

[209] Mr. Pavathaneni stated that the basis for the analysis was premised on the SE unit designed and built without the inadequate engineering, the change in design, and the less than perfect component selection and related quantities experienced in the construction of the SE project.

[210] Mr. Pavathaneni stated that due to the heated market at the time of construction, long lead time items created an issue, as they were ordered based on assumptions early in the DBM process, and then designed around the items. He stated this was not wrong; however, was not optimal and the result was increased engineering and quantities due to the sub-optimal design.

[211] Mr. Pavathaneni further stated that while working with the offshore engineering firm in developing alternative technology, it was determined that the design could have achieved the same results with a different, less expensive, and less complex design.

[212] Mr. Pavathaneni also noted the discussion concerning the storage of the solvent and the heaters used in the SE as detailed in paragraph 193 and paragraph 195, respectively. In addition, in paragraph 186, there is reference to the height of the froth settling unit being 63 metres. All three aspects, if engineered correctly, would have had significant cost savings, and this is the basis for the requested assessment reduction. The specific savings could have been realized as follows:

a) Reduced height and fewer vessels would reduce the cost of steel, piping, cable, and fireproofing quantities.
b) Reduced height of the SE plant would have resulted in steel cost savings and reduced PFP; and,
c) Heaters were fire based therefore the vessels needed to be located further apart which increased steel and piping quantities, associated insulation and fireproofing.

[213] Mr. Pavathaneni also stated that due to the early lead time for the vessels, the design work was incomplete, requiring major rework.

[214] Mr. Pavathaneni stated the basis for the rework calculation was derived from the difference between actual cost and costs based on proper engineering.

[215] Ms. Ghosal spoke to how the table of cost comparisons was derived and the assumptions used to prepare the data. Those assumptions included:

a) The table was developed using a "reduction in quantity" estimate from the project engineering director;
b) Possible reduction in quantity were captured in the following areas:
    i. Mechanical engineering (including vessels and heaters); and
    ii. Associated bulk (including steel, pipe, cables, insulation, and fireproofing) (the "Quantities");
c) The estimated reduction in the Quantities includes the quantities in the Approved Project APNS PCNs;
d) Estimates were developed using Quantities which were received from engineering, and specifically through the use of "Unit Rates" which were calculated based on actual amounts and bids for the SE project.
e) Unit Rates include (i) Materials; (ii) Direct Labour; (iii) Construction Indirects; (iv) Engineering; (v) Suncor Home Office Costs; (vi) Commissioning and Start-Up Costs; and (vii) Pre-Commissioning Costs;
f) For each of the Quantities considered, a range of estimates was provided by the engineering department which considered the potential quantity reduction in: (i) cables; (ii) insulation; (iii) mechanical; (iv) PFP; (v) piping; and (vi) structural steel;
g) In each of the specific Quantities, from the high and low range, averages were taken;
h) To avoid double counting the Quantities, one-third of the estimated Quantity reduction was removed;
i) The remaining two-thirds of the Quantity reduction reflects the Quantity that was due to out of sequence engineering and procurement;
j) Process is reflected in the Fort Hills Quality Adjustment Chart;

k) For the Quantities remaining, two-thirds were then applied to the Total Project Cost Unit Rate and reflected a calculated reduction of $272,388,870 due to out of sequence engineering and procurement;
l) To prevent double counting of costs accounted for in settled non-assessable categories the percentage of non-assessable amounts from the negotiated settlement between Fort Hills and the Respondent was deducted; and
m) The cost reduction adjusted for previously settled non-assessable categories is $190,672, 209.

[216] Mr. Jackson submitted the total reductions to the assessment based on the foregoing was $1,761,357,921.

Automation, Electrical and Telecommunications ("AET") – Mr. Matthew Colden (Exhibit 6-C Redacted and Unredacted, Exhibit 34–C, and Exhibit 56-C)

[217] Mr. Colden provided background information concerning the construction and construction costs associated with AET.

[218] Mr. Colden was qualified primarily as a fact witness (Exhibit P16C). The Respondent agreed to the following:

> Mr. Colden was primarily a fact witness (sic), and will testify in respect of the automation, electrical and telecommunication project area. He is a Suncor engineer. In the course of giving his evidence, he may provide opinions on the impact of delays, design changes or repair and other matters on productivity and cost escalations.

[219] Mr. Colden's work history includes Manager - Utilities and Infrastructure Development at the Fort Hills Mine from 2011 to 2014, Director for the Automation, Electrical, and Telecommunications Area of the Fort Hills Project from 2014 to 2017, and in 2017 assumed his present position at Suncor as the Director of Renewable Power – Development and Business Services.

[220] Mr. Colden's educational background includes a Bachelor of Applied Science - Chemical and Environmental (1998) and Master of Engineering - Chemical and Environmental (2000). He is also a Professional Engineer in Alberta (2004).

[221] Mr. Colden's involvement in the AET Project was as the Director of Automation Electrical and Telecommunications.

[222] Mr. Colden submitted that the purpose of his report was to identify abnormal costs in the AET portion of the Fort Hills Project. Working with Suncor cost engineers, Mr. Colden stated that he assisted in identifying additional costs associated with the AET Project of $84,148,565. These costs reflected changes and rework which did not increase the nameplate or scope of the AET Project. The primary causes of these additional costs were design changes corrected during field construction, geotechnical challenges, release and replacement of one of the main contractors, and coordination of contractors executing concurrent scopes in other project areas. The exclusions relate to doing work multiple times (as a result of error or faulty construction), as a part of the project regardless of source (rework); schedule slippage due to replacement, lack of, or incorrect materials; and poor engineering and labor productivity that caused rework, alterations, or modifications.

[223] Mr. Colden stated that these unforeseen changes were captured in PCN logs and reviewed for exclusion for property tax assessment purposes.

[224] Mr. Colden referred to the types of Project Changes which were described in paragraph 59 of this decision as Project Scope, Non-scope, and Transfers definitions.

[225] Mr. Colden also stated that the major financial impacts to the AET Project were the result of cost escalations from three (3) main contractors: Main Automation Contractor ("MAC"), Main Electrical Contractor ("MEC"), and Main Telecommunication Contractor ("MTC"):

a. MAC
- design changes identified and corrected during field construction.

b. MEC
- contractor mobilization too early without proper job planning, geotechnical site investigation, engineering deliverables, and material procurement;
- late engineering deliverables;
- late delivery of materials;
- unfavorable soil conditions and complexities;
- release of original major contractor due to incompetent work and replacement by a second contractor; and
- design changes to improve inherent safety in design of site-wide electrical system to meet corporate requirements.

c. MTC
- lack of adherence to integration requirements resulting in deficiencies to telecommunications systems;
- contractor productivity impacted due to slower interaction and coordination with concurrent scopes and contractors; and
- unplanned growth in temporary facilities to accommodate additional labor brought on site to meet schedule pressures.

[226] Mr. Colden extrapolated on the major financial impacts to the AET Project. Those impacts were broken down as Fuel Costs, MAC, MEC and MTC, as identified below.

Fuel Costs	$ 2,650,000
MAC	$ 706,669
MEC	$38,748,181
MTC	$29,807,232
Total PCNs identified	$71,912,082

Fuel Costs $2,650,000

[227] The PCN for Fuel Costs of $2,650,000 states the costs were the result of the impact to fuel costs associated with the design changes which required scheduling extensions into winter months versus summer months. This included schedule slippage requiring the extended use of generators.

a. MAC

[228] Mr. Colden stated that the MAC was primarily an engineering services contract for automation. In the case of Fort Hills, the MAC project worked closely interfacing with other areas of the project, and when other project areas had scheduling slippage issues, it cascaded to the AET project. Most of the MAC increased costs were due to rescheduling, and many were indirect costs such as travel, camp, and field labour costs.

[229] Mr. Colden also stated that although Fort Hills incurred $3.6 million in design changes, only $706,669 were considered in reducing the assessment. Those were extensions for field technician stays on site for field changes at interface of $18,400. In addition, $688,299 was established for indirect costs due to schedule changes (temporary construction facilities, temporary construction services and utilities, construction equipment) while the MAC scope of work waited to interface with other construction areas that were delayed. Delays were caused due to material shortages, unproductive labour, and various other causes that were addressed in the specific project PCN claims. Significant time and effort were invested to have construction schedules align to avoid unproductive efforts coordinating the direct and indirect construction activities.

b. MEC

[230] Mr. Colden stated that MEC cost escalations of $38,748,181 were incurred, and Mr. Colden provided further comments on some of the major financial impacts:

a. The high voltage electrical transmission and distribution system for the Fort Hills site is a complex grid with hundreds of kilometers of power lines, 6 large substations, and 11 skid substations. There was a critical requirement to have Fort Hills connected to the electricity grid and able to deliver power to the various project areas in advance of construction completion. To meet the required timelines, the EPC contractor mobilized to the field early, but without proper job planning, geotechnical site investigation, engineering deliverables, or procured materials.

b. The result was a significant delay in the field and rework. Engineering deliverables were late, or incomplete, and changed, which resulted in rework. Materials were not delivered when needed, resulting in standby costs and inefficient execution. There were complexities with the soil, groundwater and subsurface on site which drove both rework in the field and engineering, which resulted in significantly increased costs. The performance of the EPC did not meet expectations, and after some time of working with the EPC to improve, the contractor was released from the job.

c. The replacement contractor was the EPC for the MTC portion who was already on site and had the capability to step in. After reviewing the state of work on site, the new contractor submitted change orders to account for the rework of some of the work done by the original EPC, and to finish the scope. As the primary EPC had already consumed most of the budget for the original scope, the costs for the remaining work significantly inflated the Estimated at Completion amount for the scope. These issues were identified through PCNs for:

    i. engineering productivity and rework - $1,136,164;
    ii. field changes at interface - $22,292;
    iii. field changes due to design or found conditions - $6,349,378;
    iv. indirect costs increase due to extension of schedules due to rework and change $258,413; and
    v. rework, productivity, quality - $14,050,599.

d. There was a design change implemented to improve safety of the electrical system site wide. This involved designing an Electrical Protection Network ("EPN") consisting of dual protection schemes utilizing high speed communication using a messaging protocol to minimize arc flash potential in the system. The concept was relatively new, and designers had challenges making the system work. There were multiple engineering hour increases to rework the design. The requirements of the Inside Battery Limit ("ISBL") areas were not clear, and the areas did not typically deliver what was ultimately required through interface management tools. There were significant gaps with all interfaces of the design with respect to cabinets, wiring and programming. The resulting impact added significant on-site resources to complete the protection system in every area, reworking installations, and resetting programming.

c. MTC

[231] Within MTC, cost escalations of $29,807,232 were incurred, and Mr. Colden provided further comments on some of the major financial impacts:

a. The telecom scope was highly complex in its integration site-wide of all fibre optic cabling, networks, and applications, and building systems integration. Due to lack of adherence to the interface requirements established by the Telecom team, many deliverables by ISBL areas were deficient. The design requirements were not well translated by the EPC into its scoping for package units, subcontracted building, and other systems. The telecom contractor faced issues such as:

    i. being required to rework or complete many aspects of the scope that should have been delivered on site as complete;
    ii. heavily impacted by its ability to plan and manage work inside other project areas as they were under the authority of other construction contractors;
    iii. being denied access, delayed permits and moving schedules; and
    iv. once granted access into these areas, the telecom contractor often found deficient scope.

[232] This led to increased costs due to delays, rework, and low productivity of onsite resources. These cost impacts are represented as follows:

a. field changes at interface - $3,816,569;
b. field changes due to design or found conditions - $427,389;
c. indirect increases due to schedule extensions due to rework and change - $1,950,789; and
d. rework, productivity, quality - $14,365,136.

[233] Mr. Colden stated that there were 44 PCNs associated with the AET project. He led the Panel through 18 of the PCNs in detail and submitted the total reductions to the assessment based on the sum of the PCNs is $71,771,420.

[234] Mr. Colden also advised that two further amounts totalling $12,377,145 were included in the total requested adjustment to the assessment based on the AET portion of the project.

a. $12,360,522 – calculated as a 5% contingency from all labour projects included in certain Fort Hills project control accounts (17HA, 17HC, 17E, 17F, 17G, 18JA, 50A0, 50B0 and 50C0). The rationale provided was that the contractors included a contingency within their contracted amount for rework and productivity and that this amount should reduce the assessment as well.

b. $16,623 – calculated a 1% contingency from all engineering costs in Fort Hills engineering control accounts (60 series). The same rationale provided was that engineers included a contingency within their contracted amount for rework and productivity and that this amount should reduce the assessment.

[235] Mr. Colden summarized that $84,148,565 in adjustments attributed to the AET project should be accepted.

Ore Processing Plant ("OPP"), Extraction and Tailing Ponds ("E&T"), and Facilities & Common Services ("F&CS") – Mr. Chris Woloshyn (Exhibits 3-C, Exhibit 4-C and Exhibit 5-C Redacted and Unredacted, Exhibit 31-C, Exhibit 32-C and Exhibit 33–C)

[236] Mr. Woloshyn provided background information concerning the construction and construction costs associated with OPP, E&T, and F&CS.

[237] Mr. Woloshyn was qualified primarily as a fact witness (Exhibit P16C). The Respondent agreed to the following:

> Mr. Woloshyn is primarily a fact witness. He will testify in respect of the ore processing plant ("OPP"), extraction and tailings project area ("E&T") and common services project area. He is a Suncor engineer. In the course of giving his evidence he may provide opinions on the impact of delays, rework or repair on project costs.

[238] Mr. Woloshyn's work history includes that he began employment with Suncor in 2001, and through a series of promotions, was the Project Director, Fort Hills Ore Preparation Plant, from 2013 to 2017. From 2017 to 2018, he was the Site Integration Director, Fort Hills Site, and from 2018 to 2019, was Director, Upstream Project Development. From 2019 to 2020, he was Director, Meadow Creek Project, and in 2020 he assumed the role he currently holds as General Manager, Project Excellence and Performance Improvement.

[239] Mr. Woloshyn's educational background includes a Bachelor of Science - Electrical Engineering (1996). He is a Professional Engineer. He also attended the Southern Alberta Institute of Technology in the Project Management Institute Program (2005) and attended the Harvard Business School Residence Leadership Program (2017).

[240] Mr. Woloshyn's involvement in the OPP, E&T, and F&CS projects was as project director for the OPP project, with no direct accountability for the E&T project, but he was responsible for the close-out of the project, and he worked with the team on F&CS as the integration director and was responsible for the close-out of the project.

[241] Mr. Woloshyn submitted that the purpose of his reports was to identify abnormal costs in the three (3) projects with which he was involved. The three (3) areas and the related reports were OPP (Exhibit 3-C), E&T (Exhibit 4-C) and F&CS (Exhibit 5-C), as well as his rebuttal disclosure exhibits (Exhibit 31-C, Exhibit 32-C and Exhibit 33-C). He reviewed each report separately.

Ore Processing Plant ("OPP")

[242] Working with Suncor cost engineers, Mr. Woloshyn stated that he assisted in identifying additional costs associated with the OPP Project of $129,795,201. These costs reflected changes and rework which

did not increase the nameplate or scope of the OPP Project. The primary causes of these additional costs were design changes corrected during field construction pertaining to ground water remediation, which costs have been agreed to by the Provincial Assessor. In addition, there was a loss of site-specific productivity, as well as the insolvency of an external contractor, and the indirect costs associated with schedule delays to complete the project due to the preceding problems.

[243] Mr. Woloshyn stated that these unforeseen changes were captured in PCN logs and reviewed for exclusion for property tax assessment purposes.

[244] Mr. Woloshyn referred to the types of Project Changes, which were described in paragraph 59 of this decision as Project Scope, Non-scope, and Transfers Definitions.

[245] Mr. Woloshyn provided further details as to the causes of the changes and rework he referred to:

a. Ground water remediation – was due to costs associated with significant ground water incursion onto the site, which necessitated abandoning typical dewatering techniques including wells and ditching. This was replaced with a much more complex and expensive system that involved installing a system of gravel filled trenches, piping, and sumps forming a perimeter around the site, thereby preventing ground water ingress into the construction and operating area.
b. Loss of site-specific productivity and work delays – were the result of better understanding the detail of the work completed and additional scope required to complete the project.
c. Insolvency of an external contractor – was the result of a lump sum contractor who was responsible the conveyors, crushers, surge bins and all associated facilities, advising Fort Hills in late 2016 that it was at risk of financial insolvency because of projects outside of Fort Hills. It advised it would not be able to complete its contractual obligations to sub-contractors and vendors. Suncor stepped in and decided with those sub-contractors and vendors to be paid and to remain on the project. The result was the engagement of the lump sum contract to a time and material contract with one of the other contractors on site. Mr. Woloshyn submits that making this transition when the project was approximately 75% complete was a very complicated and expensive undertaking. Many instances of incomplete scope and low-quality work were discovered during the changeover, which needed to be addressed as part of the remaining work to complete the project. The change of general contractor resulted in a period of very low productivity and delays while the new contractor mobilized its own resources, as well as taking over and managing more than a dozen subcontractors.
d. Increase in indirect costs – costs associated with the delays noted above created an increase in indirect costs associated with the project.

[246] Mr. Woloshyn stated that there were 26 PCNs associated with the OPP project. He led the Panel through nine (9) of the PCNs in detail and submits the total reductions to the assessment based on the totality of the PCNs is $114,889,330.

[247] In addition, Mr. Woloshyn submits that a further $14,869,871 should be included in the reduction based on $14,746,129 and $123,742, which were based on a 5% contingency for additional labour costs and 1% for engineering service costs respectively considered to be estimates of rework costs.

[248] Those amounts were further clarified as:

a. $14,869,871 – calculated as a 5% contingency from all labour projects included in certain Fort Hills project control accounts (10AB, 10AH, 10AJ, 10AO, 11BB, 11BD, 12CA, 12CB, 13DO, 15FO, 16GO, 17HB, 17HC, 17HE, 17HF, 18JB, 19KA, 20LO, 29WA, 31DE, 31E0 and

31HO). The rationale provided was that the contractors included a contingency within its contracted amount for rework and productivity and that this amount should reduce the assessment as well.

b. $123,742 – calculated a 1% contingency from all engineering costs in Fort Hills engineering control accounts (60 series). The same rationale provided was that engineers included a contingency within its contracted amount for rework and productivity and that this amount should reduce the assessment.

[249] Mr. Woloshyn summarized that $129,759,201 in adjustments attributed to the OPP project should be accepted.

Extraction & Tailings ("E&T")

[250] Mr. Woloshyn stated that he was not responsible for the day-to-day management of the E&T Project. He was brought in at the close-out of the project; however, he was comfortable presenting the report on the E&T challenges and associated request for a reduction of the assessment.

[251] Working with Suncor cost engineers, Mr. Woloshyn stated that he assisted in identifying additional costs associated with the E&T Project of $109,371,187. These costs reflected changes and rework which did not increase the nameplate or scope of the E&T Project. The primary causes of these additional costs were design changes corrected in the field, demarcation of the firewater lines, and schedule delays caused by the wildfire.

[252] The primary exclusions in the E&T Project related to the EPC contractor schedule running longer than planned. The original targeted mechanical completion date for the E&T Project was March 2017 and the actual completion was December 2017, a total delay of nine months. Mr. Woloshyn stated that the following contributed to unexpected cost escalations:

a. Fire hydrant amendments: eleven hydrants and associated bollards had to be removed from the E&T Project prior to mass pours. The height of the hydrants unexpectedly ended up being the same height as the piles being transported by loaders. This amendment included evacuation of the fire hydrant and fire line to the valve connection, sloping and benching of all excavations and installation of appropriate access and egress points and subsequent reinstallation of the hydrants. In addition, there was a need to excavate and remove abandoned improvements from the original work at the site;
b. Piling costs: piling installation was more intensive and costly than forecasted. More piles were required than planned due to the geotechnical deliverables being split among the EP house, the Geotechnical Engineer, and the Piling Contractor which caused confusion and increased expense;
c. Out of sequence engineering: out of sequence engineering & rework related to the interface issues with the MAC, MTC, and MEC led to higher engineering costs;
d. Extended field engineering support: extended field engineering support from December 2016 to December 2017 increased costs;
e. Home office costs: Suncor home office cost overruns due to the overall project extension from December 2016 to December 2017;
f. Wildfire costs: the wildfire impacted the ISBL at a key stage of project construction. The fire stopped all site activities for 35 days and had additional cost impacts related to demobilization,

remobilization and restart of work after the fire. The General Contractor not only demobilized personnel but was also required to demobilize the work area of all equipment and materials;

g. Product quality challenges: the ISBL piping experienced increased costs because of a quality issue from the supplier. Approximately 5.1km of piping had to be removed, refabricated, and reinstalled. In addition, the E&T Project experienced increased costs associated with the incorrect installation of a liner on the East PAW Pond which delayed flooding, and resulted in the demobilization of the General Contractor and the re-award of the unfinished scope to another contractor; and

h. Contractor changes: change out of the contractor responsible for Thickener construction occurred. The original sub-contractor was replaced due to poor safety and poor execution performance issues. This resulted in a schedule delay of 1 month. The original contractor was demobilized from the Thickener site in November 2015. To avoid standby time and the higher additional cost of winter work, the replacement contractor was engaged to carry on the Thickener scope beginning in April 2016 for the balance scope of Phase I and Phase II work. This delay resulted in a $17.9M cost impact.

[253] Mr. Woloshyn referred to his description of scope change PCNs, non-scope PCNs, and budget transfer PCNs as described in paragraph 59 as Project Scope, Non-scope, and Transfers Definition.

[254] Mr. Woloshyn stated that there were 78 PCNs associated with the E&T project. He led the Panel through 16 of the PCNs in detail and submits the total reductions to the assessment based on the totality of the PCNs is $109,371,187.

[255] In addition, Mr. Woloshyn submitted that a further $14,218,298 should be included in the reduction based on $12,971,457 and $1,246,841, which were based on a 5% contingency for additional labour costs and 1% for engineering service costs, respectively considered to be estimates of rework costs.

[256] Those amounts were further clarified as:

a. $12,971,457 – calculated as a 5% contingency from all labour projects included in certain Fort Hills project control accounts (10AJ, 10AO, 11B0, 12CA, 12CB, 13DO, 14EO, 15FO, 16GO, 17HA, 20LO, 29WA, 31EO and 31HO). The rationale provided was that the contractors included a contingency within its contracted amount for rework and productivity and that this amount should reduce the assessment as well.

b. $1,246,841 – calculated a 1% contingency from all engineering costs in Fort Hills engineering control accounts (60 series). The same rationale provided was that engineers included a contingency within its contracted amount for rework and productivity and that this amount should reduce the assessment.

[257] Mr. Woloshyn summarized that $109,371,187 in adjustments attributed to the E&T project should be accepted.

Facilities and Common Services (“F&CS”)

[258] Mr. Woloshyn submitted that the F&CS Project provided site-wide services to facilitate direct construction in the Fort Hills Project, mainly in indirect costs with some minimal direct costs. It was the only area of the Fort Hills Project that did not involve direct construction, apart from the Operation Service Access Road. The F&CS Project Area dealt with approximately 45 contractors, support groups including Material Management and EMS, and other camp services such as Water, Sewage, Power, and Security.

[259] Mr. Woloshyn expanded on the nature of the project's key areas, as follows:

a. Common Construction Indirect Costs including the management and coordination of common F&CS identified as costs identified as facilities, services, and utilities costs; equipment costs; construction management personnel costs; and related camp and transportation costs.

b. Common Engineering Services which included the following:

- engineering work to support the service access road, temporary fuel depot, area preparation for camp, and the material management area, including the warehouse, laydown yard, and parking;
- system and non-process process hazard analysis facilitation – HAZOP of vendor data;
- third party inspections per agreed to inspection and test plans;
- Logistics Control Software Tool;
- Heavy Lift Plans;
- geomatics information, lidar and satellite photographs;
- welding procedure review and approval process;
- non-destructive testing and advanced ultrasonic testing review;
- site installation inspection for pressure vessels and visits by Alberta Boiler Association;
- Safety Codes Inspection;
- process safety;
- pipe specification development for AutoPlant V8i;
- turnover support services including the Turnover Management System upgrade and Vendor Document Management for Master Data;
- consequence analysis and quantitative risk assessment ("QRA") report development, including the production of a mitigated version of QRA via software modelling, calculations, cross boundary impacts and CA new contours;
- site-wide engineering studies including studies associated with noise, lighting, chemical interaction matrix, and a fire protection layout;
- Fort Hills Interface Management Tool; and
- cathodic protection.

[260] Mr. Woloshyn stated that Fort Hills excluded $16,036,833 of the total F&CS Project costs as costs of design changes, alterations, and modifications. He submitted that the exclusions reflect the rework or changes in the F&CS Project that did not increase the nameplate or scope of the F&CS Project.

[261] Mr. Woloshyn also stated that the primary exclusions relate to doing work multiple times because of errors or faulty construction (rework), schedule slippage due to replacement, lack of or incorrect materials, and poor labor productivity that caused rework, alterations, or modifications.

[262] He also submitted that rework includes activities in the field that have been completed more than once or that remove work previously installed as a part of the project regardless of source.

[263] Mr. Woloshyn specified that the delays in the project included a delay in completing permanent site power construction, which required the use of generators. In addition, there was a delay in SE which required construction infrastructure to be maintained longer than expected.

[264] Mr. Woloshyn stated that there were ten PCNs associated with the F&CS project. He also advised the Panel that with respect to three of the PCNs, numbers 5, 6, and 7, were not in the disclosure; however,

were included in the accounting log (Trend Log). He led the Panel through five of the PCNs in detail and submitted the total reductions to the assessment based on the totality of the PCNs is $16,036,833.

General Assessment Matters ("General") – Mr. Benjamin Matthews (Exhibit 14-C Redacted and Unredacted, Exhibit 37–C, and Exhibit 57-C)

A. Matthews Background

[265] Mr. Matthews was qualified primarily as a fact witness (Exhibit P16C). The Respondent agreed to the following: "Mr. Matthews will provide opinion evidence on industrial assessment matters, including interpretation and application of *CCRG*."

[266] Mr. Matthews' work history includes being an assessor in Saskatchewan from 1997 to 1998; Manager, Assessment for a private company in Alberta from 1998 to 2004; Manager, Property Tax with a major accounting and consultancy firm from 2004 to 2006; and Senior Tax Manager, Western Property Tax Division with a major consulting firm from 2006 to 2007. Mr. Matthews was originally hired by Suncor in 2007 and he has progressed from Property Tax Manager to Team Lead, Property Tax, the position he currently holds.

[267] Mr. Matthews' educational background includes a Business Administration Diploma, Major in Appraisal and Assessment (1997), Certificate in Real Property Assessment (1997), Certified Assessment Evaluator designation from the International Association of Assessing Officers (2004), and an Alberta Municipal Accredited Assessor designation from the Alberta Assessor's Association (2007).

[268] Mr. Matthews stated that he is an industrial property tax specialist with Suncor and that his area of responsibility includes the oversight and management of Suncor and Suncor partnership industrial properties across Western Canada. Mr. Matthews stated that within Alberta he has been involved in the reporting of over 300 projects for assessment and taxation purposes over the past 15 years, representing capital costs of more than $14.4 Billion. Mr. Matthews asserted that throughout the Fort Hills Project he was the primary point of contact for assessment matters and was directly involved in communications with the PA for the periods under appeal. Mr. Matthews stated that the Fort Hills Project was a Suncor partnership where Suncor assumed the role of project oversight, providing the property assessment and tax function.

[269] Mr. Matthews submitted that the purpose of his report was to provide discussion of Fort Hills assessment history. He also set out the areas of dispute that have been resolved by joint recommendation and the areas of assessable costs that remain in dispute. He outlined the process for assessing M&E in Alberta. Mr. Matthews also discussed his understanding of the reporting of construction costs for Fort Hills and cost exclusions as provided in the cost renditions prepared for Fort Hills, in addition to his understanding of historical assessment practices in the application of the *CCRG* and the *CCRG* predecessor document – SPAG. Mr. Matthews also provided an overview of the assessments of other oil sands projects for context and comparison.

[270] Mr. Matthews discussed Fort Hills' parent company, Suncor's, role in the oil sands sector. He identified that Suncor had constructed several significant projects in the oil sands as well as processing capacity in the Edmonton area. The significant plants and milestones were reported to be the Suncor Base plant, which commenced operations in 1967 and the Steepbank facility which commenced in the 2000s. These two primary extraction plants combined with two secondary extraction plants – Firebag Steam Assisted Gravity Drainage ("SAGD") Plant in 2003 and MacKay River SAGD Plant in 2002; along with

the Syncrude Mine, Extraction, and Upgrader facilities which originally started in 1975, the East Tank Farm, the Northern Courier Tank Farm, and the Strathcona refinery pipeline network. With this number of significant projects, Mr. Matthews opined that the Suncor property tax team has significant experience in working with assessors to establish the base costs and excluded costs to derive the assessment value of the property.

[271] Mr. Matthews opined that Suncor is well positioned to interpret and complete the steps required in the *CCRG* to determine the correct assessment of Fort Hills. Mr. Matthews submitted that the renditions for the Fort Hills project comply with the *CCRG* and identify the impacts of the unskilled and unproductive labour and non-scope construction costs. Those costs are removed to establish the Fort Hills requested assessment. Consistency has been created in relation to historic regulated properties and other regulated properties within the region and the province. The requested assessment is consistent with Suncor's prior reporting on other projects and treats Fort Hills equitably given its remote location, and challenges in the execution of the project. Suncor used project experience, the property tax team, and cost engineers to assist in developing exclusions to present to the PA.

[272] Mr. Matthews submitted that he joined Suncor in 2007 and during the subsequent time frame he has been involved in preparing reports to the assessment departments of both the RMWB and the PA. He confirmed that he has consistently applied the *CCRG* as the basis for the methodology to prepare assessments, and that the methodology for preparing the Fort Hills rendition is the same process used to prepare other renditions of Suncor's projects. This includes the two significant areas at issue in Fort Hills which were non-scope construction costs and the application of the Edmonton area factor.

B. History of *CCRG* and Predecessor Legislation/Regulations

[273] Mr. Matthews provided historical information with respect to SPAG, which Mr. Matthews informed was the predecessor to the *CCRG*. Mr. Matthews submitted that SPAG specifically recognized the Edmonton area as the baseline in determining what was typical within Alberta. He further submitted that SPAG resulted in standardized assessments throughout Alberta and as a result, there was no discrimination between the assessment of remote locations in comparison to Edmonton.

[274] Mr. Matthews also submitted that SPAG was used by assessors until approximately 2001, at which time the first version of the *CCRG* was developed. During the transition from SPAG to *CCRG*, a bulletin was issued from the SPAG Stakeholder Working Group providing a summary of the events of the working group. Mr. Matthews submitted that the working group's work was summarized as follows:

> [t]he final draft of the guide, now named "Construction Cost Reporting Guide for Regulated Property", will be very similar to the existing SPAG with only a few minor changes. The new Guide is scheduled to be released in early November and intended to be included in the 2001 Minister's Guidelines.

[275] Mr. Matthews acknowledged that the *CCRG* became a regulated document in 2005 and he opined that there has been a common understanding within Alberta's assessment community that Edmonton and a 50-kilometre area around Edmonton represented a market where an adequate labour force existed and continued to be the baseline to standardize assessments. Remote sites do not represent a "balanced market" nor that "an adequate labour force" was "readily available at the worksite". He stated that labour productivity was measured against an Edmonton benchmark. These concepts were discussed, reviewed, and implemented by appointed assessors within the RMWB and elsewhere, and used in the development of rates for standardized assessments.

[276] Mr. Matthews opined that MA commissioned many reports to assist in identifying the rates to be used for assessment purposes, and the parameters of those studies provided the form for the basis of rate development, and what is deemed typical construction costs are those set out in the *CCRG*. Those rates were based on Edmonton and area costs, or also referred to as mid-Alberta based.

[277] Mr. Matthews submitted that the PA has adopted, or has agreed with, the RMWB Blue Book. This was a document developed by the RMWB at the time it attempted to introduce changes in its assessment methodology. The RMWB Blue Book removed the reference to the EAA. Mr. Matthews disagreed with the interpretation of removing the EAA and submitted that the 2017 CARB Decisions restored the EAA and rendered the RMWB Blue Book as having no effect.

[278] Mr. Matthews contends that the PA's position that the EAA is not representative of "typical" or "normal" is incorrect. He illustrated that such a change would represent a substantial change in assessments, and to do so without any significant roll-out would be illogical. Also, the PA's position would represent an inconsistent application if all properties in Alberta were not being assessed on a similar methodology.

[279] Mr. Matthews also stated that during 2016, a working group was formed to consider changes to the *CCRG*. The revised document was referred to as RIPA. Mr. Matthews' understanding from the working group, of which he was a member, was that the EAA was the basis for assessments in Alberta and abnormal costs were to be measured against what would be typical in the Edmonton area.

[280] Mr. Matthews also understood the purpose of RIPA was to provide the required clarity for the *CCRG* and the indications were that there would be no introduction of new policies to the assessment of regulated assets. Within the document it stated that Edmonton was the baseline for measurement of abnormal costs.

[281] Mr. Matthews concurred that RIPA remains a discussion document and there has been no formal resolution of any policy changes.

C. Assessment Practices for *CCRG* Reporting

[282] Mr. Matthews agreed with the assessment principles for M&E as described in paragraph 9 of this decision.

[283] Mr. Matthews submitted that M&E is a regulated assessment and the calculation is as described in paragraph 12 of this decision.

[284] Mr. Matthews opined that the Table of Contents of the *CCRG* establishes the basis for determination of the assessment, which begins with Section 1.100 – Direct versus Indirect Costs. The *CCRG* (Exhibit 14-C (Unredacted), page 203) cites the definition of costs as follows:

> Direct costs are costs for labour, materials, and installation costs which can be directly related to the construction of a specific facility.
>
> Indirect costs are costs incurred away from the site or are costs allocated to the project. Indirect costs are also incurred by a company that uses in-house resources to construct a facility.
>
> The assessor should review the company submission to determine whether in-house staff have been involved in any construction activities. When such activities are identified

allowances for indirect costs are to be included.

Direct costs include but are not limited to:

- staff, including labour, supervision, inspection, janitorial, and security,
- materials used for construction,
- consulting fees,
- engineering, design, and surveys,
- construction equipment: including scaffolding, pumps, tools, and consumable supplies,
- monitoring and control of construction,
- handling and storage of materials and equipment,
- equipment maintenance, repairs, and winterization,
- temporary facilities,
- clean-up costs and removal of rubbish, and
- security, including yard lighting and fire protection.

Indirect costs include but are not limited to:

- general contractor and subcontractor profit,
- contractors' overhead, including administration costs and head office allocations,
- staff recruitment,
- permits: building, electrical, etc.,
- insurance: fire, liability, property, etc., and
- cost to obtain a performance bond.

[285] Mr. Matthews submitted that s.2.400 Design Changes, Alterations, and Modifications specifies that alteration costs incurred during construction that improve the operational efficiency of the original plant design are excluded. Additionally, the costs of "de-bottlenecking" or modifying an operating process are excluded if there are no changes to the equipment inventory. Conversely, the cost of equipment installed to improve operational efficiency is included.

[286] In respect of the EAA, Mr. Matthews identified that the adjustments for Fort Hills were calculated in the same manner as previous Suncor reporting, and this was previously accepted by assessors, including the PA for the 2018 tax year. The calculation included considering the following additional costs which were deemed non-assessable and not included in the included cost:

a. due to unproductive labour (including EAA);
b. due to unavailability of an adequate labour force;
c. costs that would not be typically incurred in a balanced market; and/or
d. costs required to maintain consistency among regulated properties

[287] Mr. Matthews also expanded on the nature of adjusting costs and labour based on the EAA. He opined that this adjustment was made so that there would be consistency in Alberta with how projects are assessed. The concept allows for consideration of events that might not occur on a project site when compared to Edmonton as the base cost. This would include the availability of a skilled workforce and inventory of raw materials or prefabricated aspects being readily available.

[288] It was Mr. Matthews' opinion that Edmonton has always served as a hub centre for Alberta industry as it had the bulk of major industrial growth in the province. In addition, most of Alberta's modular assembly yards are in the Edmonton area, and Edmonton is well connected with transportation routes and is a central location; accordingly, it is a shipping hub for western Canada. The Edmonton area typically provides an existing, sufficient, and trained labour force as the components of a major city, such as adequate transportation, shopping, school, and hospitals.

[289] The unionized nature of the industry also contributed to the development of a superior workforce in the Edmonton area. Union seniority determined where workers were able to bid on job locations. As such, senior, skilled workers were able to work on local projects in Edmonton and remain close to family and friends. Less senior trades tended to hone their skills and build their seniority at remote sites. This resulted in inequities in skill levels for a labour force employed at remote sites.

[290] Mr. Matthews further opined that s.2.500 of the *CCRG* begins with the statement that "In order to reduce uncertainty and consistency among related properties the following assumptions are made to describe normal conditions for the construction of regulated property." He submitted that it is necessary to reduce uncertainty before construction commences, and that all regulated properties must be treated in the same manner. Mr. Matthews put forward the following assumptions:

- An adequate labour force is available at the worksite;
- Raw materials and prefabricated component parts are readily available;
- The determination of what is "typical" or "abnormal" is subjective;
- If the actual costs of an industrial facility are greater than typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded;
- Abnormal costs can result from delays in construction caused by natural disasters or inclement weather or they may occur when the construction workforce is on site but a lack of supplies or a work slowdown reduces or stops actual construction. Additional costs incurred because of unproductive labour are excluded.; and
- Specific examples are included in the *CCRG* as follows:
  - a cost that would typically not be incurred in a balanced market; and/or
  - a cost that is excluded to maintain consistency among regulated properties.

D. Fort Hills Assessment History

[291] Mr. Matthews provided historical context for the subject property. The property was originally assessed in the 1990s with a shop and several security trailers. In 2013 the Fort Hills Project received sanction by its partners and a construction camp was constructed and first assessed in 2014. As construction progressed, assets were added as they qualified for assessment. Non-process buildings, such as administrative offices, tire shops, and warehouses, were added in 2016. Both the 2016 and the 2017 assessments of the Fort Hills Project included assessment of completed assets, including the mining and infrastructure scopes of work. In 2018, the Fort Hills Plant was partially started up with mined product processed off-site, and a progressive assessment for the M&E was rendered, which included the EAA. The overall plant become 100% operational in 2018 and was fully assessed in 2019.

[292] It was Mr. Matthews' contention that the historical assessments prior to 2019 were accepted by several RMWB senior assessors, including Messrs. Schmidt, Horn, Campbell, and Scofield, prior to the involvement of the PA.

[293] Mr. Matthews confirmed that the 2017 CARB Decisions (also described in paragraph 32 of this decision) were for complaints filed concerning the 2015 and 2016 tax years, which represented 2014 and 2015 assessment years respectively, and where the RMWB attempted to remove the EAA.

[294] Mr. Matthews submitted that Suncor took the lead on the assessment complaints, as Suncor had the largest number of properties (11) on the assessment roll. Mr. Matthews advised that both Suncor and RMWB filed disclosure in advance of a proposed hearing. Prior to the hearing, Suncor and the RMWB agreed to a settlement which restored the Edmonton area productivity allowance. All of the mutual agreements were accepted by the RMWB Composite Assessment Review Board. Mr. Matthews opined that the mutual agreements were compliant with section 2.500 of the *CCRG*.

[295] Mr. Matthews provided copies of the RMWB CARB decisions respecting the 2015 and 2016 complaints ("2017 CARB Decisions") for each of the complaints (Exhibit 14-C, Appendices 34 to 50 inclusive). Mr. Matthews noted the language was very similar in each of the 2017 CARB Decisions. The following extract was from Board Order 2017-007 which concerned 2015 (Exhibit 14-C, Appendix 34, page 508) as follows:

> [5] …. The matter originally arose because the Assessor had sent out notice arising from his view of the ruling in a previous CARB decision about how productivity claims were to be addressed. The notice was provided late in 2013 with the change to be effective for the 2015 assessment, which resulted in the complaints being filed. The complaint had both site-specific components, for example, unexpected events such as bridges being blocked, as well as an element which dealt with the Edmonton area adjustment. The Edmonton area adjustment describes a call for consistency in the determination of abnormal costs. The project costs are compared to the costs of construction in the Edmonton area.
> …
>
> [13] The CARB notes that the parties have jointly agreed to the assessment values submitted as part of the joint recommendation and that both counsels have confirmed that the agreed values meet the requirements of the CCRG, section 2.500 and also address the site-specific elements which were in dispute.
> …
>
> [15] Further, the CARB accepts the submissions that the intention of the Assessor is to uniformly apply the approach used in this resolution to all of the other machinery and equipment complaints, which provides assurance to the CARB that there will be a consistency of approach for machinery and equipment assessments within the municipality.

[296] Mr. Matthews also referred to a decision for 2016, which was Board Order 2017-008 (Exhibit 14-C, Appendix 34), and provided a copy of the Joint Recommendation attached as an Exhibit (Exhibit 14-C, Appendix 37, page 541), which dealt specifically with the EAA as follows:

> [12] The Accepted Lost Productivity Claims reflect the circumstances, situations and other factors that caused lower productivity during construction of the Suncor projects that ordinarily would not have been incurred had the Suncor projects been constructed during the same time periods in conditions of a relatively balanced market within 50 kilometres of Edmonton, Alberta. Following discussions between the parties, the RMWB determined that the Accepted Lost Productivity Claims represent abnormal costs for purposes of s. 2.500 of the CCRG. Specifically, the RMWB determined that the Accepted Lost Productivity Claims

> represent costs that would typically not be incurred in a balanced market, and/or costs that were not typical. Section 2.500 of the CCRG specifies that such costs are to be excluded from the Base Cost determined for purposes of Schedule A of the *Alberta Machinery and Equipment Assessment Minister's Guidelines*.

[297] In addition, Mr. Matthews submitted that Exhibit 14-C, page 537, Appendix 36, para 10 supports the Mutual Recommendation and references the use of Mr. Iliev's reports, which Mr. Matthews submits are the basis for the reports Mr. Iliev used for this matter.

> Upon review of the information provided by Suncor in the Iliev Reports, and the additional information provided in November-December 2016, the RMWB determined that the Accepted Lost Productivity Claims represent abnormal costs for the purposes of s. 2.500 of the *CCRG*.

[298] Mr. Matthews submitted the 2017 CARB Decisions relate to 2015 and 2016 complaints. He advised that for 2017, the RMWB issued amendments to the assessment notices which reflected the EAA. He also submitted that for all 11 Suncor properties, the RMWB continued to carry forward the original agreed to construction costs which reflect the EAA in 2018.

[299] Mr. Matthews also advised, that based on personal discussions with the other companies who filed complaints in the 2017 CARB Decisions, those complaints were resolved on the same basis as the Suncor complaints, and the Edmonton area adjustment continues to be applied to those facilities. Mr. Matthews opined that it would not be possible to consider that the assessments for oil sands properties were equitable if the EAA is applied to some, but not all properties.

[300] Mr. Matthews submitted that the PA was not involved directly in the 2018 assessment; however, it was understood that the PA would be preparing the assessment for 2019. Accordingly, Mr. Matthews indicated that Fort Hills initiated conversations with RMWB staff to include the PA in discussions pertaining to 2018 so that the PA was up to speed for the transition. During those meetings with the RMWB and the PA, Mr. Matthews stated that the PA indicated that it intended to depart from the EAA. Mr. Matthews stated that as a result, the RMWB disengaged from including the PA in discussions because of the PA's perceived interference with the Municipal Assessor's processes and the PA's apparent lack of previous oil sand project renditions and understanding of abnormal costs that occurred in remote major capital projects. Mr. Matthews stated that Fort Hills attempted to keep the PA informed; however, the PA was not a party to further discussions with the RMWB.

[301] Mr. Matthews provided supporting documentation (Exhibit 37-C, paras 14–23 inclusive) to demonstrate the removal of the EAA, and the subsequent restoration of it for 2015 to 2018.

E. Reporting of Fort Hills Construction Costs

[302] Mr. Matthews confirmed that the sole basis of the Fort Hills appeal pertains to Schedule "A" – the calculation of the base cost. Fort Hills has no issues with respect to the calculations of Schedules "B", "C", "D", nor the "77% factor". Within the base cost calculation and the subject of the appeal is the admissibility of excluded costs, as prescribed in the *CCRG*. Mr. Matthews submitted that excluded costs are provided for in the *CCRG* and that, from a high level, this does not allow for the following to be considered excluded costs:

> Section 2.100 – the cost of a pre-construction activity
> Section 2.200 – the cost of a post-construction activity
> Section 2.300 – associated with a component of the project which is not defined as property in the *MGA*

Section 2.400 – associated with property which is made exempt from assessment in the *Act*
Section 2.500 – abnormal costs of construction

[303] Mr. Matthews further submitted that the disagreement between Fort Hills and the PA is with respect to a minor issue concerning Section 2.200.100 and 200 F&CS within post construction, and disagreement respecting 2.300.400 – Design Changes, Alterations, and Modifications and 2.300.500 – Interferences Costs, and 2.500 – Abnormal Costs. Within the areas under appeal, the largest issues are with respect to Section 2.500.

[304] Mr. Matthews stated that Fort Hills reported in the way the *CCRG* intended in terms of Direct and Indirect Costs.

[305] Mr. Matthews stated that the Fort Hills Project was comprised of eight specific major project areas, consisting of:

a. Ore Preparation Plant ("OPP");
b. Extraction and Tailings ("E&T");
c. Utilities and Co-gen ("U&C");
d. Secondary Extraction ("SE");
e. Automation, Electrical and Telecommunication ("AET');
f. Infrastructure;
g. Facilities and Common Services ("F&CS"); and
h. Commissioning and Start Up.

[306] Of the eight project areas referenced, only six areas are subject to appeal. Those areas not subject to appeal are items f. Infrastructure and h. Commissioning and Start Up. Of the remaining six project areas under appeal, the focus is on M&E. B&S have no outstanding issues subject to appeal.

[307] Within Exhibit 14-C (para 7), Mr. Matthews provided a summary of the Fort Hills requested revision to the property assessment in the 2019, 2020, and 2021 tax years:

DIPAUID 10534014 Requested Assessment					
		Assessment on Roll	**Part of Assessment not under appeal**	**Requested Assessment for Items Under Appeal**	**Total Requested Assessment**
2019	Land	$25,520,930	$25,520,930		$25,520,930
	B&S	$782,705,610	$522,708,436	$261,314,410	$784,022,846
	M&E	$4,534,840,680	$27,949,432	$3,065,007,864	$3,092,957,296
	Total	**$5,343,067,220**	**$576,178,798**	**$3,326,322,274**	**$3,902,501,072**
2020	Land	$25,520,930	$25,520,930		$25,520,930
	B&S	$779,042,300	$519,674,906	$260,681,623	$780,356,529
	M&E	$4,570,497,210	$28,169,192	$3,089,107,283	$3,117,276,475
	Total	**$5,375,060,440**	**$573,365,028**	**$3,349,788,906**	**$3,923,153,934**
2021	Land	$25,520,930	$25,520,930		$25,520,930
	B&S	$770,296,500	$512,146,350	$259,457,981	$771,604,331
	M&E	$4,596,465,110	$28,360,800	$3,106,634,132	$3,134,994,932
	Total	**$5,392,282,540**	**$566,028,080**	**$3,366,092,113**	**$3,932,120,193**

[308] Mr. Matthews identified that the differences in assessment values in the table in paragraph 307 are due to the application of the assessment year modifier (*CCRG* – Schedule B) and depreciation (*CCRG* – Schedule C), neither of which are an issue.

[309] Mr. Matthews provided a second table which identified the project construction costs for the areas under appeal, including the total construction costs, the B&S portions agreed to, and the related assessable construction costs under appeal.

Summary of Total Project Costs and Requested Assessable Costs			
	Total Project Costs	**Requested B&S Assessable Costs**	**Requested M&E Assessable Costs**
Ore Preparation Plant (OPP)	$1,355,128,860	$44,447,920	$502,828,530
Extraction and Tailings (E&T)	$1,415,603,768	$17,251,974	$734,009,975
Secondary Extraction (SE)	$6,292,077,750	$133,204,132	$2,399,953,550
Automation Electrical Telecommunications (AET)	$942,743,208		$379,733,711
Utilities & Offsites (U&O)	$2,632,111,726	$73,544,622	$1,180,560,736
Facilities and Common Services (F&CS)	$754,326,513		$217,371,603
Total	**$13,391,991,825**	**$268,448,648**	**$5,414,458,105**

[310] Mr. Matthews also stated that the total cost to construct the Fort Hills project was $17.3 billion. The table in paragraph 309 excludes Land and Mining costs which have been agreed to, and Infrastructure costs which are not at issue. Within B&S, Mr. Matthews submitted that there were no buildings within AET nor F&CS.

[311] Mr. Matthews opined that there were substantial changes incurred at Fort Hills due to replacing engineering firms and contractors. In the case of SE, many of the components or prefabricated aspects had significant lead times and, as a result, errors were made which impacted on the project in delays as well as poor productivity of the workforce. Mr. Matthews further stated that there were many design changes which necessitated rework of portions of the project, which were installed incorrectly as a result of unskilled labour, which he considered was unproductive labour.

[312] Mr. Matthews highlighted that the Fort Hills basis for its claim under section 2.500 - Abnormal Costs is based on Fort Hills having treated its costs as normalized to the Edmonton area and that unproductive labour in Fort McMurray should be exempt. Additionally, Mr. Matthews advised he would further detail what might be considered abnormal, or typical or normal, and then exclude costs which exceed typical or normal. Mr. Matthews advised that Fort Hills prepared PCNs for all its unplanned costs within the project to correct the baseline assessment value. Examples of significant abnormal costs at Fort Hills included the wildfire, inclement weather conditions, suppliers providing the wrong materials, or incomplete shipments of materials. Unproductive labour was considered on a site-specific basis and compared to typical labour costs in Alberta to normalize its cost to Fort Hills.

[313] Mr. Matthews expanded on certain of the principles from paragraph 290 and how they affected the Fort Hills project:

a. In terms of an adequate labour force at the site, that labour force must have the right skill set. This would include journeymen in addition to labour with various levels of skills;
b. The timing of the delivery of key components, whether raw materials or fabricated components is critical to the project being on schedule, as many aspects of construction had 5,000 workers on site;
c. The actual costs of the project should be measured against typical costs. Mr. Matthews position is that the basis for comparison should be the actual costs compared to the sanctioned budget. He submits that the Fort Hills team was highly experienced at constructing major projects thus the typical costs heading into construction are the known typical costs;
d. Mr. Matthews' position was that additional costs incurred as a result of unproductive labour should be excluded;
e. Mr. Matthews opined that the *CCRG* is specific in respect of excluded additional labour costs:
    i. due to unproductive labour;
    ii. due to unavailability of an adequate labour force;
    iii. costs that would not be typically incurred in a balanced market; and/or
    iv. costs required to maintain consistency among regulated properties.

[314] Mr. Matthews also stated that PCNs were used to identify where costs did not meet typical costs. However, he noted that those PCNs were either scope, non-scope, or transfer of budget. It was his position that only non-scope PCNs were considered abnormal costs, and that budget transfers had no overall effect on the renditions.

[315] Mr. Matthews next provided the methodology implemented by Fort Hills to arrive at its proposed assessment of the project. He confirmed that he was involved in the preparation of the renditions for each area, and that the project team supported him in deriving the information. Mr. Matthews advised that upon conclusion of the project, each project team prepared an internal project close-out report and compared the actual costs to the original budget (sanctioned budget) to determine what caused the variances to the sanctioned budget. He also advised that this project close-out review provides support for costing future projects and is referred to as "Lego blocking". Mr. Matthews confirmed that detailed reports were provided for each of the six areas under review (Exhibit 14-C, Appendices 6-11). He also confirmed that all the project areas were reviewed in detail to ensure there was no double counting of costs between projects.

[316] The property tax team working with the project team identified abnormal costs and Mr. Matthews confirms they were consolidated into PCNs, which were further consolidated and reported to the assessor. Historically, it was typical that the assessor would select some of the PCNs for review and then discuss its understanding of the cause with the property tax team and accept them, or a revised version, of non-scope PCNs.

[317] Mr. Matthews provided a detailed review of the OPP rendition (Exhibit 14-C, Appendix 7) and submitted that the remainder were prepared using similar methodology. Mr. Matthews also provided an overview of the SE rendition (Exhibit 14-C, Appendix 6).

[318] Based on the information the project team provided, the property tax team understood the total project costs and assisted in identifying what might be abnormal or unexpected costs, and determined what may be put forward as non-assessable costs. Mr. Matthews opined that the mathematics on the spreadsheets (Exhibit 14-C, Appendices 6-11) are prepared at a high level. The *CCRG* requires actual total cost, less deductions for any non-assessable amounts, which results in a step-down approach (declining balance). He pointed out that within the spreadsheets there is an explanation as to the formula used in each cell. For

example, the Abnormal Labour Costs calculation is shown as a multiplier of the difference between Fort Hills and the Edmonton area. Mr. Matthews also identified that by mutual agreement between Fort Hills and the PA in early 2022, certain categories within the spreadsheet have been agreed to and are no longer a part of the Fort Hills appeal.

[319] Mr. Matthews opined that the form of each of the renditions meets the *CCRG* requirements respecting direct/indirect costs and non-assessable costs. He also identified that the format for reporting costs and non-assessable costs to the assessor has been the same for over 10 years. As the Fort Hills project evolved the reporting was originally to RMWB, and when the *MGA* amendments were enacted, and the PA assumed responsibility for the 2019 assessment, the same model was sent to the PA.

[320] Mr. Matthews reiterated that the primary areas in which Fort Hills and the PA disagreed were Design Change, Alteration and Modification, and Abnormal Labour Costs. Mr. Matthews provided a rollup of the entire Fort Hills requested amendment to the assessment (Exhibit 14-C, Appendix 51). The summary did not include all the project costs, rather it was for project costs in the six (6) areas previously identified. The rollup excluded the mining scope, trucks and shovels, and infrastructure for non-process buildings, as these areas were agreed to previously between Fort Hills and the PA. Mr. Matthews also stated that the requested reduction in assessment derived a balance of 42% of total project costs, which Mr. Matthews opined was much lower than comparable projects. Mr. Matthews stated that Fort Hills and the PA agreed that the starting point for total construction costs for the six (6) areas under appeal was $13.392 Billion. The rollup reconciled with the chart provided in paragraph 309.

[321] Accordingly, Mr. Matthews submitted that Fort Hills has correctly applied the EAA and the non-scope changes to the base cost of the Fort Hills project.

[322] Mr. Matthews provided a chronology of the interactions and filings between Fort Hills and the PA as follows:

[323] On June 15, 2018 Suncor provided the Provincial Assessor with additional information requested at the June 7, 2018 meeting. On June 29, 2018 the Provincial Assessor indicated an intention to assess the Fort Hills Project possibly on different standards than applied on past RMWB projects and to depart from the assessing practices previously in place by the Municipal Assessor. Discussions that followed were then mainly focused on the change in practice and less on the assessment details.

> On October 30, 2018 Suncor reported to the Provincial Assessor with the first updated property tax rendition and non-assessable claim reports for the Ore Preparation Plant ("OPP") Project Area within Fort Hills. The remaining project area renditions were delivered throughout November and December 2018 with the Secondary Extraction ("SE"), Utilities and Cogeneration ("U&C"), and Facilities and Common Services ("F&CS") Project Areas.
>
> The format of the renditions modeled the same format and the same standards supplied to Municipal Assessor on historic renditions for other oils sands facilities in RMWB as well as the previous year's renditions supplied to the Municipal Assessor on the Fort Hills Project.
>
> On November 27, 2018, FHEC provided the Provincial Assessor a tour of the Fort Hills Project site. Presentations were provided from the Director of the SE Project Area, Andre Gomes, and the Fort Hills Plant General Manager, Stephane Gagnon. The day included detailed explanations of execution challenges the Fort Hills Project faced during construction and a bus tour providing a visual explanation of the plant and the execution challenges of the Fort Hills Project. The representatives of the Provincial Assessor in attendance indicated

they were appreciative of the detailed explanations as they had never seen or experienced any construction project like Fort Hills.

On January 9, 2019, the Provincial Assessor's representative at the time, A. Slostve, emailed notification to Suncor on the acceptance of Suncor's reported assessable costs for the power generation portion of the U&C project scope. This related to the portion that would be assessed as Linear Property. The costs relating to power generation capable of producing power into the provincial power grid are identified separately from the costs that are to be assessed as M&E. The assessable amounts calculated by Suncor for the entire cogeneration project were consistent with existing practices and interpretation of the CCRG and the exclusion of abnormal costs in RMWB.

On February 5, 2019, not having heard from the Provincial Assessor on the non-linear aspect of Fort Hills, Suncor emailed the Provincial Assessor to obtain a status update. On February 8, 2019, the Provincial Assessor responded that they required additional time to complete the annual 2018 annual assessment of the Fort Hills Project.

On February 22, 2019, the Provincial Assessor delivered a spreadsheet prior to the official annual assessment being sent out. A copy of this spreadsheet has been provided below **(*)**. The spreadsheet listed the assessment at a summary level only and showed what the assessable costs would be for the 2019 tax year. The overall assessment was shown as 34% higher than Suncor's renditions provided for those areas not part of the linear cogeneration assessment.

The Mining, Infrastructure and C&SU project scopes were assessed generally in accordance with Suncor's rendition and are not in dispute.

From the few details provided, it was not clear how the Provincial Assessor's assessable costs were determined and what non-assessable categories were agreed to or denied. Previous and historic assessment practices for complex projects with execution challenges normally involve the appointed assessor contacting company representatives to meet and discussing the project costs to ensure a thorough and detailed review prior to declaration of the assessment. Even though the Provincial Assessor had the preliminary cost reports and non-assessable claims used for the previous year's assessments for a full year, these discussions did not occur.

In the Provincial Assessor's February 22nd spreadsheet, formulas were found in some cells that calculated the Provincial Assessor's excluded costs. The formula simply took Suncor's requested non-assessable amounts and applied a 20% reduction to the originally requested amount. Other project areas just had a hard number coded in. No explanation was given as to how the 20% or the hard numbers were arrived at by the Provincial Assessor.

Over the next month, Suncor pursued discussions with the Provincial Assessor to try to obtain clarity as to how the new assessment was arrived at, any areas of disagreement, and what non-assessable claims were denied. Throughout the discussion it was apparent that the Provincial Assessor had not yet reviewed the data provided by Suncor in detail for the project areas. It appeared that the Provincial Assessor just felt the requested assessable amount for the M&E was too low and should be 20% higher. When asked why or how this was determined, it was stated that this was determined by their past experience in other parts of the province and by reviewing a design change claim category in the OPP project. This was then applied across the remaining projects and adjusted based on what the representative of the Provincial Assessor said, "seemed best". Their explanation was limited, as they were

experiencing staffing changes and needed more time to review. No facts or details were provided to support the Provincial Assessor's adjustments.

(*) - information is not in the quote but is provided in Exhibit 14 – C, para 34

[324] In the spring of 2019, the PA issued assessment notices. Mr. Matthews submitted that Fort Hills was not clear as to how the assessment was arrived at. Accordingly, a complaint was filed, and discussions continued. Those discussions have not rendered a solution and the 2020 and 2021 assessments were appealed as well.

[325] Based on the PA's position and lack of clarity, Mr. Matthews stated that on March 28, 2019, Fort Hills submitted a request based on s. 299.1 of the *MGA* and requested all documents, records, and other information showing how the assessable costs were arrived at from the original reported costs with respect to all the M&E on the roll. Specifically, Suncor asked how the *CCRG* was applied in arriving at the assessable costs and what specific allowances for non-assessable items were granted.

[326] Mr. Matthews stated that on April 11, 2019, the PA responded to Fort Hills request; however, the response provided little clarity for Fort Hills to understand how the PA had assessed the project. Additionally, Mr. Matthews stated that the PA requested additional information under s. 295 of the *MGA*, and further stated that this was the first occasion where either the Municipal Assessor or the PA advised that the information provided in a Suncor rendition was not sufficient for assessing any project since Mr. Matthews' involvement beginning in 2007. On occasions, where an assessor may have had an inquiry about information provided, it was resolved informally through conversation and follow-up if required by only information on a requested area.

[327] Notwithstanding Fort Hills' confusion as to the nature of what was being requested, Mr. Matthews submitted that all questions or information requested by the PA was provided September 20, 2019 and September 24, 2019.

[328] Mr. Matthews also provided a timeline for issues which have been mutually agreed to. Those are detailed as follows:

a. Settlement discussions were held in September 2019 and November 2019;
b. In July 2021, Fort Hills provided further renditions which included additional information on the areas under dispute; and
c. Between October 2021 and April 2022, additional discussions occurred resulting in a Joint Recommendation.

[329] Mr. Matthews advised that the Joint Recommendation includes the following:

1. Feasibility Studies – $134,214,950
2. Pre and Post Construction Costs – $398,452,904
3. Interference Costs – Excluded costs in the amount of $4,740,942 are agreed to. There remains $5,024,983 in disagreement.
4. Spare Equipment – Jointly recommended excluded costs of $11,195,224.
5. Bonus or Penalty – Jointly recommended excluded costs of $99,775,154.
6. Water and Sewer Domestic – Jointly recommended excluded costs of $21,691,080.
7. Travel Costs – $386,423,962, adjusted from the originally requested amount of $388,151,595.
8. Transportation Costs – $257,340,250. There remains $49,442,240 in disagreement.
9. Overtime – $569,070,717

10. Owner's Costs – $982,731,809
11. Camp Costs –$710,087,593.
12. Atypical and Abnormal Condition and Costs – $21,179,670
13. Not Typical Site Development – $59,792,294, $6,012,712 remains in disagreement.
14. Site Prep Costs – $171,170,591.
15. Material Spares – $91,693,571.
16. Higher than Industry Standard – $2,235,907. $5,824,678 remains in disagreement.
17. Other – $47,745,833.

[330] Based on the issues identified, and after allowing for those resolved by Joint Recommendation, Mr. Matthews advised that the following table identifies the remaining issues, which total $3,754,869,717:

Excluded Machinery and Equipment Non Assessable Claims in Dispute Summary

Property Tax Report Reference	Cost Description	Total Excluded Amount	E&T	SE	AET	OPP	U&C	F&CS
2.3.5	Interference Costs	$5,024,983				$4,924,983	$100,000	
2.4.4	Design Changes and Reworks	$2,472,498,011	$109,371,187	$1,679,641,260	$84,148,565	$129,795,201	$453,504,965	$16,036,833
2.6.2	Transportation	$49,442,240	$10,350,152	$15,526,971	$1,078,283	$18,184,924	$4,301,910	
2.6.10	Abnormal Labor Costs	$1,181,891,771	$171,539,214	$440,229,181	$69,995,673	$222,837,428	$200,333,838	$76,956,437
2.6.13	Not typical or normal site development	$46,012,712	$9,964,440		$18,270,425		$17,777,847	
2.6.19	Higher than Industry Standard	$5,824.768			$5,824,678			
Total in Dispute		**$3,754,869,717**	**$301,224,993**	**$2,135,397,412**	**$179,317,624**	**$375,742,536**	**$676,018,560**	**$92,993,270**

F. Other Oil Sands Projects

[331] Mr. Matthews stated that the actual assessment under appeal compared to the reported base cost represents 42.43% of the total construction costs of those assets.

[332] Mr. Matthews provided information pertaining to each of the Suncor projects, identifying the percentage of assessment in comparison to the reported base costs of the project.

Summary of Past Major Projects by Suncor in RM of Wood Buffalo						
Plant	**Project**	**Year Completed**	**Reported Capital Costs**	**Assessable B&S**	**Assessable M&E**	**Percentage Assessable**
Steepbank Mine	Plant 300	2009	$1,021,007,831	$28,124,922	$537,483,562	**55.40%**
Steepbank Mine	Steepbank Debottleneck	2005	$121,992,649		$74,617,016	**61.17%**
Firebag	FB1	2003	$613,935,765	$5,618,777	$197,824,160	**33.14%**
Firebag	FB2	2004	$416,960,298	$7,663,133	$212,497,217	**52.80%**
Firebag	FB3	2011	$4,238,942,440	$76,241,990	$2,247,930,520	**54.83%**
Firebag	FB4	2012	$1,570,764,867	$41,888,972	$906,081,546	**60.35%**
Bae Plant	MCU	2007	$2,235,468,946	$8,455,098	$1,112,270,303	**50.13%**
Steepbank Mine	TRO	2012	$1,226,616,402	$5,521,110	$525,333,688	**43.28%**
Bae Plant	MNU	2011	$969,366,000	$4,597,096	$534,114,445	**55.57%**
Bae Plant	MVU	2005	$449,111,587	$2,344,261	$269,912,806	**60.62%**
MacKay River	MR1	2002	$273,157,072	$6,317,601	$162,418,281	**61.77%**
	Total		**$13,137,323,857**	**$186,772,960**	**$6,780,483,544**	

[333] Mr. Matthews noted that Fort Hills' percentage of assessable construction costs (42.43%) is much lower than most of the projects, and especially the projects with the largest reported base costs. He referred to information including the preceding projects (Exhibit 14-C, Appendix 29), which concluded that the percentage assessment for those projects globally was 51% compared to reported capital costs, whereas Fort Hills is assessed at a 42.43% rate.

[334] Mr. Matthews also elaborated on the Assessment to Cost Ratio. As stated, Fort Hills' ratio is 42.44%, and based on the requested assessment the ratio would be reduced to 25.3%. Mr. Matthews stated that the request is more in line with other major oil sands developments including Suncor, CNRL, and Imperial Oil, which for comparative purposes are:

- Other Suncor projects- between 18.78% and 35.15%
- CNRL 25.7%
- Imperial Oil 15.4%

Labour Productivity – Secondary Extraction ("SE"), Ore Processing Plant ("OPP"), Utilities and Co-generation ("U&C"), Automation, Electrical and Telecommunications ("AET"), and Extraction and Tailing Ponds ("E&T") – Mr. Lubo Iliev (Exhibit 8-C, Exhibit 9-C, Exhibit 10-C, Exhibit 11-C and Exhibit 12-C, Exhibit 36-C, Exhibit 58–C, and Exhibit 51-C)

[335] Mr. Iliev provided background information concerning the labour productivity costs associated with SE, OPP, U&C, AET, and E&T areas of construction.

[336] Mr. Iliev was qualified primarily as a fact witness (Exhibit P16C). The Respondent agreed to the following:

> He is a Suncor engineer primarily responsible for the productivity analysis prepared for Fort Hills on the basis of mid-Alberta adjustment. He is a professional engineer with APEGA with an expertise in cost estimating for industrial projects, including project planning, and

identifying and quantifying labour productivity losses.

[337] Mr. Iliev's work history includes entering the workforce in 1994 as a junior engineer with Genmark Automation Inc. (1994 to 1998), ProSyst AG (1998 to 2000), Petro Canada (2000 to 2001), Husky Energy and Encana (2002 to 2003), IMV Projects Inc. (2004 to 2005), Bantrel Co. (2005 to 2007), and Petro Canada (2007 to 2009). Mr. Iliev commenced employment with Suncor in 2009 as Director, Estimating Project Controls, Major Projects.

[338] Mr. Iliev's educational background includes a Master of Computer Science, and numerous courses and certificates. He is a Professional Engineer, and a member of the Association for the Advancement of Cost Engineering ("AACE") International, as well.

[339] Mr. Iliev's involvement in the SE, OPP, U&C, AET, and E&T projects was as the Director of Project Controls Central. He led estimating, benchmarking, planning, and scheduling services, and was involved in the Fort Hills project since 2007, initially with Petro Canada and then with Suncor. He has been involved with developing Fort Hills sanction estimate and Suncor's growth projects since 2007.

[340] Mr. Iliev stated that he had prepared five reports concerning labour productivity, and that four of the reports were similar in using methodology and format. Mr. Iliev then advised he would address the comments in the OPP area (Exhibit 9-C) and that the same comments would apply to U&C, AET, and E&T projects, and that SE would be addressed separately.

[341] Mr. Iliev submitted that he identified unproductive labour costs included in the sanctioned budget for the purpose of determining costs that should be excluded from the five projects. The resulting exclusions ultimately rolled up into the property tax assessment calculation, in accordance with the *CCRG*.

[342] Mr. Iliev stated that Suncor has extensive experience in projects in the oil sands and strives to have the project sanctioned costs be as close to actual costs as possible. In rebuttal testimony, he opined that the Fort Hills sanctioned budget was developed using industry practice by almost 3,000 Engineering Procurement and Construction (EPC) experts and benchmarked against historical project actuals with similar scope and location.

[343] He also stated that the sanctioned budget includes unexpected productivity losses that occurred in comparison to the Edmonton area and that he was asked to undertake a quantification of productivity loss in the construction of the Fort Hills Project. This included:

(a) losses in productivity included in the sanctioned budget;
(b) productivity losses occurred on site in the Wood Buffalo region as compared to productivity on an Alberta-wide basis; and
(c) productivity losses that occurred on site in the Wood Buffalo region as compared to productivity in the Edmonton area.

[344] Mr. Iliev opined that labour productivity includes two elements. In the budgeting process, the cost of constructing in a remote location is considered and the Fort Hills budget includes costs of this nature. Included within the sanctioned budget are anticipated losses in labour productivity arising from such things as camp work, travel, and weather impacts. In adjusting those costs to mid-Alberta, Mr. Iliev's analysis looked at the anticipated productivity losses contained within the sanctioned budget associated with a remote location.

[345] Mr. Iliev also stated that there were several site-specific cost escalations in the construction of Fort Hills and that those escalations were dealt with in the witness reports of others. Mr. Iliev stated that within cost escalation there were also productivity losses related to execution circumstances. He advised that those cost impacts were dealt with by way of PCNs to identify costs more than the sanctioned budget.

[346] Mr. Iliev's analysis was independent of the PCN process, and his analysis of productivity accounted for are those embedded within the sanctioned budget. For example, the budget anticipated lost labour time associated with working in cold weather in the Fort McMurray region. When rework was undertaken in any project area, the cost of that rework would also have been impacted by working in cold weather. That cost escalation is beyond that anticipated in the budget.

[347] Mr. Iliev opined that all productivity losses would be those arising from execution challenges and that the final project cost is compared to a quantity adjusted budget, and then productivity adjustments would be made to compare to a mid-Alberta baseline. He received a summary prepared by Suncor internal employees of the renditions prepared on each of the five project areas. He also confirmed that he reviewed his productivity loss analysis independent of productivity claims made in the overall rendition to ensure there was no duplication of amounts claimed in those reports that were made in his report. He also received a summary of the renditions prepared by Suncor on each of the five Project Areas. He reviewed the report of Mr. Matthews to confirm any abnormal costs previously claimed in Mr. Matthews' report are separate and distinct from those productivity losses claimed in this report.

[348] In rebuttal, Mr. Iliev also took exception to Dr. Thompson's characterization that Mr. Iliev's report "haphazardly disregards abnormal costs claims incurred on the Fort Hills project, based on a series of "double accounting" errors, where no such errors have occurred".

[349] In order to confirm what labour productivity is, Mr. Iliev provided a definition where he submitted that it is a ratio of production output to the input that is required to produce it. The measure of productivity can therefore be defined as a total output per one unit of a total input, i.e. unit of measurement/hour or:

$$\text{Productivity} = \frac{\text{Unit of Measure (UoM) installed}}{\text{Man-hour}}$$

[350] Mr. Iliev also said that "Labour productivity loss or gain is the difference between a contractor's anticipated achievable or planned rate of production and its actual rate of production. The productivity factor is the ratio of actual productivity and estimated productivity."

[351] Mr. Iliev provided examples of how productivity might be affected including weather, work schedule, craft experience, camp versus non camp labour source, fly-in fly-out ("FIFO") versus local labour, field and shop work, etc. He expanded that the factors used to estimate productivity rates for work in the RMWB are largely based on Alberta industry standards developed by the major EPC firms who have significant experience and knowledge in respect of factors that impact productivity in Alberta. The factors are used to build a productivity adjustment model on a project specific basis to estimate the productivity, and the required labour hours for the approved construction execution plan for each specific project. The model is further refined based on low to high dependency within the project. Mr. Iliev provided a copy of the Bantrel Co. productivity adjustment model in his report (Exhibit 9-C, page 5, para 20).

[352] Mr. Iliev also provided an example of a calculation using the model, as follows:

> 20. … the craft experience impact criteria in the Bantrel productivity adjustment model set out below is weighted at 16% of the total weight. For illustrative purposes, if project "A" with a defined scope of work plans for an optimal crew mix (with excellent craft experience) and no productivity impact, they would calculate that it will require 10,000 hours to complete such scope of work. Conversely, project "B", with a similarly defined scope of work has a sub-optimal crew mix (with poor craft experience) and expects a significant productivity impact in completing such similar scope of work. Given the information available in the model, project "B" would plan for the high end of the range and would multiply 16% (weight %) by 2.35 (the high end of the range of impact) and further multiply that number by 10,000 (hours to complete scope of work) resulting in 3,760 additional hours to complete project B's scope of work relative to project "A". Calculated as follows:
>
> 0.16(weight %) x 2.35 (productivity factor) x 10,000 (estimated hours) = 3,760
>
> 21. The Productivity adjustment factor is applied to the direct labour man hours. The resulting adjusted estimated construction labour hours are converted to costs by multiplying the hours by the full cost per hour. The cost per hour includes the direct portion (base wages, benefits, burdens, etc.) and an indirect portion (construction services, facilities, transportation, equipment, etc.).
>
> 22. Estimates developed using the above-described productivity adjustment factor already takes into account the expected productivity loss for working in the RMWB. To obtain the difference between the productivity rate for RMWB and productivity rate for average Alberta it is necessary to remove from the budget the additional estimated labour for factors unique to working in RMWB, such as FIFO, weather, and camp living. See Suncor's OPP Project labour rate calculation is set out in Exhibit 9-C, page 35, Appendix "E".

[353] Mr. Iliev submitted that he adopted the following as components of unproductive labour:

a. abnormal costs associated with unavailability of an adequate labour force;
b. abnormal costs associated with unproductive labour;
c. abnormal costs not typically incurred in a balanced market;
d. abnormal costs excluded to maintain consistency among regulated properties;
e. abnormal costs where actual costs are greater than typical construction costs due to events or factors impacting the project;
f. abnormal costs associated with delays in construction;
g. abnormal costs associated with inclement weather; and
h. abnormal costs associated with lack of supplies or a work slowdown.

[354] Mr. Iliev reviewed how each of the categories identified above were created.

a. Labour Availability – Fort Hills cited a scarcity of labour. This required workers to fly-in fly-out, and costs associated with travelling from a camp to the gate of the project. In 2016, Mr. Iliev advised that the Alberta rates are 98% local labour, and RMWB is 95% local and Fort Hills labour force was 100% FIFO. In addition, average commuting times from camp/home are 50 minutes for the Alberta average and 90 minutes for Fort Hills.

b. Craft Experience – The labour force is mostly (if not all) unionized. Accordingly, seniority and relative experience would take local construction as opposed to working in Fort Hills which

is a camp, with long commutes and long days. Accordingly, to attract labour, experience is at the lower end. Less experienced workers require: (i) more training time; (ii) increased tool time; and (iii) additional rework (given inexperienced workers have a higher percentage of rework compared to projects completed by experienced workers) and, therefore, require more time to complete projects.

c. Camp vs Non-Camp – Mr. Iliev opined that camps negatively impact health, morale and subsequently productivity. For example, some of the differences between living in a camp and living in one's personal residence and a comparison (in brackets) include confined environment (open environment), living away from family (living with family), limited nutrition options (choice of nutrition), monotonous living (normal living), various living arrangements and comfort level (choice and consistency of living arrangements based on individual set up and comfort zone), differing sleep position (choice of sleep positions), and limited social life (choice of social life).

d. Longer working days – Mr. Iliev's position was that longer working days reduces productivity. Mr. Ilive provided information that the average Alberta work week for 2011 was 41.7 hours whereas Fort Hills was 46.67 hours.

e. Weather Impact – Mr. Iliev provided data to support that productivity drops as temperatures drop because work becomes more difficult in lower temperatures. Similarly, higher wind chill factors impact productivity, such that under extreme wind chill conditions, efficiency and productivity can drop 50% or greater. The weather issues include temperature, wind chill, and snow volume levels.

[355] Mr. Iliev went through examples of his calculations for each of the four project areas. He noted that the format for each of the areas was identical other than the data used to calculate the labour unproductivity. He also confirmed that there was a "cascading effect" on the calculations and that effect was considered and the labour productivity amount was reduced accordingly.

[356] Mr. Iliev also advised that the SE labour productivity was somewhat different than the other four (4) areas. Those areas were all compared to the sanctioned budget; whereas SE was not formally sanctioned until approximately one (1) year after the sanctioned budget was approved.

[357] Mr. Ilive stated that the SE Project increased in cost from the sanctioned budget of $3.85 billion to a QAB of $4.7 billion. The actual cost of the SE Project was $6.292 billion.

[358] Mr. Iliev noted that in his detailed analysis to identify unproductive labor, he included a comparison of the original budget, to what would be the total man hours and costs for the Edmonton area. Due to the increase in the SE Project QAB, the sanctioned budget was not updated in detail to identify the hours in the QAB budget. In order to account for the variance in hours and the relative productivity loss, he provided an analysis, and noted that the revised analysis accounted for any previous non-assessable claims to prevent double counting. He provided details of the analysis in Exhibit 8-C, pages 20 to 21, paras 63 to 69.

[359] Mr. Iliev's analysis of labour unproductivity for the five areas was as follows:

	Unproductive Labour Cost	Reference
	$	
SE	440,229,181	Exhibit 8-C, pages 8&9, para. 27
OPP	222,837,428	Exhibit 9-C, page 8, para. 27
U&C	200,333,838	Exhibit 10-C, pages 8&9, para. 27
AET	69,995,673	Exhibit 11-C, pages 8&9, para. 27
E&T	171,539,214	Exhibit 12-C, pages 8&9, para.27
	1,104,935,334	

[360] It was Mr. Iliev's opinion that the PA's assessment of the Fort Hills project correctly excluded abnormal costs such as camp, travel, and overtime; however, did not make exclusions of the associated additional cascading costs of unproductive labour.

[361] Mr. Iliev also noted that his methodology was the same as was used by Suncor in its filings which were subsequently reviewed in the 2017 CARB Decisions. His opinion was that "RMWB reviewed the filed assessment reports for 11 Suncor projects in 2016 and agreed on productivity loss in relation to Alberta average that was in excess of what was typical for the Projects locations over that time period".

[362] Mr. Iliev's sur-sur-rebuttal (Exhibit 51-C, page 1, para 2) references Dr. Thompson's Rebuttal Report (Exhibit 43-Rv2, page 5, para 2.2 j), where Mr. Iliev submitted that:

> Dr. Thompson's commentary in J2.2 (sic) reveals a misunderstanding of the industry's productivity measures. It is important to clarify that the estimate is directly connected with the execution plans and specific scope of work (per the defined work breakdown structure), and once finalized (and agreed with the EPC company), that becomes the baseline for the performance during execution. Variance in labour for the same work represents the productivity for each scope, that could be a factor either above or under.

[363] In Mr. Iliev's sur-sur-rebuttal testimony, he advised that in response to the Respondent's questioning of his direct testimony, he reviewed the calculation associated with weather as a contributing factor to labour productivity. He conceded that there was an error in his calculation where temperatures of -30 degrees and lower were also included in temperatures -40 degrees and colder, rendering a double counting of certain data. The resultant correction to labour productivity was $96 million allocated as follows:

	Unproductive Labour Cost Revised	Prior Unproductive Labour Cost	Difference
	$	$	$
SE	406,390,393	440,229,181	-33,838,788
OPP	201,917,533	222,837,428	-20,919,895
U&C	181,585,498	200,333,838	-18,748,340
AET	63,558,485	69,995,673	-6,437,188
E&T	155,428,196	171,539,214	-16,111,018
	1,008,880,105	1,104,935,334	-96,055,229

Assessment of Designated Industrial Property – Mr. Ian Fluney (Exhibits 17-C, 39-C, 52–C)

[364] Mr. Fluney provided background information concerning the assessment of Designated Industrial Property.

[365] Mr. Fluney was qualified as an expert witness (Exhibit P16C). The Respondent agreed to the following:

> Mr. Fluney has an appraisal and assessment diploma, and a real property assessment certificate, and will provide opinion evidence on industrial assessment matter, including interpretation and application of CCRG.

[366] Mr. Fluney's work history began in 2003 as an Assessment Technician/Assessor 1 with Rocky View County (2003 to 2008). He joined Ducharme McMillen & Associates ("DMA") in 2008 as a Tax Manager (2008 to 2012), became Senior Property Tax Manager (2012 to 2017), then Director, Property Taxes (2017 to 2021), culminating as Managing Director, Western Canada – the position he currently holds.

[367] Mr. Fluney's educational background includes an Assessment and Appraisal Diploma (Lakeland College, 2003) and a Real Property Assessment Certificate (UBC, 2003).

[368] Mr. Fluney's role in the subject appeal was "to assist the LPRT in the understanding of the Regulated Assessment process in the Province of Alberta including the role of the assessor and taxpayer in the process. The intent of the report is to provide a detailed review of CCRG provisions as to what is considered an included and excluded cost within those provisions, to provide a review of the Fort Hills abnormal cost submissions and its compliance with CCRG standards and to review how the Fort Hills abnormal costs compare with my past knowledge and experience in the assessment of regulated industrial properties." (Exhibit 17-C, page 3, para 2)

A. Fluney Background

[369] Mr. Fluney advised that DMA is the largest industrial property assessment and tax consulting firm in Western Canada and does property assessment and taxation work across all industrial sectors including forestry, pulp and paper, oil and gas production, processing and refining, intensive agriculture, food

processing, petro-chemical, coal, concrete, and electric power generation. This includes both linear and non-linear properties assessed under the *Minister's Guidelines*.

[370] Mr. Fluney has extensive experience concerning the review and auditing of property assessment and taxation for a wide variety of industrial property owners. On behalf of clients, he has broad experience in assessment reporting and compliance with assessors, reviewing and auditing assessment and tax notices, the preparation of new and annual rendition reports, reviewing, and meeting with assessors and conducting facility tours and inspections.

[371] Mr. Fluney advised that his disclosure report addressed the concept of the EAA under the *CCRG,* and how that adjustment has been applied historically, and how it is addressed in the *CCRG* in the context of abnormal costs of construction (*CCRG* s. 2.500). Mr. Fluney's report also discussed the excluded cost claims of Fort Hills regarding non-assessable and abnormal costs.

B. History of *CCRG* and Predecessor Legislation/Regulations

[372] Mr. Fluney stated that the predecessor to the *CCRG* was SPAG (Exhibit 17-C, Tab 1, pages 38 to 63). He stated the purpose of SPAG was to assist in analyzing construction cost returns that were related to a project's costs. SPAG identified categories of assessable, non-assessable, and abnormal construction costs.

[373] Mr. Fluney explained that, on page 2 of SPAG, the standards and methods of assessment for improvements are predicated on replacement cost new.

> The 1984 Assessment Manual at Section 1090.002:
>
> The Replacement Cost New concept combines typical quantities and qualities of material and labour to establish benchmark Unit Costs which are combined to produce Component and/or Module Costs which, in turn, are used to produce Base Rates representative of replacement costs for various classes and qualities of improvements.
>
> And at section 1.080.001:
>
> Base Rates, Installation Rates, Adjustments and Specialty Rates, Module Costs, Components Costs and Unit Costs contained in the Manual are representative of typical construction replacement costs for the year 1983 in the Edmonton Area.

[374] Mr. Fluney's interpretation of SPAG was that when suitable rates were not provided, the costs must be assessed in a manner that is fair and equitable with the rates that are provided. As the rates were built on the "Edmonton area," to assess in a fair and equitable manner the costs that had to be valued through SPAG were also then based on an "Edmonton area" adjustment.

[375] Mr. Fluney stated that in 2001 the province issued the *CCRG* (Exhibit 17-C, Tab 2, pages 64 to 77) as well as the "Interpretive Guide to the Construction Cost Reporting Guide" (Exhibit 17-C, Tab 3, pages 78 to 99). Mr. Fluney stated that these documents replaced SPAG, and opined that while the *CCRG* was a new document, it did not change the underlying basis of assessment described in SPAG, including the concept that consistency amongst regulated property meant that *CCRG* provisions would continue to reflect Edmonton (mid-Alberta) area rates. This was communicated to stakeholders at the time CCRG was released.

[376] Mr. Fluney's understanding was that when the *CCRG* was being contemplated in discussions with a working group, that group was advised that the *CCRG* had only a few minor changes and there were no changes intended for the EAA.

[377] Mr. Fluney also cited a document from Mr. Larry Riep who was acting for the Alberta Assessors Association (Exhibit 17-C, Tab 4, pages 100 to 102), which advised the assessment community that:

> The group met for one final time on October 16th to finalize the wording of the SPAG draft. The final draft of the guide, now named "Construction Cost Reporting Guide for Regulated Property", will be very similar to the existing SPAG with only a few minor changes.

[378] Mr. Fluney's opinion is if there was an intended change to remove the EAA, except transportation costs, this would be a significant change in practice, and that was never communicated to the working group. He also interpreted the minor changes referred to by Mr. Riep as dealing with how land was valued as well as the assessment of earth berms around tanks and paved internal site roads.

C. Assessment Practices for *CCRG* Reporting

[379] Mr. Fluney stated that the valuation of machinery and equipment must be based on:

a) rates produced by the Minister; or
b) a detailed review of both the indirect and direct construction costs to arrive at a regulated assessment value.

[380] Mr. Fluney also stated that in 2005, the *CCRG* became regulated. His opinion was that the *CCRG* identifies the mechanics of the reporting process, along with the costs that are part of the construction of a facility. The *CCRG* identifies costs to be included in determining assessable costs, provides examples of direct and indirect costs, and identifies costs that are to be excluded in determining assessable costs. Mr. Fluney provided a summary of the *CCRG* provisions (Exhibit 17-C, pages 14 to 16, paras 30 to 34).

[381] Mr. Fluney also provided his interpretation of the Interpretive Guide to the Construction Cost Reporting Guide (Exhibit 17-C, pages 17 to 20, paras 35 to 47).

[382] Mr. Fluney described his personal experience as prior to the creation of the Centralized Industrial Property Assessment (CIPA), costs were reported through *CCRG* and brought to an Edmonton area cost. He reported that this historical practice has also been confirmed by municipal, contract, and linear assessors. Mr. Fluney further submitted that any work that he has completed for remote locations such as oilsands facilities, pulp and paper mills, coal mines, gas plants, power generation, sawmills, and agricultural projects have always included an EAA.

[383] Mr. Fluney also discussed the *Minister's Guidelines* rates which he opined represent Edmonton area costs. He stated that MA's own practices when determining costs and modifiers specifically instructed consultants retained by the province to use *CCRG* principles and to develop the regulated rates set out in the *M&E Guidelines* based either on mid- Alberta or Edmonton Area Costs. This was illustrated in several documents (Exhibit 17-C, Tabs 6 to 12, pages 106 to 127), which represent the time frame July 1, 2006 to June 30, 2007, and immediately after the *CCRG* was enacted.

[384] Mr. Fluney provided an example of the scheduled rate application from the *M&E Guideline* as follows (Exhibit 17-C, page 25):

> 65) To be consistent, costs that are in excess of the rates prepared by the Minister should be excluded from the assessable costs. An example of would be a separator. The rate can be found in the Alberta Machinery & Equipment Assessment Minister's Guidelines but by using the costs and *CCRG* correctly which should include an Edmonton region adjustment should result in a similar rate. The result should be the same regardless of where the separator is located.
>
> 66) This shows the intent was to maintain consistency among regulated properties throughout Alberta, not regions within Alberta. If the intent was to have consistency only within specific regions rather than throughout Alberta then the *CCRG* would have said so.

[385] Mr. Fluney also cited s. 2.500 of the *CCRG*, which he opined clearly describes that an abnormal cost includes "a cost that is excluded to maintain consistency among regulated properties". His perception is that it would be incorrect to assess some properties using the EAA and to exclude the EAA for other properties.

[386] Mr. Fluney discussed a number of documents which he indicated support the basis of the EAA. These can be found in Exhibit 17-C, Tabs 14 to 21, pages 134 to 217, as detailed in para 67.

[387] Mr. Fluney also stated that since 2015, a working committee was formed to create a new document that would replace *CCRG*. This proposed document was called the RIPA. The committee was constituted to conduct an in-depth review of the *CCRG* and to build a baseline of proposed changes from the current *CCRG*. Mr. Fluney advised that the committee never finalized the document, although the working committee remains in place.

[388] Mr. Fluney stated that:

> 69) The Alberta Assessors Association CCRG Working Group provided comments on the draft RIPA in August 2016. The AAA working group's submissions on revisions to the CCRG [TAB 25, pg. 3] references efforts to continue to normalize construction to the Edmonton region. The reference to "continued" efforts implies that the committee was of the view that CCRG incorporates an Edmonton area adjustment:
>
> > *We have developed a new version of the CCRG written in the format of a regulation. The new version contains some new concepts and updates the value that is produced to represent included project costs based on typical modern-day construction practices and procedures. We continue to take efforts to normalize construction costs to those found in the Edmonton region (base area or region). We have named our document the "Total Project Cost Regulation" (TPCR).*
>
> 70) Larry Riep, who was previously on the CCRG committee, is also on the RIPA committee. Mr. Riep has previously stated that there were only minimal changes from SPAG to CCRG [Tab 4]. It was his opinion as an experienced assessor with knowledge of the creation of CCRG that CCRG wasn't built on an Edmonton region, this would have been addressed within the committee.

[389] Mr. Fluney also commented on certain assessments from 2014 and 2015 which were appealed, and which were resolved prior to the proposed hearings. The decisions are referenced in the 2017 CARB Decisions accepting joint recommendations in each case. The outcome was that the EAA was restored to the assessments. These decisions were provided in Exhibit 17-C, Tabs 26 to 40, pages 280 to 382.

[390] Mr. Fluney stated that those assessments dealt with the RMWB assessor removing the EAA. He noted that he had many clients who were affected by this change in practice by RMWB and stated that the assessments were appealed. The result of the appeals was that the EAA was restored. Mr. Fluney also noted that, for his clients, the restoration was based on Suncor's appeal, and the joint recommendation was applied to his clients without any further discussion.

[391] Mr. Fluney submitted that similar verbiage appears in most of the decisions. Using MEG Energy vs. RMWB CARB 2017-024 (Exhibit 17-C, Tab 33, pages 340 to 344) as a reference, the Board accepted the joint recommendation from both parties that the EAA should be applied to the assessments. Supportive documentation on this can be found in the decision:

> [6] The Joint Recommendation resolves all abnormal cost claims, which focused on the issue of the Edmonton area adjustment regarding productivity, which is in regard to the cost expected for labour productivity at the time when compared to the benchmark of Edmonton.
>
> [7] The recommended assessment for the 2016 Tax Year is $684,071,147. The initial assessment for the 2016 Tax Year is $768,859,040.
>
> [8] The recommended assessment is a compromise position on behalf of the Assessor and the Taxpayer. The recommendations resolve the disputes in each category of costs which were in issue in the 2016 Tax Year, and represent finality between the parties. The current Joint Recommendation resolves the disputes on each category of costs in issue, including productivity claim adjustments in 2016. The methodology, as well as the new evidence, which was presented to the assessor, allowed the parties to come to this.

[392] Mr. Fluney stated that based on his knowledge, the clients he dealt with included assessments dating back in some cases to 2002, and the subsequent assessments included the EAA. This supports that when the transition from SPAG to *CCRG* occurred, the EAA was considered in the assessment. Mr. Fluney also stated that in the assessments which were appealed, the RMWB attempted to ensure equity was achieved by reviewing the old assessments and making amendments. In the Fort Hills matter, Mr. Fluney stated that the PA is ignoring the equity requirements by making determinations that equity somehow does not apply to Fort Hills, or by ignoring the 2017 CARB Decisions.

[393] Mr. Fluney also submitted that it appears the PA performed a selective review of new major oil sands projects. He further stated that it does not appear there was a comprehensive review. As a result, there are many thousands of facilities that were not subject to the review and this created a significant inequity.

[394] Mr. Fluney included the following in his report:

> 75) When the centralization of designated industrial properties was implemented in 2018 the Government of Alberta posted on its website that "centralization of designated industrial property assessment will lead to improved consistency and equity for industrial tax payers (sic) and lower administrative costs for municipalities." [TAB 42]
>
> 76) A rejection of the Edmonton-area adjustment would represent an extreme departure from the principles that can be traced from SPAG, through the transition from SPAG to CCRG which did not change the Edmonton area adjustment, the fact that Ministers rates are built on Edmonton area costs, and the current definition of abnormal costs in CCRG. If a hypothetical assumption that CCRG does not take into account the Edmonton area is accepted, a significant amount of resources would be required to remove the current applied Edmonton modifier to each assessment. Since Alberta operates on an annual assessment cycle, in order to maintain equity, all assessments would have to be adjusted in the same

> assessment year. Since the creation of CCRG this also means that not only would the big expansions or new facilities have to be audited, but also each capital expenditure reported each year through the annual request for information process. Based on my experience, it is not uncommon for larger companies to have hundreds of new capital projects, both big and small, throughout the year. This then means each new project, each expansion and each annual expenditure report would have to be reviewed, a task would take considerable amount of time and resources to complete.
>
> 77) The information described above in this report supports that the Edmonton area adjustment is part of CCRG. It also speaks volumes that after seeking to remove the Edmonton-area adjustment in 2015 the RMWB, the municipality that is most impacted by this issue, agreed to put a joint recommendation to the board to re-apply the Edmonton area adjustment to the assessments and has since supported the inclusion of the Edmonton-area adjustment.

D. Reporting of Fort Hills Construction Costs

[395] Mr. Fluney reviewed the Fort Hills abnormal costs claims which remain at issue. These include the following:

a. Interference costs
    1. Abnormal site preparation (poor soil condition)
    2. Utilities and cogeneration
b. Design Changes (*CCRG* s. 2.300.400)
    1. Design error
    2. Re-engineering and rework
c. Transportation Costs (CCRG s. 2.500.200)
d. Abnormal costs of construction (Concrete) (*CCRG* s. 2.500)
e. Abnormal labour costs (*CCRG* s. 2.500)
f. Site preparation.

[396] Mr. Fluney also noted that based on his understanding of the background and experience of the Fort Hills team, Fort Hills has employed the skill set to quantify labour productivity levels and construction costs.

[397] Mr. Fluney's position is that the *CCRG* provisions do not dictate the content or form of a cost submission for *CCRG*, but the regulation states only that "specific documentation is required to substantiate claims for abnormal costs".

[398] Mr. Fluney stated further that the Fort Hills cost analysis was prepared and resulted in the determination of what would be considered as normal or typical costs as allowed for in the *CCRG*. The purpose of a *CCRG* analysis is to exclude costs that are not normal or typical, as set out in the assumptions used to describe those terms in the *CCRG*. These include costs associated with unproductive labour, costs that would not typically be incurred in a balanced market, and costs that are excluded to maintain consistency among regulated properties.

[399] Mr. Fluney also confirmed that his review of the Fort Hills assumptions used in abnormal cost claims submission are those that are set out in the *CCRG* provisions for the reporting of costs for assessment purposes.

[400] Mr. Fluney also opined that the *CCRG* specifies that documentation is required to substantiate claims for abnormal costs. Based on his experience, Mr. Fluney stated that the documents and detailed reports supplied by the Complainant meet these criteria. He continued that members of the Fort Hills team have significant expertise in the construction field, and they also have the skills required to identify issues and costs that have exceeded those expected in a typical construction project such as Fort Hills.

[401] Mr. Fluney asserted that the supporting documents supplied in his report show that *CCRG* was developed and consistently applied using the Edmonton area as the benchmark. By the assessor choosing not to apply this adjustment to a specific assessment, it is no longer maintaining consistency among regulated properties.

[402] Mr. Fluney also submitted that based on his experience, the typical practice for reviewing PCNs is for the Assessor and the taxpayer to meet to review a summary and sample of the PCN claims, and for the Assessor to spot audit the claims. The new requirements being imposed by the PA require individual review of each and every PCN, which Mr. Fluney submitted is unprecedented, and no explanation has been given for why this requirement is being imposed. Mr. Fluney observed that it would take many months to go through every PCN. Again, in his experience, he is unaware that the PA has even tried to do so. Also, the standard the PA is employing, that abnormal cost cannot be derived from a comparison to company "estimate", is simplistic and impractical.

E. Other Oil Sands Projects

[403] Mr. Fluney stated that the percentage of Fort Hill claims are consistent with his experience with cost reporting in oils sands facilities that typically see included costs in the range of 35% to 50% of total project costs. He also stated that projects with "black swan" events, such as the issue in the secondary extraction at Fort Hills, tend to have higher excluded costs.

[404] Mr. Fluney takes exception to the PA's position that, to its knowledge, there are no exceptions, or perhaps maybe a few outliers in terms of the EAA being applied subsequent to MA assuming responsibility for DIP assessments. Mr. Fluney opined that MA has an assessment audit team. If, as in 2015, the RMWB Assessor was able to identify projects with EAA, it is not plausible that the MA audit team would not have identified similar assessments if it was of the opinion that the adjustment was not consistent with the *CCRG*. If that were the case, it would have directed their removal. It was Mr. Fluney's opinion that the EAA was not identified as an issue by the MA assessment audit team from 2001 onward. Mr. Fluney suggested this implied that the MA considered adjustments for the EAA to be part of *CCRG*.

[405] It was Mr. Fluney's understanding that the EAA continued after the introduction of the *CCRG*, and that opinion was not limited to assessors. In Mr. Fluney's experience, assessment industry professionals and ratepayers also understood the evolution from SPAG to *CCRG* to have retained the EAA. Ratepayer in-house representatives and consultants continue to apply the adjustment, which continues to be accepted by assessors. Mr. Fluney submitted that he is engaged with several businesses across the province, and that he has seen the adjustment applied to numerous northern municipalities, such as Lac La Biche County, County of Northern Lights, ID 349 (now MD of Bonnyville), MD of Bonnyville, MD of Opportunity, Northern Sunrise County, and others. Assessors interpreted *CCRG* to have minimal changes from SPAG and that the Edmonton area is the base for *CCRG*. Mr. Fluney stated that Mr. Minard suggests his approach is universal, but in Mr. Fluney's opinion, "…it is an outlier, inconsistent with CCRG, and an approach which leaves Fort Hills as the only major oilsands project assessed on this new, inconsistent basis." (Exhibit 39-C, page 4, para 9)

F. Conclusion

[406] Mr. Fluney summarized his position as follows:

> 85) Through my review of the documentation attached to this report, and based on my experience, it is my opinion that the CCRG should be based on construction within 50 km of Edmonton. This has been the historic interpretation of the CCRG, continuing the principles and application of SPAG, and has also been the manner in which other oilsands facilities have been assessed in the past. The CCRG provides for the exclusion of abnormal costs, including costs that are to be excluded to maintain consistency among regulated properties. The regulated rates are based on the Edmonton area and are applied regardless of the location of the assessed property. There is no reason why property assessed pursuant to the CCRG should be treated differently, and to do so results in inconsistency and inequity.
>
> Fort Hills' assessment should reflect consistency with the assessment of other regulated property and should be equitable with the assessment of other oil sands facilities which have been assessed on the basis of an Edmonton area adjustment. Based on my review of other reports provided by the taxpayer in this matter, Fort Hills' abnormal cost claims in the categories are consistent with the historic application of the CCRG.

Assessment of Designated Industrial Property – Mr. Fumio Otsu (Exhibits 16-C and 38-C)

[407] Mr. Otsu provided background information concerning the assessment of DIPs and the impact of productivity adjustments.

[408] Mr. Otsu was qualified as an expert witness (Exhibit P16C). The Respondent agreed to the following:

> Mr. Otsu is an engineer, former instructor at the University of Calgary on cost estimating for engineers. He is to give opinion evidence on quantifying labour productivity loss and the historic practice of quantifying productivity loss for assessments of industrial projects in Alberta.

[409] Mr. Otsu's work history began with Fluor Engineering in a number of roles, principally in the fields of cost engineering and scheduling. He next worked for Informatics Corporation as a Project Management Consultant and has a number of projects in the oil sand sector. Since 2002, Mr. Otsu has been a Principal Consultant for Project Review & Analysis, LLC. His resume lists 19 projects where he has provided consulting services which includes oil sands properties.

[410] Mr. Otsu's educational background includes a Bachelor of Science, Chemical Engineering from the University of California at Berkley, and a few courses in the Business Management Certificate Program at the University of California at Los Angeles. He was also a lecturer at the University of Calgary in the field of Cost/Estimating.

[411] Mr. Otsu also has several affiliations including the American Association of Cost Engineers ("AACE"), Project Management Institute ("PMI"), Co., President and Director, Alaska Chapter PMI (1987), Fluor Daniel Executive Sponsor to Drexel University, University of California, Irving Engineering Advisory Committee, and the Construction Industry Institute ("CII"), Task Force Member Power Projects.

[412] Mr. Otsu explained his role in the hearing as follows (Exhibit 16-C, para 1):

> 1. I have been asked to provide commentary on the identification and quantification of productivity loss claims in industrial property tax renditions in Alberta since the initial implementation of CCRG. As a former lecturer at the engineering faculty of the University of Calgary on issues of Cost/Estimating and having provided consulting services on a number of projects in Alberta over the years, it is my intention to provide an overview of the development of reporting principles used in various projects over the past decade. As I had been involved in the preparation of models to assist companies and assessors in quantifying productivity loss, it is hoped that a review will be of assistance to the Tribunal in understanding rendition methodology in the context of productivity claims.

[413] Mr. Otsu advised that productivity is based on two material cost considerations:

> 1. Cost differentials for remote jobsite location as compared to Mid Alberta; and
> 2. Work efficiency losses due to delays, unplanned work, and inefficient work performance specific to a project location.

[414] Mr. Otsu's involvement in assessment matters began with the Athabasca Oil Sands Project ("AOSP") in 2001. Mr. Otsu was engaged as a professional cost engineering consultant. At the time, he was experienced in Alberta, and he was previously an Officer for the AACE.

[415] In 2002, Mr. Otsu assisted in developing a model using the principles of cost engineering and developed a methodology and process for cost reporting.

[416] This model resulted in consultation with the RMWB assessment department (Mr. J. Elzinga) to review the methodology for compliance with the CCRG. Mr. Elzinga also engaged outside consultants (Mr. K. Milne). As a result of the consultation process, a final report was agreed to in January 2004 without modification.

[417] Mr. Otsu advised that because of the acceptance of the cost methodology and cost calculations for AOSP, these principles were used for the Shell Muskeg River project in Fort McMurray. The final cost report was submitted to Mr. H. Schmidt, Tax Assessor for Wood Buffalo in December 2003, and was agreed to without modifications.

[418] Mr. Otsu advised that he developed the methodology for productivity based on cost estimating principles and since its development, it has been used for multiple projects within Alberta.

[419] Mr. Otsu stated that there were two methods of developing costs. The first was collectable costs which could be derived from cost accounting methods. The second was costs derived based on applying cost engineering estimating methodology.

[420] Mr. Otsu cited the *CCRG* respecting productivity being defined as an abnormal loss: "If the actual costs of an industrial facility are greater than typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded."

[421] Mr. Otsu's position was that the *CCRG* provides direction that abnormal costs can result from delays in construction caused by natural disasters or inclement weather, or they may occur when the construction workforce is on site, but a lack of supplies or a work slowdown reduces or stops actual construction. Additional costs incurred because of unproductive labour are excluded.

[422] The *CCRG* also provides two additional examples of abnormal costs:

1. a cost that would typically not be incurred in a balanced market, and/or
2. a cost that is excluded to maintain consistency among regulated properties.

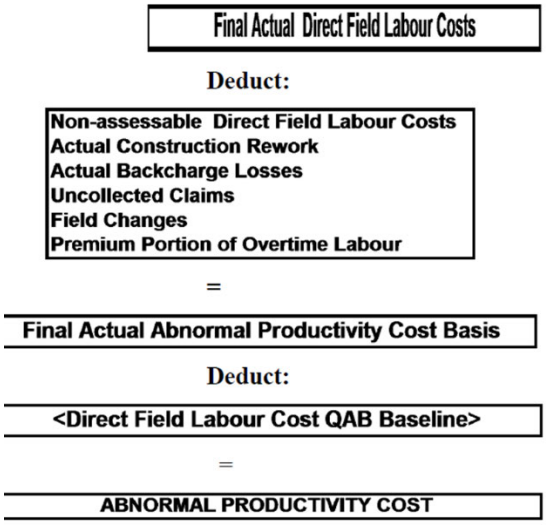
[423] Mr. Otsu opined that based on these definitions, he considered costs for abnormal labour were calculated utilizing the baseline estimate for construction labour hours and comparing this budget value to the final actual labour hours. He also confirmed the RMWB assessors previously accepted the internal budget estimate as the baseline.

[424] Mr. Otsu stated that the concept of the baseline budget is a methodology used by cost estimating professionals for measuring project construction labour performance, and that it is a practice which was established by the AACE as a recommended estimating practice and continues to be applied for tax assessment purposes.

[425] Mr. Otsu disagreed with Dr. Thompson's position that cost estimates should not be used. He commented that benchmarking of actual costs against estimated costs is important and a basic concept of cost engineering. He also stated that cost engineering methods were applied for each project; therefore, it is incorrect to say that the data was not verified. He further commented that the cost engineering methods proposed are consistent with the recommended practices of the AACE. A description of the AACE and references to additional information about the organization were included in his report (Exhibit 16-C, page 20, Appendix A). He also stated:

> 7. This methodology is consistent with methodology presented in previous projects in Edmonton using the Quantity Adjusted Budget (QAB), which was applied to all Edmonton/Ft McMurray projects in which I had consulted on, such as Shell and Suncor The basis for this was to ensure that all products were collected and controlled to ensure a reliable and consistent comparison could be made between the expected and final productivity for all projects." (Exhibit 38-C, page 3, para 7)

[426] Mr. Otsu also provided a summary of how unproductive labour was calculated (Exhibit 16-C, page 7 with terms defined on pages 7 and 8):



[427] Mr. Otsu stated this model is used in the Fort McMurray area, and significant aspects for the model include increased work week hours, weather, turnover of craft labour, travel time to work sites, and location logistics for several sites.

[428] Mr. Otsu also stated that the variables are included in the project cost estimate and establish the baseline for all the project execution plans. When this is completed, the following is expected:

- Expected costs are "norms" i.e. budget
- Variables are applied to set "norms" for the project
- Productivity measurement is made from project "norms"

[429] Mr. Otsu stated that in 2015 and 2016, he had the opportunity to meet with Mr. Iliev to review his labour productivity analysis. He found Mr. Iliev's analysis to be consistent with his expectations.

[430] Mr. Otsu acknowledged he had not reviewed the analysis in any detail for the subject complaint, but was made aware that the methodology was consistent with the 2015/16 analysis, which he confirmed was consistent with the analysis he established.

[431] In respect of the model, Mr. Otsu opined that:

> Since productivity loss for most projects could not be collected without extensive work sampling, the productivity model was developed. This model grouped multiple types of losses and is considered a derived abnormal cost. In this model the Fort McMurray productivity adjustments are included in the baseline budget for the productivity calculation. These adjustments are expected losses in productivity for the specific project." (Exhibit 16-C, page 15, paras 46 and 47)

[432] Mr. Otsu's conclusion was as follows:

> 67. The productivity loss concepts for Fort McMurray have been applied to other locations in Alberta due to conditions described in the CCRG.
>
> 68. Since the inception of CCRG, I have been involved in the development of models and concepts to assist in arriving at a basis for calculating productivity losses at site and in relation to losses incurred as a result of an imbalanced market, shortage of labour, and remote location. In some cases, these models have been vetted by engineers employed by the municipality. (Exhibit 16-C, page 19, paras 67 and 68)

[433] He further concluded in his rebuttal as follows:

> 13. I will conclude by reiterating one of the key points from my initial report, which is that the historically accepted considerations for productivity analysis included two key elements: a mid-Alberta adjustment and site-specific adjustments.
>
> 14. To the extent that Dr. Thompson and the Provincial Assessor are now arguing these two key elements should not be considered or form part of the analysis on productivity, based on my experience this would be inconsistent with how it has been historically done and accepted. (Exhibit 38-C, page 4, paras 13 and 14)

Soil Conditions – Mr. Parmit Parmer (Exhibit 13-C)

[434] Mr. Parmer provided a report concerning adverse soil conditions; however, he did not present his report and was not made available for examination by the Respondent.

[435] His report was provided to identify the abnormal costs associated with the soil conditions present in the development and construction of the Fort Hills Oil Sands Project in the AE&T, E&T, and U&C project areas.

[436] Mr. Parmer was qualified as an expert witness (Exhibit P16C). The Respondent agreed to the following:

> Mr. Parmer is primarily a fact witness, a Suncor engineer, will testify in respect of the abnormal soil conditions in automation, electrical and telecommunications, extraction and tailings and utilities and cogeneration.

[437] Mr. Parmer began his work career with GML Associates as a Junior Civil/Structural Engineer (1987-1988), then with SNC Lavalin in Montreal as a Senior Civil/Structural Engineer (1988-1993), and with SNC Lavalin in Calgary as Lead Civil/Structural Engineer (1993-2003). He began his employment with Suncor in 2003-2016 as Program Lead Civil/Structural Engineer and in 2017 was promoted to his current position of Manager, Civil/Structural Engineer.

[438] Mr. Parmer holds a Bachelor of Science, Civil Engineering from the Punjab University India, and a Master of Science, Civil Engineering from Concordia University.

[439] Mr. Parmer's report identifies the nature of ground conditions at the Fort Hills Project site as requiring additional pilings, dewatering, and work that would not be encountered in an Edmonton area greenfield site or the finished industrial land standard. The muskeg conditions and deeper bedrock at the Fort Hills site resulted in an excluded cost allowance for site preparation.

[440] Mr. Parmer also included in his report that for earthwork scopes of work, the depth of annual frost impacts the construction costs in Edmonton, which were compared to the construction costs in Fort McMurray, which confirm that Fort McMurray is impacted more than Edmonton.

[441] The frost depth in Edmonton is significantly shallower than the frost depth in Fort McMurray. Due to the frost depth, underground installations such as potable water, fire lines, and sewer lines the Edmonton area requires 75% less excavation and backfill material compared to Fort McMurray area and the Fort Hills site.

[442] Mr. Parmer's report also notes that foundation costs would be 15% lower in Edmonton, and piling costs would be lower by 25% in the subject site when compared to Edmonton.

[443] Mr. Parmer's report submits that in total, $46,012,712 in excluded costs were incurred in the three referenced project areas as a result of topography and soil conditions associated with the Fort McMurray area and the specific Fort Hills Project area.

Additional Foundation and Concrete due to unfavorable conditions and deeper bedrock than typical	**Cost Impact**
Automation, Electrical, Telecommunication	$18,270,425
Extraction and Tailings	$ 9,964,440
Utilities and Cogen	$17,777,847
Total	**$46,012,712**

Standard Practice Use of Productivity in Estimates – Mr. Felix Wong (Exhibits 15a-C and 15b-C)

[444] Mr. Wong provided a report concerning the Standard Practice of Use of Productivity in Estimates; however, he did not present his report and was not made available for examination by the Respondent.

[445] His report was provided to identify the Worley United States Gulf Coast ("USGC") workhour unit rates which are adjusted to the Worley Craft Labour Productivity Calculator to develop typical labour productivity adjustment factors.

[446] Mr. Wong was qualified as an expert witness (Exhibit P16C). Mr. Wong has a Construction Estimating Diploma from the Northern Alberta Institute of Technology (2004). He has many additional courses, which include Certified Engineering Technologist ("CET") (2014) and AACEI Certified Estimating Professional ("CEP") (2020).

[447] The Respondent agreed to the following: "Mr. Wong is a CET and CEP at Worley Parsons and will give opinion evidence on standard practice of use of productivity analysis in construction cost estimates."

[448] Mr. Wong's work experience includes Junior Technologist with EBA Engineering and Consultants (2005-2005), Facility Estimator with Flint Engineering (2005-2008), and Principal Estimator with Worley, his current position since 2008.

[449] Mr. Wong's report states that initial standardized task hours are initially based on USGC green field construction work hours and productivity to derive a cost for a specific site location. The outcome of those hours is then reviewed against the Worley Craft Labour Productivity Calculator, along with available historical data to develop adjustment factors. Accordingly, labour productivity can vary greatly amongst projects, including those in the same region. For example, a project in a remote North American location will not have the same productivity as a project in central North American location. When developing productivity, all aspects must be considered and one factor for all locations is not used.

[450] Mr. Wong provided examples of the USGC rates elements and factors in his report.

SECTION 6 - WITNESS TESTIMONY - RESPONDENT IN THE ORDER OF OCCURRENCE AT THE MERIT HEARING

Assessment of Designated Industrial Property – Mr. Brad Pickering (Exhibits 23-R and 45-R)

[451] Mr. Pickering provided a report to assist the Panel in understanding the development of the *CCRG,* which the Minister approved in 2001.

[452] Mr. Pickering was presented as a fact witness.

[453] Mr. Pickering's work experience began with the Municipal District of Sturgeon (1978-1979) as an appraiser for taxation purposes. He then moved to Strathcona County and held the positions of Property Assessor (1979-1983), Land Coordinator, Land Management (1983-1986), Manager, Real Estate Services (1986-1993), and finally Coordinator, Real Estate and Land Development Services (1993-1997). He joined the Government of Alberta in 1997 and he retired in 2019. This included positions as Executive Director, Assessment Services Branch (1997-1999), Assistant Deputy Minister, Local Government Services Division (1999-2002), Deputy Minister, Alberta Municipal Affairs (2002-2004), Deputy Minister, Sustainable Resource Development (2004-2008), Deputy Solicitor General and Deputy Minister, Public Security (2008-2011), Deputy Minister, Tourism Parks and Recreation (2011-2013), Chief Executive Officer, Alberta Environmental Monitoring, Evaluating and Reporting Agency (2013-2014), and Deputy Minister, Alberta Municipal Affairs (2014-2019).

[454] Mr. Pickering has a Municipal Assessment Certificate (1981), a Real Estate Certificate (1982) and a Local Government Certificate (1989) from the University of Alberta. He also has a certificate from the Appraisal Institute of Canada (1982).

A. History of *CCRG* and Predecessor Legislation/Regulations

[455] Mr. Pickering stated that the history of assessment in Alberta relates to pre-1995 and post-1995.

[456] In pre-1995, property was assessed on a fair actual value basis. This dealt with all land except farmland. There were regulated manuals used to assess farmland, buildings, and structures. There were about eight years between reassessments.

[457] Mr. Pickering stated that prior to 1995, a manual referred to as SPAG was used. SPAG tied assessments as if they were incurred in the Edmonton area. Similarly, all buildings and structures within a municipality were also based on the Edmonton area costs.

[458] Mr. Pickering opined that SPAG clearly reflected the legislated assessment regime of the time; however, SPAG was never a regulated or legislated document. It was simply a guide used for over 20 years to bring consistency to properties being assessed using the cost approach.

[459] Mr. Pickering stated that in 1995, the Alberta assessment system was revamped. In place of fair actual value, properties were to be assessed based on a market value assessment system and municipalities were expected to do an assessment every year. There were two assessment standards brought forward – a regulated procedure based standard and a market value based standard.

[460] In 1995, SPAG was not relevant, according to Mr. Pickering, when buildings and structures were assessed on market values within the municipality where the property was located.

[461] Mr. Pickering further stated that the *CCRG* is a regulated document, in a market value system. The *CCRG* is based on the appraisal concept of reproduction cost, however, it also identifies specific costs to either be included or excluded. The *CCRG* was prepared for assessments of complex, unique, and special properties where no rates have been regulated.

[462] Mr. Pickering went on to state that the *CCRG* was created to maintain consistency amongst regulated properties. By providing standardized procedures and costs, consistency and administrative efficiencies are achieved.

[463] Mr. Pickering opined that various assessment appeal hearings have assumed that the *CCRG* implied using Edmonton as the base for costs. Mr. Pickering submits that the *CCRG* working group discussed the concept; however, as stated by Mr. Angus Mackay:

> ***…the Industrial Property Reproduction Cost guide draft specifically excludes any reference to Edmonton area because that was all tied to the previous regulated manuals, and that's why, even though it might be accepted by this group that Edmonton area is the typical cost, then I think it is something that this group should make that conclusion. By leaving it out, I wasn't necessarily suggesting that that would not be the case, but because there was no reason, from looking at other legislation or regulations, that Edmonton area had any particular status, it would be inappropriate to reference it in the guide. So to summarize, it could be that typical is what happens in Edmonton. It could be something else. I think that's one of the things that this group really needs to come to grips with. (***Bold highlights by Mr. Pickering)

[464] Mr. Pickering also opined that the final draft of the *CCRG* document was shared and word-smithed by the working group and the concept of the Edmonton base cost was not included in the regulated *CCRG* document. As an example, one of the assumptions in the Abnormal Costs of Construction Section references "an adequate labor force is readily available at the **worksite**." It did not reference a benchmark location such as Edmonton or mid-Alberta."

[465] In addition, Mr. Pickering stated that there is an express reference within the *CCRG* for Edmonton for Transportation Costs only. Mr. Pickering's position was that if the Minister had wanted Edmonton to be viewed as the base for all costs, it would have included a provision to that effect, particularly since it was in SPAG, but not in *CCRG*. Mr. Pickering continued that the fact that it was removed from SPAG indicates that within *CCRG*, Edmonton is to be used for transportation costs only.

B. Assessment Practices for *CCRG* Reporting

[466] Mr. Pickering submitted that the legislation changes in 1995 required that regulated assessments have certain properties treated differently than market value based standard properties.

[467] Regulated properties were difficult to assess using a market value based assessment standard because:

(a) they seldom trade in the marketplace and when they do trade, the sale price usually includes non-assessable items that are difficult to separate from the sale price;

(b) they cross municipalities and municipal boundaries; and
(c) they are of a unique nature.

[468] Mr. Pickering stated that as a result, the *Minister's Guideline* were developed to assess regulated properties in Alberta. This includes establishing the procedures which includes using the *CCRG* to identify included costs ("ic"). The *CCRG* exists for assets where no regulated rates exist.

[469] Mr. Pickering testified that the *CCRG* was developed in 2001 by a working group in consultation amongst industry, municipal associations, and the assessment community. The working group was

established to review an updated guide based on market value principles. Mr. Pickering advised that it was presented to the working group in draft form and was the basis upon which the working group discussion occurred.

[470] Mr. Pickering indicated that in early meetings, the discussion centered around whether reproduction cost or replacement cost would inform the guide. The guide in its final wording landed on the appraisal principle of reproduction cost as the cost reported for the construction of the facility. He noted that the *CCRG* wording states "The policies and procedures incorporated in this guide are modelled on the appraisal principal of reproduction cost, subject to the divergences necessary to meet the requirements of Alberta's assessment legislation and secondly, to provide a stable property tax base."

[471] Mr. Pickering also stated that in mid-2001, the working group was tasked with identifying important issues. Once completed, the group was able to resolve most issues, with seven outstanding matters. Those remaining issues revolved around:

(a) Overtime
(b) Travel Time
(c) Temporary Camp Facilities
(d) Freight Charges
(e) Interest During Construction (IDC)
(f) How to define an abnormal cost
(g) Property Tax.

[472] The remaining issues were discussed at a meeting in September 2001. Of particular note was that EAA was not brought up by the working group as an issue. The seven issues were discussed and not all the considerations put forward by the department were accepted by the working group in the final draft of the *CCRG*.

[473] Also, during the September 2001 meeting, the idea of regulating the *CCRG* document and itemizing the assumptions which varied from market value principles was discussed with the working group to deal with the impasse on the substantive issues. These assumptions were:

(a) An adequate labor force is readily available at the worksite.

(b) Raw materials and prefabricated component parts are readily available.

(c) Projects are financed from operations or from shareholder equity and companies make no provision for interest during construction.

(d) Premium payments are not made for overtime worked.

[474] Mr. Pickering then submitted that the 2001 *CCRG* laid out the concept of assessable costs. It itemized a list of project costs which could be excluded under abnormal costs. The *CCRG* provided the following reasons:

- In a balanced market it is a cost that would typically not be incurred, and/or
- It is a cost that is excluded to maintain consistency among regulated properties.

[475] Mr. Pickering stated that the two points noted above acknowledged that depending on the time frame the project construction took place, the costs of certain construction components could vary upwards or downwards based on the construction market conditions which existed at the time. This was further expanded on in the 2001 *CCRG* where it laid out assumptions to produce assessment consistency for

regulated properties. It defined things, which in an appraisal context, would be considered as part of market value but would be excluded costs for assessment purposes under the *CCRG*.

[476] Mr. Pickering's opinion of the working group discussions was that travel time was identified as an item that could be dependent on when a project is constructed as to whether owners would be required to pay. This was a factor of market conditions at the time it was constructed; the rational to exclude this item was an example of an abnormal cost, based on an assumption of balance market, and to get consistency among regulated assessments irrespective of the timeframe the project was constructed. The Edmonton area location was not part of the discussion rationale to define these as abnormal costs.

[477] Mr. Pickering also noted that SPAG defined Normal or Typical Construction Cost Element as: "A construction cost element typically incurred in the construction of specific classes of industrial improvements, the cost of which reflect:

- Economic conditions typical at the time of construction, and
- Construction under typical climatic conditions."

[478] Mr. Pickering opined that the *CCRG* definition of "typical" or "normal" is difficult; it is subjective and:

(a) Varies over time
(b) Varies by location
(c) Varies by industry

[479] Mr. Pickering also stated that any claims for costs which are considered abnormal require specific documentation to substantiate the claim.

[480] Mr. Pickering stated that in October 2001, the working group received the final draft document and did not raise the EAA except for transportation costs. The document was accepted by Ministerial Order, and subsequently the regulated process of using a modified cost approach through the application of *CCRG* with regulated factors has not changed.

[481] Mr. Pickering also noted that he has reviewed the RMWB Blue Book. The document was prepared by Mr. Elzinga, who was an Assessor of Industrial Property in Alberta and was a very active participant during the working group development of the *CCRG*. The interpretation by Mr. Elzinga is consistent with Mr. Pickering's interpretation of the *CCRG*, and his understanding of the policy of MA while Mr. Pickering was the Deputy Minister.

D. Conclusion

[482] Mr. Pickering suggested that Mr. Fluney's reference to Mr. Reip's statement that there were no substantive changes between SPAG and the *CCRG* (Exhibit 17-C, page 21, para 51), is an oversimplification. Mr. Pickering concurred that several of the included or excluded items were like the previous SPAG document; however, the policy decision on the market value assessment system had moved away from an Edmonton based manual system. The SPAG document and its successor, the *CCRG*, were to determine what was included or excluded for assessable costs and a preamble dealing with Edmonton area cost basis was specifically removed.

[483] Mr. Pickering submitted that the preamble in SPAG outlines a concept to achieve consistency with other improvements. At the time SPAG was in place, assessors used the Provincial Assessment Manuals which were based on Edmonton area costs. The *CCRG* was developed at a time when other improvements

were based on market value, which takes into consideration the property location, and the property location is what the *CCRG* was endeavoring to do as well.

[484] Mr. Pickering's opinion was that under the previous fair actual value assessment system, SPAG was developed based on Edmonton area costs. Mr. Pickering further opined that the *CCRG* is modelled to determine value within a market value assessment system. As reported costs represent reproduction costs, they reflect typical construction costs at the time of construction, at the plant location, and under normal climate conditions. The *CCRG* determines assessable costs through a process of costs which are included or excluded based on the provisions of the *Ministers Guidelines*. Nowhere in the *CCRG*, other than transportation, has the Minister given direction to Assessors that Edmonton area costs are the basis of assessable costs. Through the regulated assessment process, the Minister has determined the procedure as to how the assessment is to be calculated.

[485] Mr. Pickering also stated that to determine how equity is achieved for regulated properties, as set out in *MGA* section 293(1), it is by the application of the regulations and procedures. If one looks at the market value assessments, as set out in *MGA* section 293(2), equity is achieved in those instances based upon similar properties within the same municipality and not the province generally.

[486] Mr. Pickering noted that during the working group review process, consensus was not reached on maintaining pure market value principles. Accordingly, certain assumptions were made to vary from those principles which were contained in the document. It was decided that the majority of the cost exclusion provisions in the SPAG would continue in the *CCRG*.

[487] Mr. Pickering further stated that the *CCRG* position on abnormal costs of industrial facilities did not identify a benchmark location which could be used as the basis for determining typical, normal construction costs. The *CCRG* acknowledges that what constitutes "typical" or "normal" is difficult and it describes a number of assumptions when describing normal conditions for the construction of regulated property. No assumption was made as to location, other than where the property is located under the appraisal methodology of reproduction cost.

[488] Mr. Pickering submitted that the definition of "typical" was tested by industry shortly after the final draft of the *CCRG* was sent out by MA. As noted in a letter dated December 5, 2001 from Mr. Best, representing CPTA, he requested that "Costs to deal with adverse factors related to topography or soil condition not ordinarily encountered in typical construction projects based at a location outside of Edmonton, would not be included". (Exhibit 20-R, page 1643) Mr. Pickering submitted that his response to that letter references section 2.600 of the *CCRG* which states "The determination of what constitutes "typical" or "normal" is difficult; it is subjective and may vary over time, from one location to another and among industries. If the actual costs of an industrial facility are greater than the typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded." Nowhere does it reference Edmonton based costs in Mr. Pickering's response as to what is typical and Mr. Best's invitation to include a reference to an Edmonton area baseline was not included in the final version of the *CCRG*.

Assessment of Designated Industrial Property – Ms. Sheila Young (Exhibits 21-R and 46-R)

[489] Ms. Young's report provided historical and factual information regarding the applicable regulations and underlying Alberta government policy respecting the assessment of machinery and equipment.

[490] Ms. Young was presented as a fact witness.

[491] Ms. Young's work experience began with Alberta Mortgage and Housing as an appraiser, then to Mendel, also as an appraiser. This was followed by the City of Calgary, Assessment Department as an Assessor 2, Assessor 3, and Acting Manager. In January 1998, Ms. Young began work for the Government of Alberta, Municipal Affairs, Assessment Branch, initially as an Auditor, Assessment Audit (1998-2001), Audit Coordinator (2001-2004), Project Manager, Industrial Assessment Review (2004), Audit Manager (2004-2007), and lastly as Director, Assessment and Property Tax Policy (2007-2022). She retired in 2022.

[492] Ms. Young completed the Certificate Program Real Property Assessment from the University of British Columbia, the Senior Manager and Executive's Development Program from the Alberta School of Business, and she received a Bachelor of Management, Athabasca University.

[493] Ms. Young is an Accredited Appraiser Canadian Institute (AACI – retired, Fellow) as well as a Designated Member - International Association of Assessing Officers (CAE)

A. History of *CCRG* and Predecessor Legislation/Regulations

[494] Ms. Young stated that the history of assessment in Alberta relates to pre-1995 and post-1995.

[495] Ms. Young testified that prior to the introduction of the *Municipal Government Act* in 1995, the assessment process for all properties was regulated, with cost manuals based on the Edmonton area. Ms. Young's testimony is that the cost manuals from that era, except for the farm land manual, no longer apply. SPAG, while not a regulation was applicable to the pre-1995 era, and it no longer applies.

[496] Ms. Young opined that the current framework from 1995 and subsequent has two valuation standards for property: the market value standard and the regulated standard. The regulated standard was introduced as some types of properties are difficult to assess using a market value assessment standard because:

- they seldom trade in the marketplace. When they do trade, the sale price usually includes non-assessable items that are difficult to separate from the sale price;
- they cross municipalities and municipal boundaries; and
- they are unique in nature.

[497] Ms. Young stated that for those regulated properties, the Minister prescribes rates and procedures to assess them.

[498] Ms. Young described the legislated term used where the PA determines the assessment of a property. These properties are referred to as DIP, which includes the categories of M&E, linear property, and in some cases, land and B&S.

[499] Ms. Young also stated that in the 2017 updates to the *MGA,* the property assessment function of designated industrial properties was amended to fall under the PA, who took responsibility for the assessment of these properties on January 1, 2018. The MA website states "centralization of designated industrial property assessments will lead to improved consistency and equity for industrial taxpayers and lower administrative costs for municipalities."

[500] Ms. Young also stated that the reference to M&E is defined in *MRAT*. *MRAT* directs the valuation standard for M&E to be calculated in accordance with the applicable procedures set out in the *Minister's Guidelines*. Ms. Young noted that the *Minister's Guidelines* are updated annually.

[501] Ms. Young testified that the PA's goal is to achieve consistent predictable assessments, and identified that consistency is achieved through policies such as excluded costs from the *CCRG*, truncated depreciation, 77 percent statutory level, and no education taxes for machinery and equipment.

[502] Ms. Young's position is that in preparing an assessment, the Assessor must follow s. 293 of the *MGA* which specifies that:

> In preparing an assessment, the assessor must, in a fair and equitable manner,
>
> a) Apply the valuation standards set out in the regulations, and
>
> b) Follow the procedures set out in the regulations
>
> If there are no procedures set out in the regulations for preparing assessments, the assessor must take into consideration assessments of similar property in the same municipality in which the property that is being assessed is located.

[503] In Ms. Young's opinion, assessment methodology is designed to distribute property taxes in a reasonable manner. She also opined that *MRAT* directs the assessor to assess some properties at market value and location is a primary component of market value. Ms. Young provided an example where a motel in Olds is unlikely to be assessed at the same value as a similar one in Edmonton. The regulation specifies that machinery and equipment is to be assessed using the *Minister's Guidelines*. This includes the 2005 *CCRG*. Ms. Young noted that the *CCRG* only specifies the Edmonton area location for transportation costs.

B. Assessment Practices for *CCRG* Reporting

[504] Ms. Young concurred with the basis for assessment of DIPs as described in this decision in paragraph 12.

[505] Ms. Young provided a detailed review of each of the components in the foregoing calculation (Exhibit 21-R, pages 8 to 12, and paras 16 to 33).

C. Reporting of Fort Hills Constructions Costs

[506] Ms. Young's interpretation of the Complainant's issues is that they center around abnormal labour costs; design changes, alterations, and modifications; interference costs; transportation costs; and abnormal construction costs.

[507] In respect of abnormal costs in general, Ms. Young stated that the *CCRG* applies to all M&E in the province, from all industries, in all locations, and for a number of years. Ms. Young quoted the *CCRG* at paragraph 4 concerning abnormal construction costs as follows:

> The determination of what constitutes "typical" or "normal" is difficult; it is subjective, and it may vary over time, from one location to another and among industries. If the actual costs of an industrial facility are greater than typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded.

[508] Ms. Young opined that the foregoing definition "… is reasonable that normal or typical for one industry or one location or one period of time may not apply to all industries, all locations, or all time periods. It is reasonable because there are a variety of economic factors that influence each type of industrial development. Technology may be changing in one industry and not another, or one industry may be sourcing materials and labour from a global market, and another industry may only source local materials and labour."

[509] Ms. Young also noted that the *CCRG* on page 4 expands on its guidance as follows:

> "Two additional examples of abnormal costs are:
>
> - a cost that would typically not be incurred in a balanced market, and/or
> - a cost that is excluded to maintain consistency among regulated properties.
>
> Specific documentation is required to substantiate claims for abnormal costs."

[510] Ms. Young stated it was a requirement that a balanced market need to be considered based on what is "normal" and "typical". To do so, she expanded, would require comparing this project to what is occurring within the industry, a similar location in the municipality, and during the same time frame.

[511] Ms. Young also noted that the International Association of Assessing Officers ("IAAO") defines balance as:

> Markets have a tendency to move toward equilibrium. Balance is a term used by appraisers to indicate that there is a proper mix of types and uses of property. When a real estate market is in balance, land values are maximized. (International Association of Assessing Officers, 1990)

[512] Ms. Young confirmed that neither the *CCRG* nor the IAAO define a market in a particular location, time, or industry which is always in balance. However, the *CCRG*, in the four bullets under section 2.500, lists four of the common components of a balanced market (adequate, readily available labour, available materials, normal/typical financing, no overtime paid).

[513] Regarding abnormal labour costs, Ms. Young referred to the *CCRG*, page 4, section 2.500 which provides two examples:

- an adequate labour force is readily available at the worksite, and
- Abnormal costs can result from delays in construction caused by natural disasters or inclement weather or they may occur when the construction workforce is on site but a lack of supplies or a work slowdown reduces or stops actual construction. Additional costs incurred because of unproductive labour are excluded.

[514] Ms. Young spoke further about abnormal labour costs. Her opinion was that to achieve an adequate labour force readily available at the worksite, the costs of travel to the worksite and the premium paid for overtime are excluded costs, and therefore excluded from the property assessment. The lost time due to construction delays caused by a lack of supplies, work slowdown, natural disaster, or inclement weather also qualifies as an excluded cost. (*CCRG*, page 4).

[515] Ms. Young next commented on design changes, alterations and modifications, and referred to the *CCRG*, page 2, section 2.300:

> Alteration costs incurred during construction that improve the operational efficiency of the original plant design, are excluded. Likewise, the costs of "de-bottlenecking" or modifying an operating process are excluded if there are no changes to the equipment inventory. Note: The cost of equipment installed to improve operational efficiency is included.

[516] Ms. Young suggested that the assessed person and the assessor need to consider the following questions:

i. Did the design change, alteration, or modification improve the operational efficiency of the original plant design?
ii. For de-bottlenecking or modifications in operating processes, did the equipment inventory change?
iii. Was defective equipment installed or defective work completed and did the actions taken to correct this exceed the amount typically included in the budget for this type of error?

[517] Ms. Young also stated that interference costs as defined in *CCRG*, page 3, section 2.300.500 are:

> Additional costs incurred for reasons of safety while working in close proximity to existing facilities, such as the cost of pilings to ensure the structural integrity of existing buildings or the rerouting of piping, electrical lines, or telecommunications lines, are all excluded.

[518] In Ms. Young's opinion, the assessed person and the assessor must consider whether the additional cost incurred for safety is near existing facilities.

[519] In respect of transportation charges Ms. Young reviewed the *CCRG*, page 4, section 2.500.200:

> The costs of transporting raw material and components from the Edmonton area to the work site are excluded. However, if the actual transportation costs from the point of origin to the plant site are equal to or less than the cost to the Edmonton area, the entire transportation costs are included. Note: The cost of loading and unloading the raw materials and components is included.

[520] Ms. Young suggested that the assessed person and assessor should consider whether the documentation indicates the cost to transport raw materials and components to the worksite are higher than transporting to the Edmonton area.

[521] Ms. Young also testified that the reference to the cost of transporting raw material and components from Edmonton is the only area in which the *CCRG* refers to an Edmonton area adjustment.

[522] Ms. Young turned to abnormal construction costs and stated it was defined in the *CCRG* on page 4 under section 2.5000 as, "If the actual costs of an industrial facility are greater than typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded."

[523] Ms. Young's opinion was that the assessed person and the assessor need to determine whether the cost of the component or material is like other projects in the municipality built within a similar time frame. If not, can the increase be tied to inflation, or other cost increases or decreases for similar industries and projects? Further, she submitted the Assessment Year Modifier could be used as a proxy for any changes in construction costs.

[524] Ms. Young also referred to the RMWB Blue Book, and she confirmed that in 2015, the precursor to the PA reviewed the interpretation of the *CCRG* submitted by the RMWB. Ms. Young stated that the Assessment Services Branch team, which included Ms. Young, agreed with the interpretation provided by the RMWB at that time. Ms. Young further confirmed that she continues to agree with this interpretation.

D. Other Oil Sands Projects

[525] Mr. Fluney's rebuttal report concerning whether similar properties were assessed in a similar manner, stated that "surely the Municipal Affairs audit team would have identified similar assessments if they were of the opinion that the adjustment was not consistent with the CCRG, and directed their removal." (Exhibit 39-C, page 3, para 6) Ms. Young in her sur-rebuttal report responded to Mr. Fluney's assertion as follows:

> The Assessment Services Branch, Assessment Audit Unit reviewed the assessments of mid-sized oil and gas properties in 2012. The properties reviewed were assessments between 100K and 100 million, and were located in all rural municipalities. The observations noted in the audit report are that "some older plants, or those where the assessments were created by the previous assessors lacked sufficient detailed historical cost information." Also, "excluded and non-assessable cost adjustments often lacked proper documentation, and in many instances, were "negotiated" by owners and assessors", and, "CCRG compliance for large plants requires sophisticated accounting, legal, engineering, and valuation expertise. Municipalities not having the resources and expertise are more prone to having unsupported, negotiated assessments, or are more likely to accept self-assessments prepared by industrial plant owners." The observations from the auditor were one of the factors that led to the centralization of industrial property within Municipal Affairs. (Exhibit 46-R, page 4, paragraph 2)

[526] Ms. Young also commented on Mr. Fluney's understanding of the Request for Proposal process to update assessment year modifiers and prescribed rates for certain machinery and equipment (Exhibit 39-C, page 11, para 38). Ms. Young's response was "these RFPs were issued during a transition period to new assessment rates which were implemented in 2007. In later years, the request for proposals was updated to direct the contractors to apply legislative directives to determine included and excluded components."

E. Conclusion

[527] Ms. Young provided the following summary and her conclusion:

> The development of the CCRG, or of prescribed assessment rates is not an easy task. Stakeholders (municipalities, assessed persons, assessors, tax agents, etc.) bring their unique perspectives to any discussion, and consensus is seldom found. Therefore, the Minister must make the decision. The Minister's decision may be different from discussions held in working groups, or recommendations developed from those discussions. However, at the end of the day, it is the Minister who has the legislative authority to determine assessment policy. While an Edmonton area adjustment has been discussed by stakeholders at various times in the past and present, and individual recollection of what was discussed and approved may vary, the only legislated requirement for an Edmonton area adjustment is for transportation costs.

Assessment of Designated Industrial Property – Mr. Dan Driscoll (Exhibits 22-R and 44-R)

[528] Mr. Driscoll's report was to clarify the Alberta legislation and assessment processes since the repeal of the *Municipal Taxation Act*, its Regulations, and procedural documents in 1995.

[529] Mr. Driscoll was presented as an expert witness as follows:

> The Provincial Assessor is seeking to have Dan Driscoll qualified (to) give opinion evidence as an Accredited Municipal Assessor of Alberta (AMAA) on the historical and current regulated property assessment regime and on the interpretation and application of the CCRG.

[530] Mr. Driscoll's work experience began at Government of Alberta, Municipal Affairs, Assessment Branch, initially as an Assessor (1985-1995), then as Coordinator, Linear Property Assessment Unit, Utilities Section (1995-2000), Manager, Regulated Policy Unit (2000-2004) and lastly as Director, Regulated Standards and Utilities Assessment (2004-2006). He subsequently worked for SNC Lavalin (2007-2016) and at the same time commenced a personal consulting business (D. Driscoll Consulting Inc. 2006-present).

[531] Mr. Driscoll completed the Farmland Appraisal and Assessment course at Olds College (1979), Certificate in Municipal Assessment from the University of Alberta (1982) and a Certificate Program Real Property Assessment from the University of British Columbia (1997).

A. History of *CCRG* and Predecessor Legislation/Regulations

[532] Mr. Driscoll testified that prior to 1995, the Alberta assessment scheme was governed by the *Municipal Taxation Act*, the *Municipal Provincial Property Valuation Act* and the *Electric Power and Pipeline Assessment Act.* As well, there were numerous regulations and manuals used to conduct assessments.

[533] Mr. Driscoll stated that in 1995, the legislation and regulations were repealed. The *Municipal Taxation Act* was replaced within the *MGA.* Also, the *Fair Actual Valuation Act* was replaced with the *Standards of Assessment Regulation.* Mr. Driscoll further stated that the task of assessing property was assumed by local Municipalities, as opposed to the previous legislation where the Assessment Operations within MA conducted assessments.

[534] Mr. Driscoll stated that a consequence of the overhaul of legislation was that it resulted in gaps in the new legislation.

[535] Mr. Driscoll testified that in 1995, there was a transitional period that lasted until 2001. For example, the *Standards of Assessment Regulations* allowed municipalities a period to move from the fair actual value which was in place prior to 1995, to the market value introduced in the 1995 legislation.

[536] Mr. Driscoll also submitted that within the transition period, the *Standards of Assessment Regulation* was repealed in 1999, and in its place the legislature enacted *MRAT*. Mr. Driscoll opined that many of the gaps were in the assessment of regulated properties.

[537] Mr. Driscoll provided an example of a gap and referred to the use of SPAG. This guide was not a regulated document; however, it was in place for many years and was used prior to 1995 when the legislation changed. Mr. Driscoll confirmed that SPAG was widely used before and after the legislation changed, to prepare assessments for Special Purpose Properties (both structures and machinery and equipment) until the introduction of the *CCRG* into the *Minster's Guidelines* in 2001.

[538] Mr. Driscoll stated that Regulated Property was defined to include linear property and machinery and equipment, and in 2001 MA began a process to develop new rates, policies, and procedures to assess those properties. Mr. Driscoll was appointed as the Manager, Regulated Policy to clarify, review, and implement those changes to legislation and the regulations.

[539] Mr. Driscoll identified SPAG as a starting point for the reform. SPAG was used in a number of situations and needed updating, as it was in place prior to the 1995 legislated amendments, related originally to the fair actual value assessment system, and it was not legislated. SPAG was used to assess machinery and equipment and building and structures, which after 1995, had different assessment valuation standards. Until then, fairness and equity were in conflict by comparing properties within the municipality, which was at odds with *MRAT*.

[540] After identifying the issues with SPAG, Mr. Driscoll stated that a working group was created in 2001 with the mandate to discuss and develop a new terms of reference document because SPAG was inconsistent with both the *MGA* and the *MRAT*. The replacement document was the *CCRG*.

[541] Mr. Driscoll explained the workings of the working group and his analysis as to what transpired between the formation of the working group until the MA's finalization of it and the Minister's signing to enact the *CCRG*. (Exhibit 22-R, pages 18 to 21, paras 32 to 42)

[542] The *CCRG* was introduced into the legislative scheme process in 2001 and Mr. Driscoll opined that it was consistent with the *MGA* and the *MRAT*. *CCRG* also incorporated market value principles, such as components of reproduction cost, cost indices for regulated properties, and depreciation that is calculated using updated depreciation factors and declining age life principles.

[543] It was Mr. Driscoll's opinion that any previous gaps in the legislation and regulations were corrected with the introduction of the *CCRG*, which was a legislated document.

[544] Mr. Driscoll also submitted that the *CCRG* held two options for establishing base costs for regulated properties. The first included M&E that was common (such as tanks, pumps, separators) and linear property (electric power systems, telecommunication systems, pipelines and well), which Mr. Driscoll referred to as "catalogued items". The second option was for "one-off" facilities such as oil sands plants, OSB plants, pulp and paper plants, electrical power generation facilities, sub-stations, and telecommunication data centres. The one-off site typically is not reoccurring, whereas the catalogue items are abundant in Alberta. Mr. Driscoll stated that each one-off site is unique, and the base cost is calculated on the actual construction costs of that facility, less excluded costs under the *CCRG*. Mr. Driscoll stated that in his opinion and based on his participation in the regulated rate working groups, and the variety of different rates identified in the *Minister's Guidelines* confirms the rates do not reflect the EAA. He further stated that the costs reflect the cost in Alberta where construction of the improvements typically takes place and that they are based on the value of the machinery and equipment (regulated property) calculated in accordance with the 2005 *CCRG*.

[545] Mr. Driscoll also submitted that for this hearing, the rates in the M&E *Minister's Guidelines* reflect that "included costs (ic) means the value of machinery and equipment calculated in accordance with the 2005 Construction Cost Reporting Guide, prior to adjustment by the cost factor".

B. Assessment Practices for CCRG Reporting

[546] Mr. Driscoll stated that once the *CCRG* was legislated in 2005, the next step was to determine rates, policies, and guidelines. Mr. Driscoll testified that once again there was significant discussion with industry specific stakeholder working groups comprised of municipal, industry specific professionals, and assessment professionals. Mr. Driscoll also testified that the new rates, policies, and procedures for Regulated Policies (Linear Property; Machinery and Equipment; and Railway) were introduced in the *Minister's Guidelines* in 2007 reflecting 2005 based costs.

[547] Mr. Driscoll stated that the starting point for assessment of one-off facilities is for the property owner to provide all construction costs, and he submitted that this means all actual expenditures. He further submitted that these costs cannot be based on generic models, and that while the actual costs for labour are incurred in the locations in which the property is built the cost for the fabrication of the modules (components) can be from anywhere in the world.

[548] Mr. Driscoll then testified that the *CCRG* is clear in section 2.500 that "In order to reduce uncertainty and improve assessment consistency among regulated properties…". Mr. Driscoll's opinion is that to achieve this consistency it is not reasonable to consider excluded costs by comparing actual expenditures against a "fictional plant, in a fictional location, using fictional costs." Mr. Driscoll further opined that the starting point to compare actual construction costs to is an engineering planning document such as a DBM.

[549] Mr. Driscoll also stated that the *CCRG* is explicit in section 2.500 that:

> The determination of what constitutes "typical" or "normal" is difficult; it is subjective, and it may vary over time, from one location to another and among industries. If the actual costs of an industrial facility are greater than typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded.

[550] Mr. Driscoll's interpretation of the foregoing is that "typical' or "normal" cannot be interpreted as referring to Edmonton area costs. He opined that the reference to "may vary over time, from one location to another" means there is not a single, relevant location, such as Edmonton.

[551] Mr. Driscoll stated that, from the base cost (ic), the *CCRG* permits certain costs to be excluded from assessment.

[552] Mr. Driscoll maintained that the only reference to the Edmonton area was regarding transportation charges. Nowhere else in the *CCRG* does it refer to EAA.

C. Reporting of Fort Hills Constructions Costs

[553] Mr. Driscoll confirmed that he has not reviewed the assessments that are subject to the Complaints.

[554] Mr. Driscoll submitted that he had reviewed the reports of Mr. Fluney (Exhibit 17-C) and Mr. Matthews (Exhibit 14-C), and his understanding of both reports is that those writers have interpreted the 2005 *CCRG* to instruct assessors to prepare the assessment of Linear Property and M&E using Edmonton area or mid-Alberta costs. Mr. Driscoll's opinion is that "they cannot arrive at their conclusion regarding the Edmonton area when they consider the CCRG in its entirety along with the other legislation."

[555] Mr. Driscoll also confirmed the PA assumed responsibility for the preparation of assessments for Fort Hills, as well as other Designated Industrial Property, on January 1, 2019.

D. Conclusion

[556] Mr. Driscoll summarized his position as follows:

> 89. My position is that there is nothing identified in the Legislation to suggest the assessor is to use Edmonton or mid-Alberta costs. This is supported by the following correspondences including:

- December 5, 2001 - letter to Brad Pickering from CPTA Representative Larry Best (Book of Common Documents, Tab 22);
- December 21, 2001 – Brad Pickering response letter to Larry Best (Book of Common Documents, Tab 23);
- October 8, 2014 – B. Moore letter seeking clarification on the Regional Municipality of Wood Buffalo Practice and Principles of Application of the 2005 Alberta Construction Cost Reporting Guide (Book of Common Documents, Tab 24); and
- January 20, 2015 - Steve White confirmed the Linear Property Unit's understanding of the CCRG is assessments prepared by the department are based on local costs and not Edmonton costs (Book of Common Documents, Tab 26).

90. In addition to the correspondence identified above, I had regard for the following in reaching my conclusion.

- The evidence of Mr. Brad Pickering, Assistant Deputy Minister of Local Government Services (retired), who had oversight of the Assessment Services Branch and led and participated in the development of the CCRG;
- The evidence of Ms. Shelia Young, Director of Assessment and Property Tax Policy for Alberta Municipal Affairs from 2007 through 2022, who was responsible for policy development, legislative and regulatory changes relating to the Minister's Guidelines for Regulated Properties
- The evidence of Mr. Mike Minard, the Director of Centralized Industrial Property Assessment, Alberta Municipal Affairs, who is currently responsible for $102 Billion dollars of annual industrial assessment.
- the entire transcript (eight volumes) of the CCRG working group from April 18, 2001, through October 16, 2001, which does not reference Edmonton Area as the cost center for regulated assessments (Book of Common Documents, Tab 16).

91. The above documentation, the recollections of people involved during the CCRG consultation and my own recollections of the CCRG consultation process support the conclusions I have reached - the only adjustment of the actual construction costs to the Edmonton area is for transportation as identified specifically in the CCRG s2.500.200.

The Provincial Assessor – Mr. Michael Minard (Exhibits 20-R and 42-R)

A. Minard Background

[557] Mr. Minard was qualified as an expert witness (Exhibit P18R). The Complainant agreed to the following:

> The Provincial Assessor is seeking to have Michael Minard qualified to give both fact and opinion evidence as an Accredited Municipal Assessor of Alberta (AMAA) with expertise in the application of the 2005 Alberta Construction Cost Reporting Guide. As the Provincial Assessor and Director of Centralized Industrial Property Assessment, Michael Minard was involved in the preparation of the assessments under complaint.

[558] Mr. Minard's work history includes being a boilermaker from 2006 to 2008, an assessor in the RMWB from 2009 to 2012, and an appraiser in 2012. In 2012, he began with MA as an Assessment Advisor from 2012 to 2017, Manager of Industrial Sites from 2018 to 2019, Manager of Major Plants from 2019 to 2021, and as PA and Manager of Centralized Industrial Property Assessment in 2022, the position he currently holds.

[559] Mr. Minard's educational background includes a Business Administration Certificate (2007), Real Property Assessment Certificate (2009), Diploma majoring in Appraisal and Assessment (2009), Bachelor of Commerce (2011), Alberta Assessors' Association, Accredited Municipal Assessor of Alberta (AMAA designation) (2014), and a Post-Graduate Certificate in Real Property Valuation, UBC (2016).

[560] Mr. Minard discussed his roles within MA and the Assessment Business Unit. He stated that he had a few roles and responsibilities including Linear Assessment Advisor, Industrial Assessment Advisor, Industrial Sites Manager, Major Plants, Manager, Director of Centralized Industrial Property Assessment, and PA.

[561] With respect to the subject complaint, Mr. Minard stated that MA has been in discussions with Fort Hills for a few years and the parties have not been able to agree to a determination of the property assessment. Mr. Minard's opinion is that the PA has not been provided with the required cost reporting information to prepare the annual assessments. This has resulted in the PA relying on the best information available to it. He also stated that the first full year of operations and, consequently, the first full assessment of Fort Hills was for the 2018 assessment year, which was the 2019 tax year. Fort Hills has appealed the 2019 assessment and subsequent years. This hearing includes the 2019, 2020, and 2021 assessments.

[562] Mr. Minard stated that his report would consider the PA's requested assessment, clarify the applicable legislation/regulations, outline the current assessments, detail the joint recommendation, and provide explanations for the unacceptable excluded cost claims by Fort Hills. Mr. Minard further stated that he would provide the PA's interpretation of the *CCRG* and to illustrate the consistent approach that MA follows on related categories within the 2005 *CCRG*.

[563] Mr. Minard also stated that the party positions are as follows:

	Assessable Costs Determined by the Complainant	Assessable Costs Determined by the Respondent
Total Project Costs	$13,391,991,825	$13,391,991,825
Less Total Excluded Costs	$7,709,085,073	$4,146,595,946
Equals Total Assessable Costs	$5,682,906,752	$9,245,395,879

[564] Mr. Minard stated that the substantial difference between the PA and the Complainant related to:

i. An adjustment referred to a theoretical Edmonton Comparison;
ii. Design change excluded costs; and,
iii. Abnormal labour excluded costs.

B. History of *CCRG* and Predecessor Legislation/Regulations

[565] Mr. Minard does not dispute that previously (prior to 2001), SPAG formed the foundation for the industrial assessment in RMWB and across the province. The replacement to SPAG was the *CCRG* which is legislated. Mr. Minard also does not dispute that in 2016 a working group was formed to discuss potential amendments to the *CCRG*, and that group was referred to as the RIPA working group. That group held meetings; however, since COVID-19 it has not met and any discussions emanating from that group are simply discussions and have not resulted in any amendments to the legislation, regulations, or guidelines.

[566] Mr. Minard reviewed the applicable legislation and rules that the PA follows in respect of regulated assessment. In particular, he submits that the assessment of DIPs is based on regulated principles and is not based on market value principles.

[567] Mr. Minard submitted paragraph 188 of Mr. Matthews report says that "under the CCRG and the former SPAG an Edmonton area cost base has always formed the foundation for the industrial assessment in RMWB and the province". Mr. Minard submits that while Mr. Matthews makes this statement, Mr. Matthews does not provide any evidence to support the comment. Additionally, Mr. Minard submitted that even if SPAG was considered in the past, it was replaced more than 20 years ago with the *CCRG*. SPAG was never a legislated requirement whereas *CCRG* is legislated.

[568] Mr. Minard opined that the Assessor is not able to consider any repealed legislation or regulations in determining these assessments, and that includes SPAG. Therefore, SPAG is not applicable to the assessments under complaint. Mr. Minard also confirmed that the *CCRG* does not direct the PA to make Edmonton or mid-Alberta adjustments to project costs, with the one exception of transportation costs. His position is that there is no mention in the *CCRG* for other excluded costs to be based on a comparison or adjustment to Edmonton and that it would be incorrect for the PA to make any other EAA to Fort Hills, or any DIP assessment, that is not prescribed in the *CCRG*.

[569] Mr. Minard also opined that the legislation and regulation require all DIP assessments must be prepared consistently based on the PA's authority Mr. Minard's opinion was that the assessments for the Fort Hills for 2019, 2020, and the 2021 were prepared by using the following assessment legislation and regulations:

i. The *MGA*,
ii. The *MRAT*,
iii. The *Minister's Guidelines*"), and
iv. The *CCRG*.

[570] Mr. Minard also stated that the *MGA* provides the overall direction, rules, and definitions regarding preparing a property assessment. *MGA* section 292(2) provides that the assessment must reflect:

(a) the valuation standard set out in the regulations; and
(b) the specifications and characteristics of the property as specified in the regulations.

[571] The regulation that the Assessor is directed to is *MRAT*, which provides the valuation standard for M&E is *MRAT* section 12(1) which states "the valuation standard for machinery and equipment is that calculated in accordance with the applicable procedures set out in the Alberta Machinery and Equipment Assessment *Minister's Guidelines*." *MRAT* section 12(2) states "in preparing an assessment for machinery and equipment, the Assessor must follow the applicable procedures referred to in subsection (1)". A final factor in the regulated M&E assessment is the statutory level of 77%. *MRAT* section 12(3) states the M &E assessment "must reflect 77% of its value". Mr. Minard stated that his understanding of the foregoing means

the final M&E assessment is legislated to be factored by 77% resulting in a regulated 23% reduction for all regulated M&E assessments. This 23% reduction is not used for other property types and is unique to M&E assessments.

[572] The next step taken by the assessor is to consider the calculation of the components of the assessment which was described previously in paragraph 12 of this decision.

[573] Mr. Minard stated that achieving fairness and equity in the assessment is not by comparing properties; rather, it is by the correct and consistent application of the prescribed legislation. Mr. Minard cited *MGA* s. 499(3)(a) which states "the Board must not alter any assessment of designated industrial property that has been prepared correctly in accordance with the regulations." He further stated that the PA achieves equity by strictly following a consistent assessment process for all DIPs.

[574] Mr. Minard confirmed that the PA assumed responsibility for DIPs on January 1, 2018, and the MA cites that the "centralization for designated industrial property assessments will lead to improved consistency and equity for industrial taxpayers and lower administrative costs for municipalities".

[575] Mr. Minard submitted that to achieve an equitable and consistent assessment process, the provincial assessment department has many internal procedures and has instituted best practices to ensure the Alberta assessment legislation, regulations, and guidelines are consistently and correctly adhered to. He further submitted that consistency and accuracy of the application of the legislation across the province is a challenge and is a work in progress that will take some time to achieve. While there may be some outliers, the PA is taking steps to identify and correct any outliers to achieve this consistency. One way this is being done is by reviewing property types to assess for proper application of assessment principles, such as incorrect EAA or Schedule "D" adjustments.

[576] Mr. Minard provided a detailed examination of his interpretation of the *CCRG*. The following is from his report (Exhibit 20-R, pages 16 to 21, paras 33 to 36):

> 32. The following are the PA's interpretation of relevant sections of the CCRG as the Provincial Assessor. It is my understanding and belief that all assessments prepared by the PA (in-house and Contract assessors) were prepared consistent with these interpretations of the CCRG.
>
> 33. Interpretation and application for CCRG section1.000
>
> **1.000 COSTS TO BE INCLUDED IN DETERMINING ASSESSABLE COSTS**
>
> The costs of construction reported by the company to the assessor are the actual expenditures made in constructing the facility as referenced in the agreement with the contractor or as incurred directly by the company.
>
> Construction costs include both direct and indirect costs.
>
> - Section 1.000 is interpreted to mean all construction costs are to be reported to the assessor including:
> - all purchasing and procurement costs;
> - all construction costs incurred by the contractor(s);
> - all owner's costs that have a nexus to construction or that facilitate construction.
> - Total construction cost is the cost incurred by the contractor(s) plus the owner's cost that have a nexus to construction or that facilitate construction.

- Section 1.000 directs that “actual costs” are to be reported to the assessor. All excluded cost claims must be based on actual constructions costs and not on costs generated by estimating models.
- As section 1.000 directs that “actual costs” are to be reported; therefore, costs generated by generic models are not considered acceptable for reporting total construction costs for excluded costs.

34. Interpretation and application for CCRG section2.300.400

2.300.400 DESIGN CHANGES, ALTERATIONS, AND MODIFICATIONS

Alteration costs incurred during construction that improve the operational efficiency of the original plant design, are excluded. Likewise, the costs of “de-bottlenecking” or modifying an operating process are excluded if there are no changes to the equipment inventory.

Note: The cost of equipment installed to improve operational efficiency is included.

- Only design changes, alterations and modifications as referenced above may be claimed as an excluded cost. Normal rework cost that is included in budget estimates and are normal project costs are not an excluded cost. Rework may be claimed as an excluded cost if the cost of rework exceeds what is included in the budget for the subject construction project. Claimed rework costs greater than normal or typical rework costs are excluded costs. Actual rework costs must be measured against normal rework cost in the municipality.
- If the construct cost is simply a “like for like” replacement to old equipment, and there is no change to the replaced component part other than change in chronological age, then this is an excluded cost.

35. Interpretation and application for CCRG section 2.500

2.500 ABNORMAL COSTS OF CONSTRUCTION

In order to reduce uncertainty and improve assessment consistency among regulated properties the following assumptions are made to describe normal conditions for the construction of regulated property:

- an adequate labour force is readily available at the worksite,
- raw materials and pre-fabricated component parts are readily available,
- projects are financed from operations or from shareholder equity and companies make no provision for interest during construction, and
- premium payments are not made for overtime worked.

The determination of what constitutes “typical” or “normal” is difficult; it is subjective and it may vary over time, from one location to another and among industries. If the actual costs of an industrial facility are greater than typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded.

Abnormal costs can result from delays in construction caused by natural disasters or inclement weather or they may occur when the construction workforce is on site but a lack of supplies or a work slowdown reduces or stops actual construction. Additional costs incurred because of unproductive labour are excluded.

Two additional examples of abnormal costs are:

- a cost that would typically not be incurred in a balanced market, and/or
- a cost that is excluded to maintain consistency among regulated properties.

Specific documentation is required to substantiate claims for abnormal costs.

- This section starts out with the statement “In order to reduce uncertainty and improve assessment consistency among regulated properties…” This reinforces the guiding principle found in CCRG section 1.00 that “The costs of construction reported by the company to the assessor are the actual expenditures made in

constructing the facility as referenced in the agreement with the contractor or as incurred directly by the company."

- All abnormal costs below are to be read in the context of these two statements. Uncertainty and consistency are not achieved by comparing a fictional plant, in a fictional location, using fictional costs.
- It is assumed that a workforce does not need to travel to the worksite. Section 2.500 states, 'worksite' when considering labour force. Accordingly, this section contemplates costs to the gate of the worksite, not mid-Alberta. Travel costs to the worksite are therefore an excluded cost as per section 2.500.100.
- It is assumed that raw materials and pre-fabricated components do not need to be
- transported outside of a 50 kilometer radius of Edmonton. (also see TRANSPORTATION COSTS section 2.500.200).
- Normal construction costs do not include the cost of financing. (also see INTEREST DURING CONSTRUCTION section 2.500.300).
- Normal construction costs do not include the cost of overtime payments (also see
- OVERTIME section 2.500.400).
- Typical and normal must be measured based upon costs from similar projects in the same Municipality (area/location). Typical and normal for the subject site varies:
    - overtime – therefore any abnormal cost claims made under section 2.500 must be measured against what is typical or normal for the construction period;
    - by location - therefore any abnormal cost claims made under section 2.500 must be measured against what is typical or normal for the subject location; and
    - among industries – therefore abnormal cost claims made under section 2.500 must be measured against what is typical or normal for the subject industry.
- Typical and normal cannot be based on project estimates – see CCRG section 1.000
    - Typical must be measured based upon other similar projects constructed in the same location in the same time period.
    - Measurement is based upon the project estimate are not acceptable (see section 1.000). Measurement of abnormal construction costs = site specific cost – typical cost in the municipality.
- A typical cost is not a single number but represents a range of possible costs. For large projects that take several months to construct, statistical analysis of the construction costs of other large project in the municipality may be used to determine the typical construction costs. A reasonable process is: if the site-specific construction cost is between the mean construction cost + one standard deviation then the site-specific cost is typical. If, however, the site-specific cost is greater than (mean+ 1 Standard Deviation) then the site-specific cost should be adjusted to this upper limit. The difference may represent abnormal costs, subject to detailed documentation that evidences the same.

- For smaller projects detailed costs of other projects similar in scale and construction timelines may not be available and reliable data from knowledgeable sources may be required to determine the typical range.
- The starting point for the measurement of abnormal costs must be measured against documents similar to the Design Basis Memorandum ("DBM") and can result from:
    - a natural disaster such as a forest fire, flooding, tornado, etc.;
    - inclement weather which must be measured against what is normal for the location of the subject construction site using the environmental design conditions defined during engineering in the project DBM;
    - lack of supplies (late delivery of supplies) which must be measured by accounting for lost time;
    - work slowdown such as a work to rule, strike, etc.;
    - schedule slippage which must be measured against normal/typical schedule slippage for the construction period of the subject, the location of the subject;
    - and, an industry that is comparable to the subject.
- Labour productivity is a relative and not an absolute measurement. Site-specific is:
    - benchmarked to the metric defined in the project DBM, and
    - measured against the typical labour productivity for the location, time and industry.
- There is an inter-relationship between: changes in labour productivity, schedule slippage, change orders, weather impacts and re-work. Numerical analysis must be undertaken to differentiate the construction costs resulting from each issue. This will remove double accounting.
- The use of generic models to calculate abnormal labour productivity cost claims is not acceptable because assessments are calculated based on actual expenditures made in constructing the facility as referenced in the agreement with the contractor or as incurred directly by the company.
- A balanced market is achieved through a proper and consistent application of section 2.000 of the CCRG. A determination of what constitutes a balanced market needs to be made in the context of the:
    - time period in which construction is taking place;
    - location in which construction is taking place; and
    - industry that is being constructed.
- The application of the AYM accounts for fluctuations in market conditions.
- Abnormal construction costs resulting from dynamic market conditions must include the impact of the Minister's AYM in numerical analysis, see the chart below.

- Unless the level of cost escalation experienced was greater than that reflected in the cost factors, it is not an abnormal cost.
- Abnormal costs may be incurred when a specific construction site is experiencing a shortage of labour and/or materials that is not being experienced by among industry during the same construction period and in the same location.
- A comparison of the actual cost to the project plan/budget is not sufficient to measure abnormal costs.
- All cost impacts owing to market dynamics must be in the form of a scaled measurement.
- A comparison to the project plan/budget is not sufficient to measure abnormal costs.
- The CCRG provides direction to the assessor to determine the included cost (“ic”).
- Consistency in regulated property is achieved through the consistent and correct application from CCRG section 100. through CCRG section 200. to arrive at “ic”. This means starting with actual costs provided by the owner and then the consistent application of the CCRG removes costs that are not intended to be part of the “ic”. Examples of costs to be removed include transportation costs that exceed Edmonton area, fly-in/fly-out travel costs, overtime, premium costs, interest during construction, etc.
- The property owner must provide the assessor with site-specific documentation that enables abnormal cost claims to be specifically identified, measured and quantified.
- The calculation of abnormal cost claims cannot be made by comparing a fictional plant, in a fictional location, using fictional costs.

36. Interpretation and application for CCRG section2.500.200

> **2.500.200 TRANSPORTATION COSTS**
>
> The costs of transporting raw material and components from the Edmonton area to the work site are excluded. However, if the actual transportation costs from the point of origin to the plant site are equal to or less than the cost to the Edmonton area, the entire transportation costs are included.

- Transportation costs that exceed costs that would be incurred within 50 kilometres of the City of Edmonton city limits are an excluded cost.
- Onsite transportation costs are an included cost (all transportation costs within the boundaries of the construction site).
- Documentation that shows the calculation of the transportation cost claim must be provided.
- The requirement in the CCRG to reflect Edmonton area transportation cost as the normal transportation cost is the only reference and the only requirement in the CCRG to reflect Edmonton area cost as a normal cost.

[577] Mr. Minard cited two examples of information that he considered in respect of the Edmonton area adjustment:

1. Mr. Elzinga, a highly regarded assessor, prepared a *CCRG* interpretation document that has been described as RMWB Blue Book. The document was prepared when Mr. Elzinga was a contracted assessor at the RMWB and Mr. Minard indicates the document is consistent with the PA's interpretation of the *CCRG*.
2. Mr. Moore was the Municipal Assessor for the RMWB from 2012 to 2016 and Mr. Minard opined that based on the evidence in *Imperial Oil Resources Ventures Limited and Exxon Mobil Canada Properties assessed as Imperial Oil Resources Limited ("IOR") v Regional Municipality of Wood Buffalo ("RMWB")*, CARB 2015-001 [IORVL], Mr. Moore had instructed Mr. Elzinga to prepare the Blue Book interpretation document. It was Mr. Minard's understanding of Mr. Moore's evidence in the IORVL assessment complaint, that for the 2013 AY and 2014 AY, Mr. Moore instructed both Mr. Elzinga and Mr. Larry Horne (the two RMWB assessors who prepared all RMWB assessments of oil sands M&E at the time) to follow the practices and principles of application set out in The Blue Book interpretation to ensure consistency of interpretation of the *CCRG* in the RMWB.

[578] Mr. Minard submitted that the regulated assessment process is prescriptive, and he opined that if the Assessor is to consider an adjustment of other costs to an EAA, then it is expected that the *CCRG* assessment regulation would clearly stipulate this direction, just as it did for transportation costs. Mr. Minard submitted this is not the case. Rather, the Assessor is instructed to assess based on the actual expenditures made in constructing the facility as stated in *CCRG* section 1.000.

[579] Mr. Minard discussed the 2017 CARB Decisions that are relied on by the Complainant to demonstrate that the EAA was applied to assessments for the 2015 and the 2016 assessments, and the results of the 2017 CARB Decisions was also the basis for the 2017 assessments. He stated that all those assessments were done prior to MA assuming responsibility for DIP assessments commencing in 2018. He also stated that the PA was not involved with the assessments, were not party to the settlement discussions, and have been refused access to the Confidential Settlement Agreements related to the joint recommendations.

[580] It was Mr. Minard's position that in discussions with Mr. Schofield, who was the RMWB assessor who prepared the assessments subject to the 2017 CARB Decisions, Mr. Schofield advised him that the 2017 CARB Decision settlement agreements were "not based on a principled assessment approach which follows the assessment legislation and regulations". Mr. Minard also held that Mr. Schofield stated that "these agreements were done with a focus of lowering the outstanding taxation impact liability for the properties under complaint in order to reach a resolution and establish predictability for the municipal budget."

C. Assessment Practices for CCRG Reporting

[581] Mr. Minard submitted that it was his intent as PA to produce the best assessments possible. He asserted his confidence that most current and historic assessments are based on the working assumptions in his report and the outlined PA interpretations of the *CCRG*, outlined above. His level of confidence was based on an understanding that none of the linear assessments, which are part of DIPs, have been adjusted based on an EAA. He also stated that no EAAs were identified to the PA during the integration process in discussions with the previously appointed Assessors. As well, he submitted that no EAAs have been applied by the PA team since taking over the DIP assessment function in 2018 and that he has reviewed the DIP assessment base through a variety of analyses and sampling processes and no EAAs were found.

[582] Mr. Minard stated that any assessments that were prepared outside of the standard practice, including EAA, would be outlier discrepancies. He opined that RMWB is one municipality that has had some inconsistencies in the application of the *CCRG* in the past, but those are outliers, and most DIP assessments have been prepared in the correct manner. For context, he added that there are approximately 584,000 unique DIP assessment IDs (DIPAUIDs), otherwise known as roll numbers. Of those DIP rolls there are currently 34,799 unique DIP rolls (19,873 industrial and 14,926 linear) that utilize the *CCRG* for assessment preparations. Most of the assessments for these cost-reported rolls are based on the working assumptions in his report. They do not adjust for the Edmonton area, or for abnormal costs that were determined based on comparing to an internal budget, as those are not acceptable *CCRG* adjustments. Of the 34,799 DIP rolls that utilize the *CCRG* for assessment preparation, excluding the properties that were the subject of the 2017 CARB decisions, Mr. Minard stated that since the PA assumed responsibility for DIP assessment, the assessors do not apply the EAA and he is not aware of any properties that include EAA.

[583] Mr. Minard also provided a list of 25 projects, which he submitted were similar to the subject, and of which 11 were assessed at greater than $350 million. Of those 11 properties, seven were over $500 million. Mr. Minard confirmed that all those properties were assessed based on the PA's interpretation as outlined above.

[584] Mr. Minard spoke about the requirement for the Complainant to submit a DBM and EDS. He submitted that the PA has made requests in the RFI, which was sent to Fort Hills annually since 2018; however, the PA has not been provided the documents. Mr. Minard submitted that the PA requires the DBM/EDS to adequately analyze reported cost information. Mr. Minard stated that the DBM is particularly important for analysis of design changes, abnormal labour, and other excluded cost claims requested by Fort Hills. Mr. Minard submitted that the RFI explains that,

> to assist our office in determining the nature and assessability of the work, the RFI must be returned with copies of supporting documentation such as, but not limited to: A description of the scope and purpose of the work including sufficient explanation to support the cost reports and the cost classifications. Include a facility overview, site plans, plot plans, process flow diagrams, design basis memorandum (DBM), piping and instrumentation diagrams,

schematics, building blueprints, and any other information that helps to describe the scope of work.

[585] Mr. Minard opined that the DBM and supporting documents establish the principles, rationale, criteria, assumptions made, and potential constraints used for detailed engineering and the final design of the project. The Assessor requires the DBM to review the claims for potential abnormal and excluded costs. He also opined that it is not acceptable for the Complainant, or others, to measure what is abnormal against an internal budget as budget fluctuations are expected. He went on to state it is possible to use documents, such as a DBM, to establish what was expected or anticipated in the project construction and what could potentially be seen as an abnormal change or cost.

[586] Mr. Minard further stated that if a company is unwilling to provide the DBM and supporting documentation, the Assessor reviews the information that is available to determine the assessable costs. Mr. Minard also opined that any company must demonstrate that its actual cost is abnormal based on a metric to show what is typical and typical does not mean comparing costs to the company's own internal budget. Mr. Minard stated that the property owner must measure the abnormal cost and the onus is on the property owner to prove any abnormal cost. Mr. Minard's opinion is that it is not acceptable to claim the difference between actual costs and an internal budget as the basis for an abnormal excluded cost claim. Mr. Minard stated this is why the RFI specifically requests the DBM and other supporting documentation to assist the PA in determining the nature and assessability of the work.

D. Fort Hills Assessment History

[587] The PA first began the assessment function of industrial/non-linear DIP for certain municipalities in 2018, which included RMWB and the subject property.

[588] The Fort Hills assessment went on the provincial roll for 2019. Prior to the operational facility being assessed by the PA, the Fort Hills property had an assessment of $2.2 billion in 2018, which was prepared by the RMWB Municipal Assessor for the part of the property that was assessable.

E. Reporting of Fort Hills Constructions Costs

[589] Mr. Minard stated that Fort Hills, as other large facilities which are similar, is assessed based on its actual costs for its location because that is what is typical for those facilities. Mr. Minard also stated that the smaller, tabled rate for equipment in the *Minister's Guidelines* is not comparable to a major facility. He observed that the legislation prescribes a different method of determining the assessable costs for these contrasting types of property; however, he opined that it is not permissible for the Assessor to make Edmonton area or mid-Alberta adjustments for facilities like Fort Hills. He also stated that large facilities are typically built on site in a custom construction process, and that is not the case for the simple tabled rate M&E items.

[590] Mr. Minard also suggested that oil sands facilities should not be adjusted as if they were fictionally, or theoretically constructed in the Edmonton area, as that is not what the legislation, regulations, and *Minister's Guidelines* permits. He held that the Assessor must use the actual expenditures made in constructing the facility to determine the assessable costs as stated in section 1.000 of the *CCRG*.

[591] Mr. Minard stated that the assessments the PA created were based on the best information available to the PA at the time and lacked complete cost reporting information from Fort Hills.

[592] Mr. Minard stated that the PA had initially requested complete cost reporting information from Fort Hills since August 2018, which is demonstrated by the annual RFI package, and that additional RFI's were sent in August 2018, 2019, 2020, and 2021.

[593] Mr. Minard submitted that the party's requested assessment and the PA's position were as follows for the three tax years under appeal.

		Current Assessment on the Roll	Complainant's Requested Assessment	Provincial Assessor's Recommended Assessment
	Land	$25,520,930	$25,520,930	$25,520,930
	B&S	$782,705,610	$784,022,846	$784,022,846
2018AY (2019Tax)	M&E	$4,534,840,680	$3,092,957,296	$5,153,081,904
	Total	$5,343,067,220	$3,902,501,072	$5,962,625,680
	Land	$25,520,930	$25,520,930	$25,520,930
	B&S	$779,042,300	$780,356,529	$780,356,529
2019AY (2020Tax)	M&E	$4,570,497,210	$3,117,276,475	$5,189,889,632
	Total	$5,375,060,440	$3,923,153,934	$5,995,767,091
	Land	$25,520,930	$25,520,930	$25,520,930
	B&S	$770,296,500	$771,604,331	$771,604,331
2020AY (2021Tax)	M&E	$4,596,465,110	$3,134,994,932	$5,219,335,814
	Total	$5,392,282,540	$3,932,120,193	$6,016,461,075

[594] Mr. Minard submitted that the EAA and Design Changes account for approximately 97% of the claims rejected by the PA. Mr. Minard noted that the PA has agreed to $177 million in accepted excluded costs.

[595] Mr. Minard stated that beyond the formal RFI process, the PA also had ongoing communications with Fort Hills' representatives. The PA has been requesting complete cost reporting information from Fort Hills and some information was received in July 2021 and November 2021. However, Mr. Minard further stated that the detailed information it requested was not entirely received until the Complainant filed its May 2022 disclosure package for this hearing, and that information contained significant volumes of new and additional information.

[596] Mr. Minard also responded to Mr. Matthews contention that a "memory stick" was provided to the PA office, and Mr. Matthews' assertion that it had subsequently been lost, as not verified. Mr. Minard maintained that there is no record of a "memory stick" with information that was ever received.

[597] Mr. Minard submitted that during the latter portion of 2021 and into 2022, the PA worked with the Complainant to endeavour to identify areas the Parties could agree on. Mr. Minard said the negotiations were held to streamline the complaint hearing process, so the process could focus on the primary areas of disagreement. Several in-person and virtual meetings were held, and the primary documents used to settle the areas of agreement include:

The 2018 cost rendition documents:

- SE Cost Rendition December 16, 2018
- U&C Cost Rendition December 16, 2018
- OPP Property Tax Report from L2 Actual November 7, 2018
- AET Property Tax Report from L2 Actual November 13, 2018

- E&T Property Tax Report from L2 Actual November 7, 2018
- F&CS Property Tax Report from L2 Actual November 28, 2018

The 2021 newly provided documents:

- Fort Hills Property Tax Assessment – Non-Assessable Cost Description June 16
- Fort Hills Property Tax Assessment Back-up documentation

2022 rendition document

- FHPTA Project Area Assessment Summary Cost Analysis Rendition

[598] Mr. Minard advised there were several meetings with Fort Hills' representatives and email exchanges to work through the areas of agreement and identify the outstanding issues that ultimately could not be resolved. This resulted in multiple drafts of a joint recommendation and statement of outstanding issues document. The goal of this document was to focus on the areas of disagreement between Fort Hills and the PA. The parties worked in collaboration and good faith and finally arrived at the joint recommendation document entitled "FH Joint Recommendation and Statement of Outstanding Issues Mar 31, 2022" (the "Joint Recommendation"). Mr. Minard stated that at no time during the ongoing discussions between the Fort Hills team and the PA, did Fort Hills submit a section 299 request.

[599] The Joint Recommendation identified several items of agreement and listed the items that remained at issue. Among the areas remaining at issue was the 'Design Changes, Alteration, and Modifications' cost category of $2.18 billion. A list of the joint recommendations agreed to was provided, as follows: (Exhibit 20-R, pages 30 and 31, para 62)

Cost Description	**Excluded Amount**	**Status**
Feasibility Studies	$134,214,950	Accepted
Pre and Post Construction Costs	$398,452,904	Accepted
Spare Equipment #1	$11,195,224	Accepted
Bonus or Penalty	$99,775,154	Accepted
Water and Sewer Domestic	$21,691,080	Accepted
Travel Costs	$386,423,926	Accepted
Overtime	$569,070,717	Accepted
Not a Cost of Construction #1	$982,731,809	Accepted
Not a Cost of Construction #2	$21,179,670	Accepted
Costs to achieve adequate labour force at worksite	$710,087,594	Accepted
Site prep costs	$171,170,591	Accepted
Spare Equipment #2	$91,693,571	Accepted
Not a Cost of Construction #3	$47,745,833	Accepted
Interference: E & T	$1,519,852	Accepted
Interference: A E & T	$3,121,090	Accepted
Abnormal Costs of Construction: A E & T	$2,235,907	Accepted
Transportation Costs	$257,340,250	Accepted
Abnormal Costs of Construction: site development	$59,792,294	Accepted
Total Joint Recommendation Excluded Costs	$3,969,442,416	Total Accepted

[600] Mr. Minard provided additional information with respect to portions of excluded costs identified in the Joint Recommendation.

[601] Mr. Minard also provided details of the outstanding issues which are included on pages 6 and 7 of the Joint Recommendation. He opined that the claims were rejected as they are not consistent with the legislation and standard practices of the PA, as previously detailed in this decision (paragraphs 569 to 576). Mr. Minard stated that the PA's analysis is consistent with how the *CCRG* has been applied by MA since the formation of centralized industrial property assessment in 2018, and that the analysis is also consistent with the MA linear property assessments dating from the early 2000's when the *CCRG* was first introduced. The summary chart below shows each of the costs labelled as outstanding issues in the Joint Recommendation:

Order	Cost Description	Excluded Amount S	Status
a.i	Interference Costs: OPP 1	$3,815,475	Rejected
a.ii	Interference Costs: OPP 2	$1,109,508	Rejected
a.iii	Interference Costs Utilities and cogen	$100,000	Rejected
b.i	Abnormal Costs of Construction: OS-3M A003	$385,980	Rejected
b.ii	Abnormal Costs of Construction: OS-3M A003	$2,534,594	Rejected
b.iii	Abnormal Costs of Construction: OS-3M A069	$2,904,104	Rejected
c.i	Transportation Costs: ET	$10,350,152	Rejected
c.ii	Transportation Costs: AET	$1,078,283	Rejected
c.iii	Transportation Costs: OPP	$18,184,924	Rejected
c.iv	Transportation Costs: SE	$15,526,971	Rejected
c.v	Transportation Costs: UC	$4,301,910	Rejected
d.i	Abnormal Costs of Construction - Adverse Soil: ET	$9,964,440	Rejected
d.ii	Abnormal Costs of Construction - Adverse Soil: AET	$18,270,425	Rejected
d.iii	Abnormal Costs of Construction - Adverse Soil: UC	$17,777,847	Rejected
e.i	Abnormal Costs of Construction - Labour Costs	$644,330,320	Rejected
f.i	Abnormal Costs of Construction: site devlopment	$46,015,712	Rejected
g.i	Design Changes, Alterations, Modification	$2,183,852,264	Rejected
	Total of Disagreed Excluded Costs	$2,980,502,909	Total Rejected

[602] Mr. Minard provided further clarity as to why the claims were rejected as follows: (Exhibit 20-R, pages 33 to 44, paras 66 to 94)

> 66. a. Interference Costs (CCRG s.2.300.500) (Total $5,024,983)
>
> i. OPP - related to underground services and adverse soil conditions - excluded costs claim of $3,815,475
>
> ii. OPP – related to road crossing– excluded costs claim of $1,109,508
>
> iii. Utilities and Cogeneration - related to a secondary access road to the plant – excluded costs claim of $100,000.
>
> 67. These interference cost claims were rejected on the basis of 2.300.500 of the CCRG which states "2.300.500 INTERFERENCE COSTS – Additional costs incurred for reasons of safety while working in close proximity to existing facilities, such as the cost of pilings to ensure the structural integrity of existing buildings or the rerouting of piping, electrical lines, or telecommunications lines, are all excluded." The claim is not interference as per the CCRG, rather they are costs related to underground services, soil conditions, and road crossing. Underground services crossing a road is common throughout industrial property and it is not an acceptable interference cost as per the CCRG. The soil conditions are also

not an acceptable CCRG interference claim, and accordingly, should be assessed. The soil conditions are also not an acceptable excluded site preparation cost as this is beyond the "costs to clear, level and finish the site to standards typical for industrial property in the area" as outlined in the site preparations section of regulations. The costs are actually related to the company choosing to improve the land by changing the sloping conditions for better use in its facility. The road crossing was required to access the site and is not an abnormal cost or an interference cost as per the CCRG. These are three smaller items in comparison to the scope of this total assessment, amounting to approximately $5 million, but they must be rejected for consistency in how the CCRG is written and the PA's application the CCRG.

68. b. Abnormal Costs of Construction (Higher than industry standard) (CCRG s.2.500) Automation, Electrical and Telecommunication Project Area. (Total $5,824,678)

i. OS -3MA003 - related to costs over and above typical costs -excluded costs claim of $385,980
ii. OS -3MA003 - related to costs over and above typical costs-excluded costs claim of $2,534,594
iii. OS -3MA069 - related to higher than typical blend rates for engineering - excluded costs claim of $2,904,104

69. These abnormal costs are based on alleged higher than industry standard and were rejected on the basis of 2.500 of the CCRG. These are actual construction costs paid by Fort Hills, which are assessable. Page 29 of the Matthews report states "the control and safety MCC & VFD signals will be hard wired to DCS/SIS instead of using networked communication-based protocol (i.e. Device Net) for all areas of the Fort Hills Project. Typical standard is to have networked communication, and this is over the standard practice." It is clear that these are actual costs and how the company built the plant is its decision. It is not acceptable to claim a cost as abnormal simply on the basis of a company choosing to hard wire improvements rather than using a network option. The actual costs must be assessed, and this is not an abnormal cost. Furthermore, page 29 of the Matthews report also says the claim is based on a "higher than typical blend rate for engineering". Comparing an engineering rate to the internal budget or to other engineering rates on the project is not proof of an abnormal cost. The abnormal costs claims are not shown to actually be abnormal as per 2.500 of the CCRG and they must be assessed as included costs.

70. c. Transportation Costs – concrete transportation (CCRG s.2.500.200). (Total $49,442,240)

i. Extraction and Tailings – excluded costs claim of $10,350,152
ii. Automation, Electrical and Telecommunication – excluded costs claim of $1,078,283
iii. Ore Processing Plant – excluded costs claim of $18,184,924
iv. Secondary Extraction – excluded costs claim of $15,526,971
v. Utilities and Cogeneration – excluded costs claim of $4,301,910

71. These transportation cost claims were rejected on the basis of 2.500.200 of the CCRG which states, "2.500.200 TRANSPORTATION COSTS - The costs of transporting raw material and components from the Edmonton area to the work site are excluded. However, if the actual transportation costs from the point of origin to the plant site are equal to or less than the cost to the Edmonton area, the entire transportation costs are included." This claim is not actually transportation related. The concrete was brought in from the Fort McMurray area and is being claimed as excluded on the basis that it is more expensive than concrete in Edmonton by using a price per cubic meter for concrete in both locations. The concrete was

not transported from Edmonton and as such these excluded adjustments are not applicable or appropriate for a transportation cost claim as per the CCRG. This is also not an acceptable abnormal cost claim because a company cannot receive an abnormal cost adjustment on the basis of a general Edmonton area comparison. The CCRG does not direct the assessor to adjust actual costs to the costs of the Edmonton area. The one exception is transportation costs; however, as stated, the concrete was not transported from Edmonton, it was sourced in the Fort McMurray area. The assessor must reject this Edmonton area comparison claim.

72. d. Abnormal Costs of Construction – Adverse Soil Conditions (CCRG s.2.500). (Total $46,012,712)

i. Extraction and Tailings – excluded costs claim of $9,964,440
ii. Automation, Electrical and Telecommunication – excluded costs claim of $18,270,425.
iii. Utilities and Cogeneration – excluded costs claim of $17,777,847

73. These adverse soil condition claims totaling $46,012,712 and detailed in the Parmar report were rejected on the basis of the site preparation section of the CCRG Interpretive Guide, which states, “SITE PREPARATION - The costs to deal with adverse factors, for example topography or soil conditions not ordinarily encountered in construction projects, as well as reclamation costs required to bring the site back to the quality of raw land in the vicinity, are considered abnormal costs and are therefore excluded.” Paragraph 9 of the Parmar report summarizes the basis for this exclusion as "the soil conditions at the Fort Hills site, and in the Fort McMurray area differ greatly in comparison to the Edmonton area. This adds additional costs in comparison to similar projects in the Edmonton area." As mentioned previously, there is nothing in the CCRG that instructs the Assessor to adjust site development costs on the basis of those costs being higher than an Edmonton property. Naturally, the soil conditions in an oil sands region are very different than that of other areas in Alberta, such as the City of Edmonton. The soil conditions appear typical for the Wood Buffalo region as they are not shown to be abnormal for an oil sands project by Mr. Parmar. Instead, he makes the incorrect case of showing the soil is different than Edmonton. It is normal for the soil in Wood Buffalo to be different than the soil in Edmonton, or other regions of Alberta. What Mr. Parmar is suggesting would require soil analysis and review for every DI property, which would then be compared to an Edmonton soil sample. This approach is not consistent with the regulated assessment regime and is not allowable by any DI property related assessment legislation.

74. Also of note is that this approach for handling adverse soil condition cost claims has been consistent since the initial development of the CCRG. The issue of “typical” was questioned by Industry members shortly after the final draft of the CCRG was released in 2001. Tab 23 in Appendix 10 of my report provides a December 5, 2001 letter from Larry Best representing the Canadian Property Tax Association (CPTA). In this letter, Mr. Best requested that “costs to deal with adverse factors related to topography or soil condition not ordinarily encounter in typical construction projects based at a location outside of Edmonton, would not be included”. Assistant Deputy Minister, Brad Pickering responded to this CPTA letter on December 21, 2001, by referencing CCRG, which states the “determination of what constitutes “typical” or “normal” is difficult; it is subjective and may vary over time, from one location to another and among industries. If the actual costs of an industrial facility are greater than the typical construction costs, the excess construction costs of the facility are considered abnormal and are excluded.” As can be seen in this historic letter from December 2001, the Assistant Deputy Minister did not reference Edmonton as a basis for typical or for a location factor to consider in potential adverse soil conditions excluded costs. This CCRG

assessment approach from the Assistant Deputy Minister of Municipal Affairs in 2001 has been consist with Municipal Affairs over the last 22 years. So, when Mr. Parmar states, "the soil conditions at the Fort Hills site, and in the Fort McMurray area differ greatly in comparison to the Edmonton area", and when Mr. Parmar goes on to say, "this adds additional costs in comparison to similar projects in the Edmonton area", the Assessor should not, and cannot, make this adjustment. It is not acceptable for the Assessor to compare soil conditions in Wood Buffalo to soil conditions in Edmonton as the basis for an excluded cost claim.

75. e. Abnormal Costs of Construction – Labour Costs (CCRG s.2.500) (Total $644,330,320, however the revised total as of the Fort Hills disclosure document is now a total of $1,181,891,771)

i. Excluded cost claim of $644,330,320.

76. This is the second largest excluded cost claim which is in dispute and is detailed in each of the Lubo Lliev (sic) reports. As mentioned, this claim was previously submitted by Fort Hills at $644 million as seen on the Joint Recommendation document and referenced on page 16 of the disclosure Report of Ben Matthews; however, the abnormal labour costs claim was then increased to $1.18 billion just two months after the Joint Recommendation, as seen on page 18 of the Matthews report.

77. It is of note that there are 6 major areas for the Fort Hills project; however, Mr. Lliev (sic) only provides reports for 5 areas, as he does not provide an abnormal labour report or any details for the Facilities & Common Services (F&CS) area of the plant. Page 18 of the Matthews report shows the company is attributing $76,956,437 of their abnormal labour excluded cost claim to the F&CS area, but the Fort Hills disclosure did not include a report or any details for this claim.

78. The 5 labour productivity reports that Lubo Lliev (sic) did provide were written for the areas of SE, OPP, UC, AET, and ET (none for F&CS). Each report organizes the information for abnormal labour into 5 or 6 categories. The chart for the SE abnormal labour claims is shown as the example below.

Item	Productivity Impact Categories
(i)	Labour Availability
(ii)	Craft Experience
(iii)	Camp Stay vs Non-Camp
(iv)	Longer Work Days
(v)	Weather Impact
(vi)	Productivity Impact from Gate 3 to Key Quantity Adjusted Budget

79. These labour productivity arguments are all primarily based on the idea of comparing budgeted construction costs to the costs of building in Edmonton. This is known as the Edmonton area comparison or Alberta averaging costs. The CCRG does not direct the Assessor to adjust all labour costs to the Edmonton area and, therefore, these Edmonton area and labour productivity claims are not acceptable. The CCRG begins by outlining "costs to be included in determining assessable costs" in section 1.00 by stating the "actual expenditure made in constructing the facility" are to be used. The CCRG then gives specific direction on excluded costs from section 2.000 to 2.500.500. In all of those sections the only direction to exclude costs based on an Edmonton location consideration is for transportation

costs in section 2.500.200. It is an error by Mr. Lliev (sic) to make mid-Alberta/Edmonton area abnormal labour claims. Mr. Lliev (sic) explained his general mid-Alberta adjusting error in paragraph 7 by stating: "In adjusting these costs to mid -Alberta my analysis looks to the anticipated productivity losses contained within the sanctioned budget associated with remote location." This statement also points out another issue with this approach as Mr. Lliev (sic) is basing his excluded cost claim on a general comparison to the Fort Hills budget. Any excluded cost must be based on actual costs, making a claim based on a comparison to the internal company budget is not acceptable. In this way, it is determined that Mr. Lliev's (sic) analysis is flawed on two grounds: it is based on an unacceptable comparison to mid-Alberta, and it is based on an unacceptable comparison to an internal budget rather than actual costs.

80. (i.) Labour Availability – Mr. Lliev (sic) provides two abnormal cost reasons for labour availability. The first is a comparison between local labour and Fly In/Fly Out ("FIFO") labour, the second is commuting time. Both FIFO and commuting times are normal circumstances for all projects in the Regional Municipality of Wood Buffalo and are not acceptable excluded costs claims. Mr. Lliev (sic) does not provide information on how Fort Hills' actual costs compare to typical construction costs in the region, rather he provides a general excluded cost claim on the basis of FIFO and commuting time alone. CCRG 2.500 does impose an assumption that "an adequate labour force is readily available at the worksite" and this project has already had the actual labour travel costs of over $386 million excluded and the actual camp/living out costs $710 million excluded. These related costs totaling over $1.1 billion have been accepted by the Assessor as they were actual costs and acceptable based on the assessment regulations. This general cost model for FIFO and commuting costs are not based on actual costs, are not abnormal for the region, and are double dipping on actual excluded costs claims that the Assessor has already accepted.

81. (ii) Craft Experience - Mr. Lliev (sic) outlines the craft labour experience comparison by comparing Regional Municipality of Wood Buffalo general figures to an Alberta average as a whole. This comparison is used to claim an unproductive labour amount for craft experience. This is not a site-specific issue for Fort Hills as the craft experience in Wood Buffalo is common for the region. Section 2.500 of the CCRG says "the determination of what constitutes "typical" or "normal" is difficult; it is subjective and it may vary over time, from one location to another and among industries." So, using a general region comparison of craft experience in Wood Buffalo to that of Alberta does not prove an abnormal cost. Furthermore, these are generic models, not actual costs. It is not acceptable to use a mid-Alberta comparison as a benchmark for determining an abnormal cost, and it is further not acceptable to use a generic model that is not related to actual construction costs.

82. (iii) Camp stay vs Non-Camp – Mr. Lliev (sic) requests an abnormal cost exclusion on the basis of "social isolation that results from living in a remote workcamp." He does not provide any proof that this is abnormal for the region or is unique/site-specific to Fort Hills. It is the PA's understanding and experience that camp stay is typical for Wood Buffalo construction projects and is in fact not abnormal. Mr. Lliev (sic) does not claim that Wood Buffalo camp stay is abnormal but still requests significant excluded costs on the basis of this camp work condition being an abnormal cost. Once again this is based on a regional Edmonton area or mid-Alberta comparison, which is not acceptable as CCRG 2.500 clearly states what constitutes normal may vary "from one location to another and among industries." It is the PA's understanding that camp stays are normal for major construction projects in the Wood Buffalo location and Mr. Lliev (sic) has not provided any evidence to the contrary.

83. (iv) Longer Work Days - Mr. Lliev (sic) claims to measure the loss of working longer days with a comparison to a typical week in mid-Alberta. Mr. Lliev (sic) quotes from a 2015 Municipal Census that says "RMWB workers average 46.67 work hours per week, as compared to 41.70 work hours per week for the rest of Alberta as set out in the table below." It is the PA's understanding and experience that companies typically work longer hours during construction. This is especially common for construction projects in Wood Buffalo that utilize a camp work environment. It is certainly not abnormal to work longer days in Wood Buffalo during major construction projects and Mr. Lliev (sic) has not provided any proof of as site-specific abnormal cost. Mr. Lliev (sic) instead is once again using a generic model that compares Wood Buffalo to mid-Alberta. This is not acceptable as the CCRG states the assessment must be based on actual costs and does not direct the Assessor to use general models. It is also important to point out that the premium portion of all Fort Hills overtime labour costs was already claimed as an exclusion by Fort Hills and accepted by the PA pursuant to CCRG 2.500.400. This "longer workday" claim is made in additional to the overtime excluded cost allowance. This "longer workday" claim is not allowable by the assessment legislation or regulations and must be rejected.

84. (v) Weather – Mr. Lliev (sic) makes a general excluded cost claim on the basis of labour productivity decreasing as weather temperatures decrease. CCRG 2.500 does say "abnormal costs can result from delays in construction caused by natural disasters or inclement weather", however there is no direction in the CCRG for the Assessor to make a large general exclusion for the typical weather in the region. Mr. Lliev's (sic) report fails to provide any actual costs related to inclement weather. Instead, the Lliev (sic) report provides information on general weather trends for the region, typical company break schedules, and a generic weather comparison model. If the company provided actual costs for a delay in work caused by inclement weather, as the CCRG requires, the Assessor could review and make a potential adjustment. However, the Assessor cannot accept a claim that simply outlines the general weather in the region over time. The PA has accepted inclement weather claims for other projects, which provided actual costs and supporting evidence to show stoppages in work that occurred due to inclement weather. However, the PA cannot make an abnormal cost adjustment on the basis of the typical weather trends for an area.

85. (vi) Productivity Impact from Gate 3 to Key Quantity Adjusted Budget – Mr. Lliev (sic) states in his report that this budget analysis claim is based on "unproductive labor included in the Gate 3 budget in comparison to Edmonton." The information is unclear as to how the calculations were done to arrive at the percentage figures, and the fact that Mr. Lliev (sic) states the claim is based on an internal budget comparison to Edmonton makes the adjustment unacceptable as per the CCRG. Section 1.000 of the CCRG instructs the Assessor to use "actual expenditures" to determine assessable costs and this general comparison to between the internal budget and the Edmonton area does not follow the assessment regulations.

86. Overall, the abnormal costs of labour were not proven to be abnormal based on the Lubo Lliev (sic) reports, and they did not follow the assessment legislation and regulations. Fort Hills is not being assessed unfairly by rejecting their Edmonton area or mid-Alberta abnormal labour cost claims. The CCRG does not direct the Assessor to measure claims for abnormal costs against what is typical/normal in Edmonton or mid-Alberta. Since the beginning of centralization and the formation of the Provincial Assessor, we have consistently assessed all designated industrial properties by not allowing other Edmonton area adjustments. Furthermore, prior to 2017 the Assessment Services Branch was responsible for linear assessment and I can confirm that Edmonton area adjustments were

not acceptable for linear assessment either. Moreover, this approach has been consistent since the development of the CCRG going back to 2001. As mentioned, the issue of "typical" was questioned by Industry members shortly after the final draft of the CCRG was released back in 2001. Tab 23 in Appendix 10 of my report provides a December 2001 letter from the Canadian Property Tax Association ("CPTA") that stated costs not ordinarily encountered in construction projects" based at a location outside of Edmonton, would not be included". Assistant Deputy Minister, Brad Pickering responded to the CPTA letter in December 2001 by referencing CCRG which states the "determination of what constitutes "typical" or "normal" is difficult; it is subjective and may vary overtime, from one location to another and among industries". As can be seen in this historic letter from December 2001, the Assistant Deputy Minister did not reference Edmonton as the basis for typical for the Assessor to consider for excluded costs. This CCRG assessment approach from the Assistant Deputy Minister of Municipal Affairs in 2001 has been consist with Municipal Affairs over the last 21 years. So, Mr. Lliev's (sic) approach is flawed as he states in his paragraph 7 that "in adjusting these costs to mid-Alberta" his "analysis looks to the anticipated productivity losses contained within the sanctioned budget associated with remote location." The Assessor should not and cannot make this mid-Alberta or Edmonton based adjustment. It is not acceptable for the Assessor to make an excluded labour cost claim that is based on comparing labour productivity in mid-Alberta to actual expenditures. Rather, section 1.000 of the CCRG says the assessment is based on actual expenditures, and there is no direction to adjust for Edmonton in the CCRG expect for section 2.500.200 where the Minister has specifically identified only transportation costs to be adjusted based on an Edmonton comparison. As such, the PA has adjusted transportation costs based on Edmonton, but has not adjusted labour productivity based on Edmonton or mid-Alberta.

87. f. Abnormal Costs of Constructions – Abnormal Site Development Costs (Total $46,015,712 however the revised total as of the Fort Hills disclosure document is now a total of $0)

i. Excluded cost claim of $46,015,712

88. This excluded cost claim of $46 million is related to another non-typical site development land cost. However, it appears this has been removed by Fort Hills as it is not listed on page 18 of the Report of Ben Matthews. It appears Fort Hills is not in agreement with the PA on this previous claim for abnormal site development costs, which was rejected in the March 2022 Joint Agreement document.

89. g. Design Changes, Alterations, and Modifications (CCRG s. 2.300.400) (Total $2,183,852,264 however the revised total as of the Fort Hills disclosure document is now a total of $2,472,498,011)

i. Excluded cost claim of $2,183,852,264.

90. Design changes/alterations/modifications is by far the largest excluded cost claim in dispute. There are 2 overall parts for these design change claims: The first are the Project Change Notices (PCNs) provided for the 5 project areas of OPP, ET, FCS, AET, and UC. The second are the large categories shown for the Secondary Extraction (SE) unit. It was explained by Ben Matthews that the Secondary Extraction area was tracked differently than the other areas and that is the reason Fort Hills did not provide any supporting documentation for the SE design changes until the May 2022 disclosure. The OPP, ET, FCS, AET, and UC follow a similar structure and are found in the reports of Chris Woloshyn and Jeff Yarcky *(sic)*. The SE design change claims were structured differently by Fort Hills and are found in the report of Ryan Jackson.

91. The PA team has gone through the first submission of PCNs from Fort Hills in detail for OPP, ET, FCS, AET, and UC. We found there were some reasonable claims, some that were obviously unacceptable, and the majority of PCNs lacked the level of detail for analysis and could not be accepted. On principle, any excluded cost claim must be rejected by the Assessor if the company cannot provide information to support the excluded cost claim. The duty is on the company to substantiate any excluded cost.

92. Section 2.300.400 of the CCRG has a clear definition of what constitutes a design change, alteration, and modification:

2.300.400 DESIGN CHANGES, ALTERATIONS, AND MODIFICATIONS

Alteration costs incurred during construction that improve the operational efficiency of the original plant design, are excluded. Likewise, the costs of "de-bottlenecking" or modifying an operating process are excluded if there are no changes to the equipment inventory.

Note: The cost of equipment installed to improve operational efficiency is included.

93. The majority of PCN design change claims were not accepted. The complete list of PCNs for design changes are too long to list in detail here; however, a complete list of all PCN design change claims is provided in Appendix 2 of his report. This includes the description for each claim from Fort Hills as well as a response from the PA analysis.

94. The Design Changes category seems to have been used as a catchall bucket for a number of categories outside of Design Changes. The 5 examples below illustrate details and common themes for rejected design change claims:

- Misleading descriptions: Some of the claims have a misleading description that is not consistent with the details on the PCN document. Fort Hills provided descriptions for each Design Change in the body of the witness report and then attached a corresponding PCN in the appendix. An example of rejection with a misleading description is OPP PCN 0202A. Page 9 of the Chris Woloshyn OPP report says this PCN was for "additional costs due to rework delays", however the actual PCN in Appendix 22 of the same report says this cost is to "align the December 2014 re-forecast with Gate 3 Budget, an increase of $12,980,000". So, this claim is not based on rework costs as suggested in the description, rather the claim is actually an internal budget comparison to actual costs. This certainly does not meet the criteria for a Design Change as per CCRG 2.300.400. If we were to look at this more broadly as a CCRG 2.500 abnormal cost claim it would also not be acceptable because it is not allowable to simply claim the difference between actual costs and an internal budget as an excluded cost.

- Market cost increases over internal budget: E&T PCN 273 for $3,000,545 is briefly described as "Changes and reworks" on page 7 of the Witness Report by Chris Woloshyn; however, the individual PCN in Appendix 15 of the same report reads "Procurement Adjustment due to market fluctuations for Fire Alarm Systems." Market fluctuations are not a design change. CCRG 2.300.400 says "alteration costs incurred during construction that improve the operational efficiency of the original plant design, are excluded" as a design change. There is no improvement or change to the plant design related to this cost, rather this is simply a difference in costs between the internal budget and actual expenditures. The actual costs are assessable, this is not a design change, and it is also not a 2.500 abnormal cost. The E&T PCN 176A for $1,670,000 and 176B for $456,979 were claimed by Fort Hills based on "contract

increase due to hearted market," which are more examples of the unacceptable design change claims from Fort Hills on the theme of market cost changes over the internal budget.

- Additional equipment: Page 8 of the Mr. Colden's design change report for AET describes PCN OS-3ME036R EV. This is a claim for $5,400,695 requested for "Redesign and rework to fix deficiencies." Appendix 5 in the same report says "there are amounts required for EPN hardware for MEC and IBL that were not included in the EDS estimate" and continues on to say "EPN trend being revised to include accurate hardware costs." It is clear that these are costs or additional equipment that were missed on the original inaccurate estimate. These corrected costs are fully assessable and are not a design change. This was rejected because the assessment is not based on estimates, rather it is based on actual costs and additional equipment is assessable.

- Comparison to internal budget: Utilities PCN PD0163 is listed on page 16 of the Jeff Yarky (sic) Utilities design change report in the amount of $17,632,000 for "fuel increases due to changes and rework". Appendix 24 of the same report reads "increase in fuel cost forecast" and "PCN has been raised to align the December 2014 re-forecast with Gate 3 Budget". Once again this is not a design change, it is a comparison by the company from the budget to the actual costs. CCRG 2.300.400 says "alteration costs incurred during construction that improve the operational efficiency of the original plant design, are excluded" as a design change. There is no improvement to the plant design, rather this is simply a PCN to capture a change in fuel prices. The difference in fuel prices between an internal budget from 2014 and the actual construction costs in 2015 is in no way an acceptable design change as per the assessment regulations. Furthermore, this internal budget comparison to actual costs is also not an acceptable abnormal claim outlined in 2.500 of the CCRG. This is a very common theme throughout the design change claims as Fort Hills constantly issues excluded costs claims on the basis of comparing their internal budget to their actual costs. CCRG 1.000 states very clearly that the assessment is based on "actual expenditures" and does not direct the Assessor to make excluded cost adjustments on the difference between a company's internal budget and their actual expenditures.

- General rework contingency on top of individual claims: There are no PCNs provided for these claim descriptions in the design change reports for AET, E&T, and OPP. These are significant general rework claims of 5% and 1% on labour without any backup supporting documents or PCNs. Page 10 of the Mr. Colden's AET design change report claims $12.4 million excluded costs for this rework contingency. Page 10 of the Chris Woloshyn E&T design change report claims $14.2 million excluded costs for this rework contingency. And page 9 of the Woloshyn OPP design change report claims $14.8 million excluded costs for this rework contingency. These are significant excluded costs, which are not acceptable as they are claiming the best of both worlds. The company is submitting individual PCN design change claims for rework and they are also submitting general rework design change claims of 5% and 1% on labour categories.

[603] The above analysis for design changes was based on the PCN style witness reports for the five project areas of OPP, E&T, F&CS, AET, and UCT. The remaining areas of design change claims are the

large categories shown for the SE unit. For the SE design changes found in the Mr. Jackson report, the PA stated it has done a detailed review and has had meetings with Fort Hills to discuss. To this point, it concluded that the SE design change claims are not acceptable with the exception of the PFP Rework and Repair item, which is listed as #5 in the table below. The six large categories for SE design changes were organized by Fort Hills as:

	Approved Non-Scope PCNs	Increased Costs
1	Site Specific Labor Productivity	$261,399,700
2	Change in Execution Plan	$254,160,090
3	Change of Work Location to Mod Yard and/or Site	$111,003,528
4	Site Specific Rework and Repair	$182,403,286
5	Passive Fire Protection Rework and Repair	$125,485,747
6	Labor Productivity and Design Changes	$554,516,703
	Total APNS PCNs	**$1,488,969,051**
	Rebuilt with completed Engineering	$272,388,870
	Total	**$1,761,357,921**

[604] The SE design changes from Mr. Jackson's report account for $1.76 billion of the $2.47 billion total design change excluded cost claim, or 71% of the total design change claims for Fort Hills. However, it is noted that the PCNs provided total $1.49 billion for the six (6) PCN areas within SE, and there is an additional general "rebuilt with completed engineering" SE design change claim for $272 million that does not have accompanying PCNs. The details for the logic behind each the PA's rejection or accepting each SE design change claim are provided below for each SE design change claim.

98. *1. Site-specific Labour Productivity - $261,399,700*: This is primarily an abnormal labour adjustment with references by Fort Hills to a "heated market", "scarcity of labour", "lesser skilled labour", "crew mix", etc. Paragraph 23 of the Ryan Jackson report says "in total, $261,399,700 were increased costs incurred related to labour productivity as outlined above." These reasons and theory is very similar to what is found the Lubo Lliev (sic) productivity reports for abnormal labour claims but is also being used here for design change claims. These site-specific labour productivity claims were rejected on the basis of 2.300.400 of the CCRG which states, "2.300.400 DESIGN CHANGES, ALTERATIONS, AND MODIFICATIONS – Alteration costs incurred during construction that improve the operational efficiency of the original plant design, are excluded. Likewise, the costs of "de-bottlenecking" or modifying an operating process are excluded if there are no changes to the equipment inventory. The cost of equipment installed to improve operational efficiency is included."

99. Labour productivity was rejected in the abnormal labour excluded cost claim and it must be rejected here as well as it does not meet the criteria for an allowed claim. Further, labour productivity is in no way a design change and not applicable to this excluded cost category, as shown in the CCRG description above. This is also not an acceptable abnormal cost of construction defined in 2.500 of the CCRG. Abnormal cost claims made under section 2.500 of the CCRG must be measured against what is typical or normal for the construction period of the subject project and must be measured against what is typical or normal for the location of the subject construction site as the CCRG says typical "may vary overtime, from one location to another and among industries."

100. 2. Change in Execution Plan - $254,160,090: Page 7 of the Ryan Jackson report says the "changes in the execution plan developed from four causes: (i) out of sequence work; (ii) the development of only one, of three, extraction trains in 2018; (iii) the removal of the front end engineering contractor, (name redacted); and (iv) the engagement of global

suppliers." After reviewing each of these four causes and the newly provided PCNs it was determined this is not an acceptable design change as per 2.300.400, and not an acceptable abnormal cost of construction per 2.500.

101. The "(i) out of sequence work and (ii) the development of only one of three extraction trains" claims, was explained by Fort Hills to not be the most efficient way to construct. However, to be accepted as a CCRG Design Change, the claim must be "alteration costs incurred during construction that improve the operational efficiency of the original plant design." That is not what we have here, rather this is a business choice to construct in a certain order and the "original plant design" is not changed. Therefore, these are not design changes as per the CCRG, they are assessable costs that can occur on any project and must be rejected as exclusions.

102. With respect to "(iii) the removal of the front-end engineering contractor, (name redacted)" we already agreed to exclude 75% of total FEED (front-end engineering design) costs based on actual expenditures as part of the accepted $134 million exclusion that was allocated for feasibilities studies. This can be seen as item 6.a on page 2 of the Joint Recommendation document (Appendix 1). However, Fort Hills is now excluding these front-end engineering costs again under design changes. Fort Hills explained that this is the cost of switching engineering firms mid-way through the project and that this caused a delay. These are actual costs, which are assessable and must be rejected as exclusions. This claim does not meet the criteria of a CCRG design change (ie.no change to the original plant design) and furthermore, both parties have already agreed to excluding 75% of the total FEED expenditures.

103. (iv) The engagement of global suppliers– paragraph 36 of the Jackson report says, "this switch of the project Engineering and Procurement mid project to compensate for the challenged market conditions, including the labour scarcity, the high demand for goods and services, and the out of sequence engineering, resulted in a review and re-performance of project deliverables which resulted in an extension to the SE Project schedule." We inquired as to how much of these costs are associated with "re-performance" and if this is re-work engineering. However, Fort Hills stated it was unsure if this information is measured exactly. Due to a lack of understanding and supporting documentation this is rejected as a design change exclusion. Paragraph 37 also states "as an example, the SE Project's Forth *(sic)* Settler Unit was designed with a height structure of approximately 63 meters, when the lower height was more appropriate. A lower height would have reduced the height of the pipe racks and resulted in savings in steel, piping, cable, and fireproofing quantities." These cost claims are essentially the difference between actual construction costs and a theoretical design that was not constructed. The CCRG directs the assessment to be based on actual expenditures. Making an adjustment based on a theoretical design that was not constructed is completely out of line with the CCRG and regulated assessment principles. This is not an acceptable design change or an acceptable abnormal cost of construction.

104. *3. Change of Work Location to Mod Yard and/or Site - $111,003,528*: This claim explains this was a business operating decision to bring modules from the mod yard to the site earlier than originally planned. However, they were always going to be moved and this decision does not improve the operational efficiency of the original plant design as stipulated in the CCRG design change criteria, rather this is a location change for assembling the same modules. Fort Hills explained that the modules were sent earlier than originally planned and this did not work as effectively. This was rejected because it is not "alteration costs incurred during construction that improve the operational efficiency of the original plant design." This is a business operation decision to move modules to site based on the schedule. This

did not change the design of the plant and is therefore not an acceptable design change excluded cost. This is also not an abnormal cost of construction as per2.500 and must be rejected on that basis as well.

105. 4. *Site-specific Rework and Repair - $182,403,286:* Paragraph 42 of the Ryan Jackson report says, "contractors challenged by a labour shortage caused the SE Project to incur additional costs for out-of-sequence execution and rework." Paragraph 43 states "mitigations to this risk required significant process safety designs including leak detection, fire detection, fire prevention, and passive fire protection." These are all understood to be necessary construction costs and are therefore assessable. It sounds like it was not effectively planned, but it was always required, and these costs are not rework or duplications of any kind. The costs are in fact required safety expenditures, which are assessable as they do not meet the design change criteria of being "alteration costs incurred during construction that improve the operational efficiency of the original plant design." This also does not meet the abnormal costs of construction as paragraph 45 states "the decision was correct however the process safety implications were under-estimated and put pressure on the final quantities and field productivities." Comparing actual costs to an internal budget does not represent an acceptable abnormal cost of construction as per 2.500 of the CCRG.

106. 5. *Passive Fire Protection – Rework and Repair - $125,485,747:* Paragraph 46 of the Jackson report says, "the fire protection did not travel well to the project site and repairs were required." Paragraph 47 goes on further to explain the "coating was applied to the SE Project structures in June of 2015 prior to shipping and between October 2016 and March 2017 Fort Hills SE Project staff observed cracking in the coating on the structural steel, an unexpected health and safety risk to employees and contractors working on the SE Project." After analysis, this appears to be acceptable rework on the original plant design with no change to the equipment inventory. The fire protection coating was duplicated by applying it multiple times due to the coating not travelling well and requiring a reapplication. This resulted in an acceptable rework abnormal cost. The PCNs provided as supporting documentation for this rework total $125,485,748 and have been accepted.

107. 6. *Labour Productivity and Design Changes Non Assessable Claim - $554,516,703*: Pages 11 and 12 of the Jackson report outline seven parts to this labour productivity and design changes non assessable claim of $554 million. This includes the following descriptions, which are very limited:

- "a. indirect Budget transfer."
- "b. related to fees, overhead, and other in direct increases to various vendors and contractors for changes in other non-scope categories such as delay and out of sequence work."
- "c. design changes and modifications at field and in module yards that did not affect the scope and cost escalations related to changes because of site conditions, which could not be foreseen."
- "d. costs related to other non-scope changes in the original design,"
- "e. materials wrongly supplied that needed to be replaced or lost, or stolen materials that were not covered under insurance. Fort Hills explained that there is no breakdown for these repurchase items."
- "f. stoppages due to unforeseen site-specific conditions."
- "g. increases in market rates over and above the escalation estimated on account of the heated market conditions for procurement and construction activities."

108. To be a design change there must be "alteration costs incurred during construction that improve the operational efficiency of the original plant design." Furthermore, many of these claims (budget transfer, out of sequence work, lost materials, and increase in rates) are based on the company comparing actual expenditures to an internal budget. This does not represent an acceptable abnormal cost of construction as per 2.500 of the CCRG.

109. We were also told that the book-keeping would not track the difference between insured payout and re-purchase cost for lost or stolen materials. This adds another complexity to this unacceptable claim as it is likely that some of the costs for lost/stolen items were covered by insurance and it was not a double/re-purchase cost.

110. It was also explained by Fort Hills that the "stoppages" costs are for any stoppage at site, such as cold weather, rain, supply delays, stand by time, etc. It is not possible for the Assessor to understand or accept a reason for the stoppages without an allocation for each. Some could be acceptable, such as inclement weather and lack of supplies as per2.500 abnormal costs of construction, but they would need to be broken out and clearly supported with evidence. Furthermore, they certainly should not be under this design changes claim budget. There is also a likelihood of double dipping this claim with the productivity claims from the Lubo Lliev (sic) reports.

111. Any company must demonstrate that their actual cost is abnormal based on a metric to show what is typical. Typical does not mean comparing to the company's own internal budget. The property owner must measure the abnormal cost and the onus is on the property owner to prove any abnormal cost. It is not acceptable to simply claim the difference between actual costs and an internal budget as abnormal and an excluded cost claim.

112. 7. Rebuild - $272,388,870: Paragraph 50 of the Jackson report states, "through working with the new EPC firm in developing the new technology it was discovered that the design could have achieved the same results with a different less expensive design." Furthermore, Appendix A, page 7, paragraph 13 says "the $272,388,870 in costs was derived from the difference between the actual costs incurred as a result of using several bullets (the "As Built Quantities"), when the SE Project could have been created using one atmospheric tank and fewer bullets." Once again, we have a design change claim that is based on the difference between the actual construction expenditures by Fort Hills and a theoretical that was never built. There are no actual design changes occurring or abnormal cost of construction related to this $272 million dollar claim. This goes beyond the unacceptable claim theory of comparing actual costs to an internal budget. In this case, Fort Hills is going further to request significant excluded cost allowances based on a comparison of actual costs and a theoretical design that was never implemented. No actual design changes were done; this is a theoretical engineering comparison for a different approach. The Assessor has no ability to accept an excluded cost claim based on this comparison of actual costs and theoretical redesign costs. The Assessor must follow the CCRG and assess the actual construction costs. CCRG 1.000 outlines the costs to be included in determining assessable costs which clearly states, "the costs of construction reported by the company to the assessor are the actual expenditures made in constructing the facility." Nowhere in the CCRG does it direct the Assessor to make excluded cost adjustments for the difference between the actual expenditures and post-construction theoretical redesign that was never implemented. Therefore, the Assessor cannot make an excluded cost adjustment for this $272 million claim. This claim does not meet the criteria for a design change as per 2.300.400 of the CCRG and it also does not meet the criteria for an acceptable abnormal cost of construction per 2.500 of the CCRG.

[605] Mr. Minard submitted that the May 25, 2022 Complainant disclosure submission was extensive and contained over 4,800 pages of material, plus eight additional multi-tab Excel workbooks, and a video, all of which was spread over 30 individual documents. Mr. Minard noted that as the PA worked through the disclosure documents, the PA observed that the Complainant had substantially increased its excluded cost claims. The significant changes between the Joint Recommendation and the May 2022 disclosure were the abnormal labour excluded costs claim increasing from $644 million to $1.18 billion, and the design change excluded cost claim which increased from $2.1 billion to $2.47 billion. Mr. Minard identified that the differences can be seen by comparing the Joint Recommendation document from Mr. Minard's report (Exhibit 20-R, Appendix 1) to Mr. Matthews' witness report (Exhibit 14-C, pages 15-18). Mr. Minard submitted that the Fort Hills disclosure package posed a serious challenge to the PA due to the significant amount of new information, which was not provided in previous years and was required information to prepare the assessment. Mr. Minard stated that the fundamental problem was that because the facility is assessed on the legislated reported cost basis, the PA is entirely dependent on information provided by the company. Cost-based assessments place the onus on the company to provide the required information, which is explained in every annual RFI sent by the PA. There are several areas of project and cost information that have been requested since 2018, which were newly provided to the PA in 2021, and then again in the May 25, 2022 disclosure.

[606] Prior to the May 2022 disclosure package, Mr. Minard stated that the PA did not receive any details on the SE design change excluded cost claim of $1.76 billion dollars. Mr. Minard submitted that the SE design change claims accounted for 81% of all design change cost claims for Fort Hills. He submitted that the May 2022 design change information that was provided required substantial time and resources committed from the PA team to review and analyze this new information. In the opinion of Mr. Minard, this review should not have occurred so late, as Fort Hills was required to provide this information as part of the original 2018 assessment cost reporting. Mr. Minard expanded his comments and submitted that the majority of the SE design change documents in the "Ryan Jackson – Design Changes - SE" disclosure document (Exhibit 2-C Redacted), which was comprised of 1,033 pages, are dated in 2015, 2016, or 2017 such that they were clearly available to be provided with the 2018AY reporting information. Mr. Minard noted that this documentation had been requested since 2018 yet the PA received this historic information with the May 2022 disclosure.

[607] Mr. Minard also addressed the abnormal labour cost claim, which increased based on the May 2022 disclosure. He advised that at the time of the Joint Recommendation, the Complainant was using an amount of $644 million for abnormal labour costs, which amount was in dispute between the parties. In the May 2022 disclosure, the amount increased to $1.18 billion. Mr. Minard submitted the PA was surprised that the amount had almost doubled in amount two months after the signing of the Joint Recommendation.

[608] Mr. Minard provided another example of a category area remaining at issue from the March 2022 Joint Recommendation. Mr. Minard submitted that the "Abnormal Soil Conditions" category cost claim was the subject of discussion between Fort Hills and the PA; however, the details and supporting documentation were not provided. Mr. Minard stated that Fort Hills first provided this required information in the May 2022 disclosure package and was contained in the Parm Parmar disclosure (Exhibit 13-C Redacted) and the Ben Matthews disclosure (Exhibit 14-C), as well as the associated Excel workbook appendices from Mr. Matthews' disclosure. Mr. Minard opined that this is all late reporting information that should have been provided to the PA as part of the original 2018 cost rendition.

[609] Mr. Minard included in his disclosure (Exhibit 20-R, page 27, para 54) a chart that highlighted the comparison of the Parties' positions:

	PA Assessable Costs as of the March 2022 Joint Agreement	FH Requested Assessable Costs as of the March 2022 Joint Agreement	FH Requested Assessable Costs as of the May 2022 Disclosure
Total Project Costs	13,391,991,825	13,391,991,825	13,391,991,825
- agreed excluded costs	(3,969,442,416)	(3,969,442,416)	(3,969,442,416)
- disagreed excluded costs	0	(2,980,502,909)	(3,754,869,717)
Schedule A assessable costs	9,422,549,410	6,442,046,501	5,667,679,693

(Highlighted by Mr. Minard)

Note – the chart above refers to the Schedule A assessable costs for improvements only. This is before factoring in the steps to arrive at the assessed value (i.e. Schedule B, C, D, and the statutory 77% factor).

[610] Mr. Minard also discussed the lack of the Complainant providing the DBM/EDS and additional supporting documents. Mr. Minard noted that the PA was hopeful that the Complainant would include the information in its May 2022 disclosure package, based on representations Mr. Minard stated were made by the Complainant. The DBM was not received in the disclosure package, so additional requests were made by the PA. In a meeting held on June 15, 2022 with the Complainant, Mr. Minard stated that it was agreed that Fort Hills would provide the requested DBM/EDS to the PA. Mr. Minard also submitted that follow up emails for this request were sent on June 16 and June 21, 2022 and Mr. Matthews advised he had requested the files and was contemplating options for the file transfer due to its large size. Mr. Minard submits that additional emails were sent on August 31, September 1, and September 12, 2022 as well as in a meeting on October 3, 2022; however, the Complainant had yet to provide the information.

[611] Mr. Minard provided a detailed list of all PCNs submitted by the Complainant and the PA's response to each (Exhibit 20-R, Appendix 2, pages 72 to 126).

F. Summary

[612] Mr. Minard summarized that it is important to recognize that the PA is obligated to follow the assessment legislation and regulations in preparing all assessments, including the Fort Hills assessment. His interpretation of the *CCRG* is that it does not direct the Assessor to adjust labour, design changes, or soil conditions to an EAA. He further stated that the PA's recommended assessment has been prepared correctly for Fort Hills and consistently with the MA's practices for all DIPs.

[613] Mr. Minard's position is that Fort Hills is not being assessed unfairly by rejecting its claimed EAA or Alberta averaging adjustments, and that the PA has consistently assessed all designated industrial properties by not allowing other EAA, other than for transportation costs. Mr. Minard noted that the only mention of "Edmonton area" in the *CCRG* is with respect to transportation costs. Mr. Minard opined that the regulated assessment process is prescriptive, and if the Assessor is to consider an adjustment of other costs to an EAA, then the *CCRG* would clearly stipulate this direction. Rather, the Assessor is instructed to assess based on the actual expenditures made in constructing the facility (*CCRG* 1.000).

[614] Mr. Minard's position is that all DIP assessments must be prepared by following the assessment legislation and regulations, based on a cost reporting system. In the matter of Fort Hills, the PA did not receive appropriate cost reporting, therefore adjustments cannot be made.

[615] In response to the 2017 CARB decisions, Mr. Minard submitted that those decisions should not impact the assessment for Fort Hills. Mr. Minard stated that the settlements were done prior to the PA taking over the DIP assessment function in 2018 and that the PA was not involved in the settlements. He also stated that the PA has been denied access to the actual details within those settlements. Mr. Minard noted that his meeting with Mr. Schofield substantiated that the 2017 CARB settlement agreements were not based on a principled assessment approach which follows the assessment legislation and regulations and were done with a focus of lowering the outstanding taxation impact liability for RMWB.

[616] Mr. Minard submitted that some design changes have been accepted and accounted for in the PA recommended assessment for each year. In the design changes which were accepted, Mr. Minard confirmed that Fort Hills provided supporting evidence. Where Fort Hills has not provided supporting evidence, the PA's position is that they must be rejected. Additionally, a significant portion of the design change claims include an adjustment for the EAA which the PA submitted is not allowed.

[617] Mr. Minard provided a chart recognizing the total excluded costs and total assessable costs from the Complainant and the PA (see paragraph 562). The Complainant claims $7.709 billion (58% of its costs) as excluded. The PA recommended $4.147 billion (31% of the project costs) as excluded.

[618] Mr. Minard further stated that the PA's original assessments were prepared based on the information available to the PA for the 2018 assessment year, however a significant amount of information was not provided until 2021 and then more new information was sent in the May 2022 disclosure package from the Complainant. Based on the May 2022 disclosure, which Mr. Minard stated expanded detailed reporting, the PA submitted that more information was available when the assessments were created, and Fort Hills withheld information from the Assessor. Accordingly, the PA prepared updated assessments taking into consideration the Joint Recommendation and the May 2022 Complainant disclosure. Mr. Minard provided a further chart depicting the three (3) years under complaint (see paragraph 593).

[619] Mr. Minard confirmed that both parties agree that the total project costs for the Fort Hills facility are $13.392 billion for the matters under complaint. The dispute between the Parties is on the assessable costs and corresponding assessment value. The PA is recommending an assessment of $5.962 billion for the 2018 assessment year, which represents 45% of the total project costs for Fort Hills. The Complainant is seeking an assessment of $3.903 billion for the 2018 assessment year, which equates to an assessment value that represents only 29% of the total project costs for Fort Hills.

[620] The PA requests the LPRT accept the "Provincial Assessor's Recommended Assessment" for each year under complaint, as being fair, consistent, and equitable assessments for Fort Hills.

Assessment of Designated Industrial Property – Dr. Edward Thompson (Exhibits 24-R, 25-R, 26-R and 43-Rv2)

[621] Dr. Thompson was presented as an expert witness (Exhibit P18R) as, "The Provincial Assessor is seeking to have Dr. Thompson qualified as an expert in mechanical engineering with expertise in project planning/project engineering and numerical modeling."

[622] Dr. Thompson's work experience spans fifty years in mechanical engineering with extensive experience in the design and planning of oil and gas production facilities. Dr. Thompson has worked on the design, construction, and commissioning analysis of many oil sands development projects. Further, he has developed considerable experience in the prediction of labour productivity.

[623] Dr. Thompson has been awarded Bachelor of Science [1st class honours] in Mechanical Engineering, from the Imperial College of Science & Technology (1967), Bachelor of Science [Honours] in Mechanical Engineering, University of London (1972), DIC Fluid Mechanics from Imperial College (1975), and a Ph.D. in Mechanical Engineering from the University of London (1975).

[624] Dr. Thompson confirmed that he was provided with a detailed engagement from the Provincial Assessor which included "having regard to the interpretation of the CCRG and was provided the following working assumptions by Mr. Michael Minard, the Provincial Assessor" (Exhibit 24-R pages 10 to 12, para 20). The detailed assumptions were as follows:

(i) The engineering advice requested by the PA is in respect to the assessment of machinery and equipment ("M&E") within RMWB and in particular, with respect to the interpretation of the *2005 Alberta Construction Cost Reporting Guide* ("*CCRG*").

(ii) Decisions regarding whether a cost is an included or excluded cost under the *CCRG* are made by the PA;

(iii) It is the responsibility of the property owner to provide documents to the PA to substantiate claims for excluded costs. In this respect, the property owner must provide the PA with site-specific documentation that enables abnormal cost claims to be specifically identified, measured and quantified;

(iv) There are a set of Agreements established by Mr. Schofield on behalf of RMWB. These Agreements are addressed in 14 CARB BOs. These Agreements are not believed to be consistent with the CCRG. These Agreements did not involve the PA or Municipal Affairs. In addition, these CARB BOs are based on joint recommendation and are not binding;

(v) All claims for abnormal costs must be considered under section 2.500 of the CCRG. Abnormal cost claims made under section 2.500 of the CCRG must be measured against: what is typical or normal for the construction period of the subject project; what is typical or normal for the location of the subject construction site (in this case, being RMWB); and what is typical or normal for the industry in issue;

(vi) Claims for abnormal costs are not measured against what is typical or normal in Edmonton (central Alberta);

(vii) Construction costs are those "that facilitate construction" or are required for construction or "have a sufficient nexus to construction;"

(viii) The appropriate measure for abnormal costs is inter-project measurement, not intra-project measurement. Assessments are to be consistent among regulated properties;

(ix) Engineering, design, project planning, purchasing, scheduling and survey costs contained in the Design Basis Memorandum ["DBM"] & Engineering Design Specifications ["EDS"] (both parts of Front End Engineering & Design activities ["FEED"]) are included costs. It is only the cost of the feasibility study that is an excluded cost. Other FEED costs included in the Design Basis Memorandum ["DBM"] and Engineering Design Specifications ["EDS"] are included costs;

(x) A "balanced market" in terms of labour force, raw material, financing, and labour premium payments for overtime is achieved by a consistent application of section 2 of the CCRG. This requires a consideration of the context of the time period that construction

was taking place, the location in which construction was taking place, and the industry in issue;

(xi) Imbalanced market conditions are accounted for by the Assessment Year Modifiers ["AYM"] & Cost Factors ["CF"]. To allow for excluded costs for an imbalanced market, and then apply the cost factors and base year modifiers would result in a double counting for those costs;

(xii) The Cost Factors in the Minister's Guidelines account for year to year construction cost escalations [CARB BO 001-2015 para 253];

(xiii) The CCRG requires the use of actual costs. As such, the use of generic models to calculate abnormal cost claims is not acceptable;

(xiv) Abnormal costs may be measured when a specific construction site is experiencing costs that are not being experienced in RMWB during the same construction period and in the same industry as the subject;

(xv) Abnormal cost claims for schedule slippage must be measured against normal/typical schedule slippage for the development period of the subject, the location of the subject and the same industry as the subject;

(xvi) Where an abnormal cost claim is accounted for in one category of costs, it will not also be accounted for in another category. Double counting in this respect is not permitted;

(xvii) A comparison to the project plan/budget/QAB is not sufficient to measure abnormal costs [CARB BO 001-2015, para 194];

(xviii) Timing of when a cost is incurred is not a relevant factor to determining if the cost is an engineering cost or a construction cost;

(xix) The entity that incurred the construction cost is not a determining factor in whether a cost is a construction cost or not.

[625] Dr. Thompson's reports addressed aspects of labour productivity which were raised in the following:

- Exhibit 24-R - Response to the Iliev Report (Exhibits 8-C, 9-C, 10-C, 11-C, 12-C)
- Exhibit 25-R – Response to the Matthews Report (Exhibit 14-C)
- Exhibit 26-R – Response to the Otsu Report (Exhibit 16-C)

[626] Dr. Thompson referred to the Fort Hills rebuttal reports, which he understood to state that the 2017 CARB Decisions were based upon a reversal of the RMWB labour productivity calculations and that the assessments contained an EAA. Based on that understanding, Dr. Thompson provided a focused reply to the Fort Hills labour productivity abnormal cost claims. He did so in the sur-rebuttal report (Exhibit 43-Rv2).

A. Background

[627] Dr. Thompson stated that his report would consider the five reports submitted by Mr. Iliev, the report of Mr. Matthews, and the report of Mr. Otsu, as well as their rebuttal reports. While Dr. Thompson's work is within three initial reports as well as a sur-rebuttal report, he testified globally on all.

[628] Dr. Thompson submitted that based on the five Iliev reports, there were five topics he intended to address. They included:

a. Fort Hills estimates – can they be considered against the actual construction costs and which estimate is correct, if company estimates can be used
b. The *CCRG* - how costs are established numerically
c. Geographic – what is the appropriate area to consider costs – Edmonton, mid-Alberta, San Francisco or local on site
d. Reliable numerical process – how to measure costs at the project activity level
e. 2017 CARB Decisions – inability to re-engineer the relationship between project labour unproductivity and the Board Order adjustments.

B. Fort Hills Estimates

[629] Dr. Thompson's position is that it is not correct to compare actual construction costs to an owner prepared estimate. He acknowledged that the project estimate is an important document; however, he opined that it is not suitable for determining excess costs.

[630] Dr. Thompson submitted that when abnormal costs are deducted from actual construction costs, the claim amount can vary significantly based on the estimate being used. In his opinion, the levels of the estimates are as follows:

1. DBM - defines the basic design parameters for the intended project; and
2. EDS - defines all elements of project and is the control document for the commencement of detailed engineering and procurement activities on the project. It is also used in scoping the development of the Authorization for Expenditure ("AFE").
3. Dr. Thompson also noted that a further estimate is FEED"), or Front End Loaded ("FEL") which are sometimes interchangeably used with EDS.

[631] Dr. Thompson understands that the Provincial Assessor's position is that it must have the DBM. Dr. Thompson's position is that he has never requested the DBM, and he commented that if provided, he would "not know what to do with it". He opined that a DBM would be superseded by the EDS and the EDS would be superseded by a FEED/FEL.

[632] Dr. Thompson also stated that an estimate is not a single number, rather it is a range of numbers. Additionally, he stated that Fort Hills prepared a number of estimates and that there was confusion in the Complainant's evidence concerning which estimates Fort Hills was using to compare to actual construction cost in this matter. As an example, Dr. Thompson used the SE project and noted that between the original estimate and the QAB, there was an $850 million difference. The sheer amount and which estimate is used could inflate or deflate the Complainant's cost claim.

[633] Dr. Thompson also submitted that if Fort Hills intended to use the sanctioned budget, which was approved in 2013, whether the labour standards used to prepare the report could be different if the standards changed. Dr. Thompson opined that the Fort Hills budget has "no reliance on tendency" as it is based on a probability of 70%. If the estimate was based on a probability of 100%, then that estimate maybe could be considered for comparison.

[634] Dr. Thompson also addressed his understanding of what the cost estimate prepared by Fort Hills included. He stated that the cost estimate of the project plan is an integral component. He suggested that contractors bidding on a project may estimate low in order to receive the contract, and the use of the contractor's estimate is not reliable as it is a business decision to win the bid and not based on engineering.

[635] It was Dr. Thompson's opinion that all the abnormal cost claims as determined by Fort Hills are already included in the Fort Hills plan.

[636] Dr. Thompson further stated in his opinion "…that as Suncor is a very experienced operator in RMWB it would include all the elements identified above in the Fort Hills project plan. Should there be any abnormal construction costs then those abnormal costs must be measured from the project specifications prepared in the project DBM/FEL. That Suncor has not provided copies of the DBM/FEL documents is a concern and a significant limiting factor in all the Suncor complaint reports."

[637] Dr. Thompson also submitted that Fort Hills included EAA in its cost claims. His opinion is that these costs were included in the estimates and as a result, any request for a cost claim is double accounting. He based this on CARB BO 001-2015 paragraph 194 concerning double accounting.

[638] Dr. Thompson provided a specific example of Mr. Iliev's calculations with respect to weather (Exhibit 26-R, page 70, para 5):

> 5. Let us consider an example: the impact of site-specific weather conditions. Labour productivity would have been established using site weather conditions. Suncor would have a wealth of data on this topic. Activity durations in the project schedule would have been established as a function of local environmental conditions. Included in the weather impact analysis would be a function of when particular activities were planned, i.e. different durations would be set for activities undertaken in summer months compared to winter months. The project specifications for environmental conditions are established in the DBM/FEL. For an abnormal construction cost to be considered it would be measured relative to those site-specific specifications. Should an abnormal construction cost be considered it is not measured relative to some other arbitrary geographical location [e.g. Edmonton]. Should a calculation be considered and compared to Edmonton weather conditions, it would be a case of double accounting. For a particular example if the maximum low temperature established in the DBM/FEL as set at -48oC [this by the way is a typical condition], then abnormal costs might be measured on activities undertaken and disrupted when the site-specific temperature is less than -48oC, say -52oC. Actual costs as a result of this impact should be compiled and provided to the assessor. Mr. Iliev does not follow this procedure but compares the site-specific weather conditions with those derived from Edmonton [or mid-Alberta] and then calculates the impact upon labour productivity. This procedure is a case of double accounting.

C. CCRG – Establishing Costs

[639] Dr. Thompson stated that Fort Hills used many technical words in its submissions, and that certain of them were undefined. To address the disclosure reports his definitions were as follows:

> Typical – a mathematics tool and is a particular number that represents a group
>
> Group – not an assessment of the plant – it is derived from a group of construction activities
>
> Average – a likely number from a distribution of numbers
>
> Balanced market – is generally accepted as a first time derivative when at zero – equilibrium
>
> Deterministic – where a number is not subject to random chance
>
> Probabilistic – where a number is subject to random chance
>
> Monte Carlo – based on random number generation

[640] Dr. Thompson also submitted that he was a mathematical statistician, and as such he would look to the *CCRG* for guidance on how to calculate the project costs on a mathematical basis. Dr. Thompson's findings are that the *CCRG* permits two types of calculation. The first is the actual cost of the project, and the second is the "excess cost claims greater than typical". Dr. Thompson submitted that if one were on the left side of the ledger, and the other was on the right side, it would create confusion. He is looking for mathematical transparency as his guiding principle. Dr. Thompson opined that the actual costs are within the domain of the property owner, whereas excess costs from a group are within the domain of the assessor. However, both need to be transparent, and the need to review transparency is the responsibility of the assessor.

[641] Dr. Thompson's position is that section 1.000 of the *CCRG* is clear that the costs must be actual expenditures and section 2.500's words provide the basis for the mathematical calculation where:

> "normal" means numbers or amounts that represent a range – or within a group theory
>
> "typical" is more difficult as it represents a group
>
> "actual costs greater than typical" are costs that exceed actual (from section 1.000) if the grouping is greater than typical
>
> "excluded" are costs whose scope can only be confirmed by the assessor
>
> "costs" and example of costs are those not within a balanced market, albeit Dr. Thompson was unsure of what a balanced market would be.

[642] Dr. Thompson rebutted the Matthews report (Exhibit 14-C, page 26, para 82) where Mr. Matthews states that "A general factor by discipline was provided to estimate the loss in productivity included in the baseline budget". Dr. Thompson opined (Exhibit 25-R, page 9, para 14) that:

> There is a clear distinction in the objectives of the analysis undertaken by Mr. Iliev as presented in his five reports. Mr. Iliev was given instruction to consider the difference between labour costs at Fort Hills compared to labour costs in Edmonton [see Iliev paragraphs 5, 7 & 10]. Mr. Iliev does not determine the magnitude of abnormal labour costs at the Fort Hills site, but rather he presents the results of labour cost differences between two geographical locations. This result is not a labour cost that occurred at the Fort Hills site but a theoretical difference in labour costs that has zero reference to actual construction costs and is therefore of limited use to the assessor when undertaking the assessment. Further, the Board rejected the use of a project estimate as the baseline in labour productivity calculations for the Horizon & Kearl Lake projects.

D. Geographic – Edmonton Area Costs

[643] Dr. Thompson was advised in his working assumptions that there is no provision in the *CCRG* nor the *MGA* that allows for the EAA sought by Fort Hills. Dr. Thompson submitted that he is not the one who should be commenting on this and referred the Panel to other reports (Minard, Young, and Driscoll) as the authority for any adjustment based on geography.

[644] Dr. Thomspon adopted the position of Mr. Minard that "there are no known industrial property assessments in Alberta that have an Edmonton Adjustment." Dr. Thompson also stated that:

> Mr. Minard provides significant examples of Alberta industrial property assessments with no Edmonton adjustment. The Minard analysis demonstrates that Mr. Matthews' suggestion [paragraph 188] that the Edmonton adjustment is used in Alberta is incorrect. The PA knows of no industrial property assessment that contains an Edmonton adjustment [see the Minard report

paragraphs 30, 33, 34 & 35].

[645] Dr. Thompson noted that Mr. Matthews stated that the CNRL Horizon decision (CARB BO 001-2013) confirmed the productivity claim using the project budget as a baseline. Dr. Thompson submitted that this statement was an error, and his opinion was that the Assessor used actual costs rather than Mr. Otsu's model. Dr. Thompson also cited CARB BO 001-2014 (CNRL) which he explained was using the QAB as the baseline. Dr. Thompson submitted this was not accepted by the Panel, whereas the Panel accepted the values calculated by the Assessor using actual costs.

E. Reliable Numeric Process

[646] Dr. Thompson expressed concern that Fort Hills was using "mixed arithmetic" in its comparison of budget costs to actual. His opinion was that if one has a fixed number versus an actual number, it does not get to a specific number, it determines a range of numbers. Fort Hills is using fixed numbers and not the range of numbers which he would expect.

[647] Dr. Thompson also had concerns with Fort Hills estimates and lack of clarity on which probability level Fort Hills used to create its estimates.

[648] Given the lack of estimating clarity, Dr. Thompson stated that on labour productivity and design changes, there are three potential estimates: a detailed cost estimate, a detailed cost claim, and no detailed cost report which supports a cost claim. For example, Mr. Matthews had cost claims in his report (Exhibit 14-C, Appendix 6) that were based on information available for May 2022 costs, but the Complainant used information from SE from July 2021.

[649] Dr. Thompson provided numerous charts and diagrams. As a group, Dr. Thompson submitted, it is statistically incorrect to use an estimate where the probability of being met is 50% or even 70%. His example was that a forecast with a probability of 50% is right one out of two times; however, is also wrong one out of two times.

[650] Dr. Thompson addressed the inconsistency between Fort Hills reports. As examples:

i. In Mr. Otsu's report (Exhibit 16-C), Mr. Otsu indicated that the results of Mr. Iliev's work are as expected. Dr. Thompson's issue with Mr. Otsu's report was that there are two sets of calculations provided by Mr. Iliev in his July 2021 and May 2022 reports. The difference between the two is significant. Dr. Thompson stated that the Iliev report dated July 2021 was a basic element of the Joint Agreement between the PA and Suncor and the May 2022 report significantly changed the value from $641 million in July 2021 to $1.3 billion in May 22, without explanation. The July 2021 report proposed a geographical adjustment based on 21%, and the May 2022 report geographical adjustment was 33%.
ii. However, to further complicate this, in Mr. Matthews' report (Exhibit 14-C, Appendix 6), Mr. Matthews calculated the geographical adjustment at 19%.
iii. Dr. Thompson provided the SE project as a further example. He provided a comparison of SE productivity impact, where between July 2021 to May 2022 the amount increased from $193 million to $440 million (Exhibit 26-R page 12, para 24, Table 4.2.1) an increase of 228%. Dr. Thompson also provided a comparison of the variables used by Mr. Iliev (Exhibit 26-R page 12, para 25, Table 4.2.2), and those variables on average rose by 215%.

[651] Dr. Thompson noted that Mr. Iliev provided five reports on labour productivity, and there was a sixth area that was referred to by Mr. Matthews, for which no report from Mr. Iliev was submitted. The

area was Facilities and Common Services, to which Mr. Matthews submitted a claim of $76,956,437 was made, but for which there is no report from Mr. Iliev nor support within the Complainant's disclosure material.

[652] Dr. Thompson also reported that he had considerable difficulty in reconciling the amounts of labour productivity between the Matthews and Iliev Reports.

F. 2017 CARB Decisions

[653] Dr. Thompson stated that he reviewed material that was provided by the Respondent after his initial reports were concluded concerning the 2017 CARB Decisions. He submitted that he reviewed the assessor's working papers and determined the total appealed by Suncor was $1.666 Billion (Exhibit 43-Rv2, Table 4.1, page 12, para 28). The RMWB assessor accepted certain of those claims which totaled $757 Million; however, rejected five cost categories, all which were categorized as Edmonton Costs – Labour Availability, Craft Experience, Camp Stay vs Non-Camp, Longer Working Days, and Weather Impact. (Exhibit 43-Rv2, Table 4.2, page 13, para 29) Dr. Thompson acknowledged that the amount accepted did not entirely line up with what the Board ordered, however it was remarkably close. He stated that this supported that the 2017 CARB Decisions were not reduced because of applying an Edmonton area adjustment.

G. Summary

[654] Dr. Thompson summarized his findings in his sur-rebuttal (Exhibit 43-Rv2, pages 4 to 6, paras 3 and 4) as follows:

> 3. In the Fort Hills rebuttal reports it is stated that the 2017 CARB assessment decisions were based upon a reversal of the RMWB labour productivity calculations and that the assessments contained an Edmonton Adjustment. Now that this relationship has been declared by Fort Hills a focused reply to the Fort Hills labour productivity abnormal cost claims can be prepared.
>
> **2.1 The 2017 CARB Decisions:**
>
> 4. For the eleven Suncor properties subject to the CARB 2017 assessment complaints:
>
> a) It is stated in the Fort Hills rebuttal reports that the CARB assessment changes were a direct result of the reversal of labour productivity calculations undertaken by me for RMWB. The reverse engineering of the CARB decisions prove that that suggestion is correct for the Suncor properties, and I accept that result.
> b) The eleven Suncor properties that were the subject of the 2015/2016/2017 assessment complaints do not contain an Edmonton or mid-Alberta adjustments.
> c) All the Iliev labour productivity abnormal costs claims based upon a mid-Alberta comparison were rejected by the RMWB Assessor, see the Larry Horne & RMWB Technical Reports.
> d) The assessment changes made by the CARB in 2017 for the eleven Suncor properties were based upon labour productivity cost claims measured against the RMWB normal & typical benchmark,
> e) Labour productivity cost claims based upon an Edmonton or mid-Alberta benchmark were rejected by RMWB,
> f) Edmonton labour productivity adjustments did not form part of the Suncor/RMWB Settlement Agreements as per item a),
> g) RMWB prepared an assessment recommendation for the eleven Suncor properties

that rejected a mid-Alberta Adjustment for all eleven properties;
h) The RWMB assessment recommendation subsequently became a joint recommendation between RMWB & Suncor, see Horne, paragraph 4.

2.2 The Fort Hills Rebuttal Reports:

Labour Productivity and the Rebuttal Reports:

i) Fort Hills has provided significant quantities of actual labour productivity data in the rebuttal reports measured at the construction site by experienced constructors. This permitted the PA to 'approach' the measurement of actual labour productivity at Fort Hills against the RMWB normal baseline. More work is required on this topic.
j) The actual labour productivity presented by Fort Hills provides a mixed view of labour productivity at the Fort Hills construction site. For certain activities the reported labour productivity factors are greater than the RMWB normal baseline, indicating no abnormal costs.
k) The reported labour productivity factors show a steady decline [approximately 36%] as the project progressed, suggesting potential construction difficulties. This topic requires further work. This topic is discussed in section 9.2 of this report.
l) For certain construction activities the reported labour productivity factors appear to be less than the RMWB normal baseline, suggesting that abnormal construction costs may exist. A detailed review of the significant amount of data provided in the Fort Hills rebuttal report(s) has not been possible owing to the piecemeal manner in which Fort Hills has provided the source data and the limited response time permitted by this Board.

Labour Productivity the Original Approach:

m) Fort Hills has measured abnormal construction costs using job tenure and commuting times, etc. data derived from various geographical locations, in mathematics this is known as a "proxy variable substitutions" and is an unnecessary complication when actual data is available.
n) The identical form of proxy variable substitution was used by Mr. Iliev on the eleven Suncor properties in 2017 and that form of analysis was rejected by Mr. Horne the RWMB appointed Assessor.
o) It is incorrect to use proxy substitutions when analyzing abnormal costs when actual site-specific labour productivity factors are available, see above.
p) Actual labour productivity factors derived from site-specific construction activities should be used to measure labour productivity abnormal costs at Fort Hills using the RMWB normal baseline.
q) Actual labour productivity factors derived from site-specific construction activities are complex when measured against the RMWB normal labour productivity factors. The mid-Alberta baseline issue is unnecessary and complicates the analysis.
r) Labour productivity abnormal costs do not exist for the Fort Hills project when the reported labour productivity factors are greater than the RMWB normal baseline.
s) All RMWB reports listed as exhibits at the 2017 CARB hearing rejected all abnormal labour productivity cost claims measured against a mid-Alberta Adjustment.
t) All cost claims measured against an Edmonton Adjustment were rejected by the RMWB assessor.

u) The eleven Suncor properties that were the subject of the 2107 assessment complaints did not contain an Edmonton Adjustment.

2.3 The Project Estimate:

v) Oil & gas projects in RMWB have demonstrated significant cost overruns. Average cost overruns for major projects are about 97% over the project estimate.
w) The Fort Hills internal project estimate is not sufficiently accurate to use as a benchmark for the measurement of abnormal assessment costs.
x) Fort Hills has not provided measurements regarding the accuracy of the internal project estimate.
y) Using the Fort Hills internal project estimate results in erroneous abnormal cost calculations.

2.4 The CARB Hearings

z) Thompson was not involved in the presentation of evidence at the 2017 CARB assessment complaint hearings as suggested by Suncor.
aa) The RMWB reports prepared and listed exhibits to the 2017 CARB assessment complaint hearings demonstrate that a mid-Alberta adjustment is inconsistent with the CCRG.
bb) The evidence listed as exhibits in the 2017 CARB assessment complaint hearing demonstrated that the correct benchmark for the measurement of abnormal costs was the RMWB normal & typical condition or baseline.
cc) The 2017 RMWB Technical Team Suncor Report demonstrated that the use of a mid-Alberta adjustment was incorrect, and all abnormal costs based upon an Edmonton Adjustment were rejected by the Assessor.
dd) The data presented in the RMWB 2017 CARB reports are clear that a mid-Alberta adjustment is incorrect in the manner in which Fort Hills has applied the benchmark to construction costs.
ee) A review of the final RWMB technical report at this assessment hearing will demonstrate the limitations in the Fort Hills approach to labour productivity analysis.

SECTION 7 - INTERIM DECISION and DIRECTION TO THE PARTIES

[655] A summary of the Panel's resolution of the issues identified is presented below:

Issue #1 – For the PCNs where the parties were able to reach agreement, the Panel accepts the Parties' joint recommendation.

Issue #2 – The EAA adjustment should be considered as appropriate.

Issue #3 – The Panel determined that abnormal costs are costs that are not contemplated in the sanctioned budget. Abnormal costs are specifically outlined in the *CCRG Interpretive Guide*. The Panel finds that the Complainant's methodology of using the sanctioned budget and PCNs to identify excluded/included costs is appropriate.

The Panel also determined that the variance between total actual costs and the sanctioned budget is reconciled by the Complainant's PCNs. This determination is further expanded to find that where PCNs reflect non-scope changes, the associated costs are abnormal. Where the change in scope adds to the project and as a result scope changes are involved, those associated costs are assessable.
The Panel determined that scope and non-scope changes were defined by the Complainant, and the Panel adopts those definitions (paragraph 59, and Exhibit 3-C, page 5, para 17). For ease of reference, these are reproduced below:

> 17. Types of Project Changes include Scope Change PCNs, Non-Scope Change PCNs and Budget Transfer PCNs. Each of these three types of Project Changes are outlined below:
>
> *a.* Scope Change PCN is defined as a change in any item of work that materially alters the layout, specification process, configuration, capacity, quality, or execution strategy of a project. Scope changes represent significant alterations to the project plans not considered or funded within the approved project budget. All scope changes are subject to the PMoC ("Project Management of Change") process. Examples of what might be evaluated as a Scope Change PCN include:
>
> i. addition or deletion of a process unit or facility;
> ii. modifications to process equipment, piping to increase or restrict plant through-put;
> iii. design changes resulting from changing feedstock composition or product specifications;
> iv. impact of scheduling compression or extension for Owner's commercial reasons including, for example, changing market conditions; and
> v. changing the technology upon which the EDS design was based (i.e., replace one process unit with another of newer technology).
>
> b. Non-scope Change PCN is defined as project changes that are not considered to be a Scope Change PCN as defined above. Non-scope PCNs will be used for all other changes which impact cost, schedule, quantities, and workforce hours. Examples of what might be evaluated as a Non-scope Change PCN include:
>
> i. productivity increase or decrease for either of construction or engineering;
> ii. bulk material or equipment cost increases or decreases from forecasts as a result of circumstances that are outside of the deemed tolerance for the current budget; and
> iii. rework, schedule delays, design development beyond design allowances, wage rates, labour turnover, and commodity pricing for defined scope.
>
> *c.* Budget transfer PCN is defined as a transfer of both scope and budget. An approved budget transfer within a project would have a zero dollar net impact. An approved budget transfer between projects or areas would require a change to be initiated in each area.

Direction of the Panel

[656] The Panel determined it is not able to provide specific directions for each individual PCN. The Parties are directed to pursue further discussion to determine the PCN abnormal cost claims in light of the Panel's decision on the issues referenced above and the following comments, which may assist the Parties in their discussion:

a. Costs that were not or could not have been anticipated in the sanctioned budget (and QAB budget for SE) should be considered to be abnormal excluded costs.

b. Scheduling was a significant issue, and in many instances the events referred to as "black swan events" created scheduling issues where being "out of cycle" created a snowball effect to the project and created construction issues. Many of these events required work that was originally scheduled for the summer months to be rescheduled to winter months, where inherently the weather conditions are less favorable. Abnormal excluded costs could not reasonably have been foreseen, and those events created direct or indirect costs from those black swan events.

   Examples of the events include:

   i. The 2016 Fort McMurray wildfire;
   ii. The dismissal of the SE project engineers;
   iii. The dismissal of certain contractor for safety and performance issues; and
   iv. The looming bankruptcy, resulting in the replacement of a significant contractor.

c. The Complainant's inclusion of reductions for contingencies (5% for certain labour projects and 1% for certain engineering costs) is not supported by legislation nor actual expenditures, and those contingencies should not be considered as abnormal costs; and

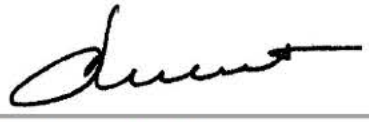
d. The costs associated with the SE which were identified by Mr. Pavathaneni and Ms. Ghosal in the amount of $272,388,870, are estimated costs which in their opinion were the result of improper engineering. This claim is rejected by the Panel. While re-engineering might have reduced costs, the actual costs were based on the engineering used for the project.

[657] The Panel directs the Parties to collaboratively review and analyze outstanding issues in light of the Panel's determination and direction and return the summary to the Panel. In the event the Parties are unable to agree on a specific PCN or group of PCNs, they are to provide their detailed written position, supported with relevant legislation and legal precedent with respect to the specific PCN or group of PCNs. The Panel will not accept a submission of "insufficient information". The summary and any submissions as to specific PCNs that may be required are to be provided to the Tribunal no later than 10 weeks from the date of the decision. The Panel will then review the submissions and render its final decision.

[658] The Panel remains seized of this matter.

Dated at the City of Chestermere in the Province of Alberta this 21st day of March, 2024.

LAND AND PROPERTY RIGHTS TRIBUNAL



D. Roberts, Member

APPENDIX "A"

PRELIMINARY AND PROCEDURAL MATTERS DURING THE MERIT HEARING

ISSUE #1– In its Sur-sur-rebuttal Brief (Exhibit 47-C) filed on July 14, 2023, the Complainant Requested Relief in the Sur-rebuttal filed by the Respondent.

Issue

[1] In its Sur-Sur-Rebuttal Brief (Exhibit 47-C) filed on July 14, 2023, the Complainant requested the following relief concerning sur-rebuttal evidence filed by the Respondent:

a. The response from Dr. Thompson regarding estimates and historic articles and reports be struck because the sur-sur-rebuttal is not proper rebuttal, it is case-splitting.

b. Evidentiary filings referring to the 2017 CARB Orders between the Regional Municipality of Wood Buffalo (RMWB) and a number of property owners, be struck as irrelevant and improper sur-rebuttal, case splitting, and hearsay.

c. Costs against the Provincial Assessor.

Decision

[2] The Panel decision is as follows:

a. The Panel declines to strike the evidence of Dr. Thompson.

b. The Panel notes the reference to RMWB in Exhibit 47-C is referred to in the Respondent's brief. The Panel declines to strike the RMWB evidentiary filings pre-settlement (leading to the 2017 CARB Decisions) by the Respondent.

c. Costs were not addressed by the Parties and any cost issues should be addressed either in closing argument, or by submissions post-merit hearing, as may be determined by the Panel.

[3] The Panel also advises that it relied on Exhibit 43-R v.2 which was filed subsequent to the original filing (Exhibit 47-R v.1). The Panel notes the Respondent's advice that v.2 excluded Appendix D as well as many pages within Appendix F. While the revised document was filed past the deadline imposed by the Panel, the Exhibit was reduced from 849 pages to 123 pages as a result. The revision simply deleted unnecessary pages and does not prejudice the Complainant.

Party Positions

Complainant's Position

[4] The Complainant's position was outlined in Exhibit 47-C. The Complainant argued that the sur-rebuttal amounted to approximately 1,500 pages (Dr. Thompson 43R v1. – 849 pages and Mr. Minard 42-R – 682 pages) and the Complainant had inadequate time to respond to the sur-rebuttal. Much of the information was concerning the time frame from 2000-2015 and the Complainant lacked the time to adequately analyze anything from 2014 and, in the Complainant's opinion, the date was unnecessary, not relevant, and unfair.

[5] It was its position that Dr. Thompson's evidence strays into advocacy, and large portions of Dr. Thompson's evidence (Exhibit 43-R) "is inappropriate, irrelevant, case splitting, hearsay and beyond the role of an expert".

[6] The Complainant also submitted that the Respondent's position was that there was urgency for the Panel to make its decision prior to Dr. Thompson providing his evidence.

[7] The Complainant also cited the *Matters Relating to Asset Complaints Regulation* ("*MRAC*") on the provision for the Complainant to provide its disclosure, the Respondent to respond to the disclosure and the Complainant to provide rebuttal disclosure. The position of the Complainant is that there are circumstances where the Panel may permit sur-rebuttal disclosure from the Respondent, and in doing so allows sur-sur-rebuttal disclosure from the Complainant. In this matter, the Complainant argued that the sur-rebuttal disclosure of Dr. Thompson was beyond the scope of proper rebuttal.

[8] In respect to "case splitting," the Complainant argued that the Respondent was attempting to split the case. The Complainant submits this is an attack on the Complainant using an Edmonton area adjustment in its submissions, and that it is a revisitation of the 2017 reinstatement of a number of assessments rendered by RMWB. The Complainant submits that the Respondent is attempting to evolve or change its position, and that should not be permitted as it is unfair and improper sur-rebuttal evidence.

[9] In respect to the Edmonton area adjustment, the Complainant submitted that the Respondent had ample time to present its argument in its original disclosure.

[10] The Complainant also submitted that the Respondent has entered into three "fictions" in its sur-rebuttal:

1) that the Respondent did not know that the changes in the 2017 settlement agreements (2017 CARB Orders) would be an issue;
2) the notion that Dr. Thompson forecast what would be required of him in sur-rebuttal based on the January 2023 filing of his disclosure; and
3) somehow the Complainant ought to have known the Respondent's theory that costs could not be benchmarked against estimated costs to determine excluded cost adjustments.

[11] For the Respondent to submit its argument in sur-rebuttal only allowed the Complainant two days to respond and thereby denies the Complainant natural justice.

[12] Additionally, the Complainant submitted that Dr. Thompson gave evidence that he located documents that pertain to the reinstatement of assessments (2017 CARB Orders). The Complainant submitted the information was available at the time Dr. Thompson filed his original disclosure (Exhibits 24-R, 25-R and 26-R), and filing it in sur-rebuttal is akin to an "ambush" when the Complainant has only two days to file its sur-sur-rebuttal. In addition, the Complainant argued that Dr. Thompson has filed considerable evidence that misstates and misunderstands the 2017 reinstatement of assessments. The information Dr. Thompson has filed does not reflect the actual 2017 reinstatement assessments and it is a mistake to suggest that Dr. Thompson's work is correlated to the reinstatement. There is no evidence that Dr. Thompson was involved in the settlement agreements; therefore, his testimony is speculation.

[13] The Complainant relies on ***Halford v Seed Hawk Inc., 2003 FCT 141*** as well as ***Noco Company, Inc. v Guangzhou Unique Electronics Co. Ltd, 2023 FC 208,*** at paras 15-16 and para 31, respectively, which suggested four key principles governing the admissibility of rebuttal evidence:

1. Evidence which is simply confirmatory of evidence already before the Court is not to be allowed.
2. Evidence which is directed to a matter raised for the first time in cross-examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
4. Evidence which is excluded because it should have been led as part of the plaintiff's case in chief will be examined to determine if it should be admitted in the exercise of the Court's discretion.

[14] In addition, the Federal Court in ***T-Rex Property AB v Pattison Outdoor Advertising Limited Partnership, 2022 FC 1008*** opined that "a party cannot present some evidence, wait to hear the other side's evidence and then respond with additional evidence to account for weaknesses identified by another expert". This decision also noted fairness should limit the scope of rebuttal and there simply cannot be "[an] endless alternation between parties in adducing evidence".

[15] ***Signalta Resources Limited v Canadian Natural Resources Limited, ABKB904*** determined that "The purpose of the expert report process is to encourage meaningful pre-trial disclosure and help focus the issues." The Complainant submitted that the limited time in which it had to respond to Dr. Thompson's sur-rebuttal did not put the issues into focus.

[16] In ***Janssen Inc. v Teva Canada Limited, FC 1309*** at para14 and ***Amgen Canada Inc v Apotex Inc., 2016 FCA 121*** at para 12, the decisions have the effect of creating "an unending alternation of successive fragments of the case coming forward." The Complainant's position is that the evidence of Dr. Thompson is speculative since the Respondent has not brought forward anyone involved in the resolution, other than through Dr. Thompson's report, such that the evidence is hearsay. The Complainant argued that Mr. Matthews has put forward Suncor's position. Accordingly, allowing Dr. Thompson's evidence will simply prolong the hearing.

[17] In a brief filed April 21, 2023, the Complainant cited ***White Burgess Langille Inman v Abbott and Haliburton Co., 2015 SCC 23*** as requiring five requirements to be met to satisfy allowing expert evidence. This was further supported by ***Nia Wine Group Co. Ltd. v North 42 Degrees Estate Winery Inc., 2022 FC 241*** at para 32 as those requirements being:

a) The evidence is logically relevant;
b) The evidence is necessary to assist the trier of fact;

c) There exists no other exclusionary rule;
d) The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfill the duty to the court to provide evidence that is impartial, independent and unbiased; and
e) For opinions based on novel or uncontested science or science used for a novel purpose, that the underlying science must be reliable for that purpose.

[18] The Complainant submitted that sur-rebuttal evidence of the Respondent, and specifically Dr. Thompson, is not relevant to this matter. Dr. Thompson was "qualified as an expert in mechanical engineering with expertise in project planning/project engineering and numerical modeling" (Exhibit P18R) and he has exceeded his scope in referring to the testimony of Messrs. Matthews, Fluney, Iliev and Otsu. The assertion is based on a decision referred to as ***Kon Construction Ltd. v Terranova Developments Ltd., 2015 ABCA 249*** at para 36 which states "Courts have held that external witnesses cannot be permitted to give an opinion which requires specialized expertise," of which the Complainant argues Dr. Thompson lacks.

[19] The Complainant further submitted that Dr. Thompson has taken on the role of an advocate in assessment matters for which he has no expertise. The Complainant suggested that any evidence related to assessment matters should be disregarded.

[20] The Complainant concluded as follows:

> 29. The following relief is sought:
>
> a. The voluminous response from Dr. Thompson regarding estimates and historic articles and reports be struck as this is pure case-splitting and available at the outset and only provided 2 days before the hearing was to commence. As such it is not proper sur-rebuttal.
>
> b. The foray into evidentiary filings pre-settlement by RMWB to be struck as irrelevant and improper sur-rebuttal, case splitting and hearsay.
>
> c. Costs against the Provincial Assessor.

Respondent's Position

[21] The Respondent filed its brief in response to the Complainant (Exhibit 61-R).

[22] The Respondent confirmed that the sur-rebuttal of Dr. Thompson (Exhibit 43-R v1) was filed on July 12, 2023, which was the final date prescribed by the Panel. After filing the brief, it was determined by the Respondent that Appendix D in the original report was filed in error and that Appendix F contained an entire publication, rather than the specific article the Respondent referred to. The Respondent then filed an amended sur-rebuttal (47-R v2) on July 13, 2023. There were no other changes to the sur-rebuttal document of Dr. Thompson. Thus, the Respondent opined that there was no prejudice to the Complainant.

[23] The Respondent's position was that the sur-rebuttal was allowed by the Panel, in response to its submission with respect to its request to exclude the Complainant's rebuttal disclosure. The Panel rejected the request to exclude the rebuttal disclosure; however, permitted sur-rebuttal to be filed by July 12, 2023, and if desired by the Complainant for it to file sur-sur-rebuttal by July 14, 2023 (***Tribunal Order LPRT2023/MG0389*** at paras. 20-21).

[24] The Respondent's position is also that the issues originally raised at the time of the complaint have evolved and are no longer the same issues.

[25] The Respondent noted that ***Elgert v Home Hardware Stores Limited, 2010 ABKB 66*** at paras. 23-25 cited the following:

> [23] In ***Edmonton (City) v. Westinghouse Canada Inc***. 2000 Carswell Alta 211 (C.A.), McClung JA., writing for the majority of the court said with respect to this discretion generally:
>
> Trial Judges have a wide discretion in making evidentiary rulings and their discretion ought to be interfered with only in the case of an error in principle or a palpable and overriding error... .
>
> [24] Fraser C.J.A., writing a dissenting judgment in the case, said further:
>
> . . .I am well aware of the considerable discretion afforded to Trial Judges to decide whether it is appropriate to permit rebuttal evidence to be called... .
>
> [25] In the motor vehicle accident case of Gartner v, 520631 Alberta Ltd., [2005] A.J. No. 194 (Q.B.), my colleague Germain J. reviewed the law regarding reply evidence and commented:
>
> The rules surrounding reply evidence are not written in stone. Even historically, some judicial discretion did exist in this area: B. F. Goodrich Canada Ltd. v. Mann's Garage Ltd. (1959), 21 D.L.R. (2d) 33 (N.B.Q.B.).. . .
>
> The rules of evidence, including those relating to reply evidence, were once strictly and rigorously applied, often with inappropriate and unexpected results. This, in turn, led to exceptions to the rules, and exceptions to the exceptions: R. v. Graat, [1982] 2 S.C.R. 819 at 835.
>
> Gratt is heralded as the starting point for the new, more principled, approach to evidence, which I apply in this case. An underlying theme in R. v. Mohan, [1994] 2 S.C.R. 9, is that relevant evidence that should be admitted will be admitted.
>
> **There is now an over-arching concern for fairness in admissibility. Courts must look to the relevance or the importance of the evidence on a case specific basis. This is often referred to as the contextual approach. If the probative value of the evidence outweighs any risk associated with its admission, the evidence generally will be admitted. In many cases, the risk is reliability of the evidence. In the case of reply evidence, it is the risk of unwarranted trial delay, or adjudicative unfairness.**
>
> This approach to reply evidence does not depend on whether the evidence to which a party wishes to reply is elicited in-chief or by cross-examination. If it is relevant and will assist the court in discovering the truth, latitude should be given in terms of its admission rather than forcing counsel to torture their way through the many exceptions and exclusions to the traditional rules of reply evidence.[emphasis added by Respondent].

[26] The Respondent submitted the foregoing promotes what the interests of natural justice are, which in its opinion is to ensure that the relevant information is before the Panel. Not to do so would be procedurally unfair.

[27] The Respondent noted that while the Complainant now advises it has been prejudiced it its ability to respond in two days, it was clearly identified by the Complainant that it only required a "couple days" prior to the hearing scheduled to commence on July 18, 2023 to respond to sur-rebuttal. Accordingly, the Panel provided the two days the Complainant suggested. The Respondent submitted that the Complainant ought to have known the scope of the material the Respondent intended to file and as a result cannot now claim about the lack of time to review and respond, which was based on its submission to the Panel.

[28] The Respondent noted that the Tribunal is not bound by the Rules of Evidence established by the Courts (***LPRT Act s 10(1)***). In the Complainant's submission to the LPRT in May 2023, the Complainant submitted the need for the LPRT to consider the interests of natural justice, rather than applying a set of rigid rules. The Respondent argued that "Rebuttal evidence (and Sur-rebuttal if necessary) should be admitted in a manner that allows the parties to hear and respond to the full submissions of the other on issues relevant to the Tribunal" citing ***Davidson v Patten, 2003 ABQB 996*** at paras. 7 and 9.

[29] At the time of the May 2023 hearing, the Complainant submitted the following test concerning the admissibility of the Complainant's rebuttal disclosure:

a. Does the evidence relate to the Respondent's evidence?

b. Is the evidence a fair response to the position advocated by the Assessor?

c. Given the content of the Rebuttal, the position of the Provincial Assessor to request additional backup in its filings, and where the Assessor has rejected the claim based on 5 or 6 "categories" that require Panel direction, is it fair Rebuttal?

d. Is the Rebuttal merely reinforcing the same evidence.

[30] The Respondent submitted that a similar test should apply to Dr. Thompson's sur-rebuttal:

a. Does the evidence relate to the Complainant's Rebuttal?

b. Is the evidence a fair response to the position advocated by the Complainant?

c. Given the content of the Sur-rebuttal, the position of the Complainant to rely on the 2017 CARB Board Orders but fail to outline the specific details underlying the 2017 CARB Board Orders, and the new information contained in the Complainant's rebuttal materials, is it fair Sur-rebuttal?

d. Is the Sur-rebuttal merely reinforcing the same evidence provided in chief? Or is the Sur-Rebuttal responding to the position of the Complainant in Rebuttal?

The Respondent submitted that if the test is followed, the Panel should admit the sur-rebuttal disclosure.

[31] The Respondent also addressed the Complainant's assertion of case-splitting. The Respondent submitted that the onus or proof lies with the Complainant. Therefore, when the Complainant provides new evidence in its rebuttal the Respondent must be afforded an opportunity to respond. The Respondent's obligation is to respond to the evidence put forward by the Complainant.

[32] The Respondent addressed the Complainant's evidence in its original disclosure. The Respondent submitted the Complainant then expanded the scope of its evidence in its rebuttal. Thus, in sur-rebuttal the Respondent must be provided the opportunity to respond. The Respondent submitted that if the Complainant argues that the Respondent is case-splitting, it is only in response to the Complainant admitting to case-splitting in its rebuttal. The Respondent submitted it is not changing its position; it is merely responding to the evidence put forth by the Complainant. The Respondent also submitted that the evidence it has entered was not raised in its initial disclosure because the Complainant only raised it in rebuttal.

[33] The Respondent also submitted that the Complainant presented new evidence that was not in its initial disclosure. Notably, there were few details in respect of the 2017 CARB Board Order calculations. The Complainant then relied on its evidence that the agreements restored the Edmonton area adjustment. In the preliminary matter on June 28, 2022, the Complainant cited at para 48:

> 48. The response suggests that because the Complainant cited multiple prior CARB decisions involving RMWB on the Edmonton area basis for productivity, that the Provincial Assessor requires "a detailed understanding of the basis of the decisions". **This is not the case. Fort Hills does not believe the details of the assessments of other facilities needs to be examined in great length by the Provincial Assessor, nor evidence be provided related to same. Fort Hills cites only on the public decisions rendered by the Tribunal, and its own experience.** [Emphasis added by Respondent] This does not require the Provincial Assessor to undertake a detailed historic analysis of all other assessments.

[34] Notwithstanding the position identified above, the Complainant provided additional calculations in its rebuttal to provide additional context to its position. In response to the Complainant's position, Dr. Thompson's sur-rebuttal disclosure (Exhibit 43-R) indicated the following:

> a. Mr. Matthews presents material about the labour productivity cost claims for 11 Suncor properties in paragraph 23. The numbers presented in column 3 appear to be consistent with the labour productivity analysis undertaken by RWMB and presented in part in Appendix 2. However, the LP costs are not the same as the numbers presented in paragraph 75, the costs are different by approximately $200 million. This creates uncertainty. Further, the numbers presented in paragraphs 23 & 75 are different to the costs shown in paragraph 198 of Mr. Matthews' original report. The summary number shown in paragraph 198 are derived from the CARB decisions. In other words, Mr. Matthews' analysis includes various and different LP costs as the purported basis for the 2017 CARB decisions. As a result, that comparison is not as simple to interpret as Mr. Matthews suggests. In particular, the analysis [suggests/indicates] that LP adjustments applied in the 2017 CARB decisions are not solely restricted to abnormal labour productivity costs.
>
> b. The labour productivity costs presented in paragraph 75 [of the Matthews Sur-rebuttal Report] represents new material and as indicated above are different from the CARB decisions.
>
> c. Appendix 2 [of the Matthews Sur-rebuttal Report] references reports, and statistical analysis derived from work undertaken by RMWB on labour productivity when measured against normal or typical conditions in RMWB and not measured against mid-Alberta, as suggested by the Fort Hills team. The material presented by Mr. Matthews in this appendix is based upon substantial work completed by RMWB in 2014. The material listed in Appendix 2 is not the complete RMWB report, it summarizes certain properties only thereby providing a limited view.

d. Significant reference is made to work undertaken by RMWB pre-2017 and how site-specific labour productivity was measured against normal or typical labour productivity in RMWB. Mr. Iliev tends to suggest that the material presented in the RMWB reports has been rejected, this will need to be reviewed for application to the Fort Hills Assessment Complaint. This suggestion appears to be inconsistent with new material presented in Mr. Matthews rebuttal report.

e. In paragraph 69 Mr. Iliev states, "I undertook my own analysis to determine if the productivity loss claimed was supportable and filed reports with respect to same. These were filed with the RMWB CARB for Dr. Thompson to review. In each case I concluded both aspects of the productivity loss was supported and, in several instances, I identified losses greater than those claimed. I did not have to testify as ultimately all Edmonton based productivity adjustment made based upon Dr. Thompson's analysis were reversed and the productivity claims reinstated."

f. Paragraph 3 d introduces a new topic, not contained in Mr. Iliev's first Report in terms of the Suncor 11 Assessment Complaints that were investigated in 2017. Further, the concept of average is new to this Rebuttal.

g. Paragraph 10 provides a new description of the Suncor approach to cost analysis, and the relationship presented is not mathematically sound.

h. In paragraph 12 a new concept is introduced that is inconsistent with statements and relationships made in paragraph 10: the term 'average' is now introduced into the measurement of Fort Hills abnormal costs. This is new material and introduces a new measurement matrix that has not been suggested in the original Fort Hills Reports. The Fort Hills team has suggested the use of a mid-Alberta baseline but never the concept of an average value.

i. Mr. Iliev introduces the concept of probabilistic estimate in paragraph 39 in which estimate spread is newly introduced. In the original reports by Mr. Iliev, Matthews, and Otsu this topic is ignored and the collective reasoning with respect to a project estimate is based upon deterministic mathematics and that is inconsistent with the best working practices of a qualified capital cost estimator or AACE. This is a major new area introduced by Mr. Iliev. This is echoed in paragraph 40 and 41 and 42.

j. In the Fluney Rebuttal Report new material is presented in terms of the Schofield Agreements, and examples of suggested locations where Edmonton adjustments assessments exist. Those issues were directly raised in Fort Hill's initial Disclosure and this new evidence is clearly intended to supplement the evidence previously provided.

k. It is being suggested in the Fort Hills Technical Rebuttal Reports and the Rebuttal Legal Brief that the Schofield Settlement Agreements ["SSA"] are based upon work undertaken by RMWB and that I have knowledge of such work. This was never suggested in the Fort Hills original Assessment Complaint documents.

[35] As a result of the foregoing, the Respondent submitted that Dr. Thompson's report directly responds to the following topics raised by the Complainant:

a. the 2017 CARB Decisions;

b. the Fort Hills Rebuttal Reports re: labour productivity;

c. the project estimate; and

d. the CARB hearings.

[36] The Respondent also submitted that the Complainant had adequate indication as to what would be included in a sur-rebuttal report. The sur-rebuttal of Dr. Thompson is exactly what he indicated would be required and should not be a surprise to the Complainant. The witness report of Dr. Thompson, dated May 12, 2023 (Preliminary Hearing Exhibit P5R), included the following references of additional evidence he proposed to provide.

> a. All CARB decisions listed by Mr. Matthews that form the central core of the Schofield Agreements will need to be reviewed in terms of resultant adjustments for: a) abnormal labour productivity costs, and b) other non-labour adjustments.
>
> b. The labour productivity costs presented in paragraph 75 represents new material and as indicated above are different from the CARB decisions. This is new material and source documentation will need to be reviewed.
>
> c. This body of work undertaken by RMWB between 2014 and 2017 will need to be reviewed within the context of the Fort Hill Assessment Complaint.
>
> d. If, however, Mr. Iliev wishes to pursue this line of analysis then all relevant reports derived from the Suncor 2015 to 2017 Assessment Complaints must be submitted for review. This will take time. The suggestion that the, "… Thompson's analysis were reversed. …" is a new topic to me and as such must be reviewed based upon material contained within the Iliev Rebuttal Reports as presented to this Board. See my comments about the Schofield Settlement Agreements, presented below.
>
> e. Paragraph 3 d introduces a new topic, not contained in Mr. Iliev's first report in terms of the Suncor 11 Assessment Complaints that were investigated in 2017. Further, the concept of average is new to this Rebuttal. The amount of work undertaken by RMWB on these Suncor Complaints was substantial and a review of that material will be presented in the Sur-rebuttal, if permitted.
>
> f. The material presented in section 3.5 Sanction Estimate and Estimate Budgeting is not a response to material presented in my Report and will need to be reviewed and the results presented in the Sur-rebuttal.
>
> g. In the Fluney Rebuttal Report new material is presented in terms of the Schofield Agreements, and examples of suggested locations where Edmonton Adjustments Assessments exist. Those issues were directly raised in Fort Hill's initial Disclosure and this new evidence is clearly intended to supplement the evidence previously provided. If this supplemental Rebuttal Evidence is admitted, the time to investigate and respond to this new material will be undertaken in parallel with the Matthews and Iliev responses.
>
> h. This new issue is expanded in the Rebuttal Legal Brief that will need to be researched and a proper response prepared. It is suggested in the reports that I have prior knowledge of the contents of the Schofield Agreements, this topic is echoed by Mr. Iliev. I had no part in the Schofield Agreements. I was not working for RMWB when these Agreements and subsequent Board decisions were issued. The background and contents of the Schofield Settlement Agreements are unknown, and more information is required to measure the impact on the Fort Hills Assessment. I should be afforded an opportunity to provide a fulsome sur-rebuttal in respect to these assertions regarding my personal knowledge of, or involvement in, the Schofield Agreements.

[37] In response to the Complainant's assertion that Dr. Thompson's evidence falls outside his area of expertise, the Respondent opined that Dr. Thompson's expertise was required to review the underlying calculations that resulted in the joint recommendation referred to as the 2017 CARB Board Orders.

[38] Additionally, the Complainant had said it would provide evidence to support its claim that the assessments were amended as a result of the Edmonton area factor; and challenged the Respondent to obtain the information. Now that the Respondent has challenged it, the Complainant objects.

[39] The Respondent also spoke concerning the prolonging of the hearing unnecessarily. At this juncture (August 22, 2023) the Respondent has had three days of witness testimony, whereas the Complainant has had five weeks. The Respondent has only two witnesses remaining, and it appears that of the total time presently allocated for the hearing, the Respondent will only have used one third of the time allotted. The Complainant's case has expanded over the course of the five weeks and any curtailment of the Respondent's case would be unfair.

[40] The Respondent also commented on the Complainant's Final Legal Brief (Exhibit 40-C). The Complainant submitted that:

> 66. It was also available to the Assessor to call witnesses who were parties to the joint recommendations and settlement agreements to counter the evidence put forth by the Complainant's witness reports. The Assessor has apparently made no efforts to do so. An adverse inference should be found as against the Assessor as a result.

As a housekeeping matter, the Intervenor submitted that efforts were made to call witnesses; however, due to the scope of confidentiality agreements witnesses were not available.

[41] The Respondent concluded the following:

> 28. The Thompson Sur-Rebuttal Report responds directly to the new evidence presented in the Rebuttal Reports of the Complainant. The Respondent must be provided with an opportunity to respond to this new information from the Complainant. The Complainant had an opportunity to present its full case in its initial disclosure, which would have allowed the Respondent to reply fully in January 2023. Instead, the Complainant disclosed new details in its Rebuttal Materials that the Respondent had to respond to in order to provide the Board with a balanced perspective. The Thompson Sur-Rebuttal Report must be admitted into evidence to ensure a fair hearing to the Respondent.

Intervenor's Position

[42] The Intervenor filed a letter dated August 21, 2023 with LPRT Administration which was entered as Exhibit 62-I.

[43] The Intervenor's position was that it supports the Respondent's position and that four points should be addressed.

[44] First, the Intervenor supports the Respondent that sur-rebuttal materials should not be struck.

[45] Second, was the request appropriate and fair? It was the Intervenor's position that while the Complainant's position was that the sur-rebuttal was unfair, both Complainant and Respondent issues can be addressed in rebuttal or cross-examinations on the sur-rebuttals.

[46] Third, is there proportionate evidence on the changes in the Complainant's argument and its introduction of further new evidence, especially regarding the 2017 Board Orders? The Intervenor opined that there has been a continuous change in the Complainant's argument which could be resolved; however, Suncor was the party to the agreements with the RMWB, and Suncor has thus far refused to release the agreements based on confidentiality matters. The Complainant chose to expand its argument on its own volition. It is attempting to tell the outcome without having to provide the argument behind it. The Intervenor's position was, and continues to be, that it is not opposed to releasing copies of the settlement agreement; however, it needed to be ordered to produce the documents. To the extent that the Respondent has located copies of public documents reported to pertain to the 2017 CARB Orders is not of concern to the Intervenor.

[47] Fourth, in terms of expert witness testimony, the Intervenor submits that if experts are properly qualified, they should be permitted to provide opinion evidence, whereas fact witnesses do not have that ability. Both Dr. Thompson and Mr. Minard have been qualified as expert witnesses and need not reply by way of sur-rebuttal but could qualify this evidence in oral testimony.

[48] The Intervenor also noted the Complainant's submission that it would only require two days to respond to the sur-rebuttal. To now complain of a lack of time is without basis.

Reasons for Decision and Findings

[49] The Panel will rely on the revised version of Exhibit 43-R (Exhibit 43-Rv2). The Panel is satisfied that the deletions shorten the document and were not necessary in the original filing. The filing of the replacement document was done on the morning of the date after which disclosure was required, and as a result the Panel finds the Complainant was not prejudiced by the removal of the pages.

[50] Between May 23-26, 2023, a Preliminary Matter was heard on the Respondent's request that the Panel exclude the Complainant's Rebuttal Disclosure or, in the alternative, that the Panel allow the rebuttal disclosure and postpone the scheduled merit hearing for at least six months to allow sufficient time for the Respondent to prepare and file sur-rebuttal. In a written decision issued by letter dated June 7, 2023, which was followed by ***Board Order LPRT2023/MG389*** dated July 17, 2023, the Panel declined to strike the Complainant's rebuttal disclosure, and directed that sur-rebuttal from the Respondent could be filed prior to July 12, 2023 and sur-sur-rebuttal could be filed by the Complainant by July 14, 2023.

[51] At that hearing, the Complainant had no objection to the filing of the sur-rebuttal by the Respondent, it suggested it would only require two days to file sur-rebuttal. The Panel finds that it was the Complainant who advised the Panel it could file its response within two days. To now suggest that is unfair given the alleged volume of the sur-rebuttal is without merit.

[52] The Respondent provided ample advice that if a sur-rebuttal was to be filed, what the information was that Dr. Thompson intended to address (witness report of Dr. Thomspon dated May 12, 2023 (Preliminary Hearing Exhibit P5R)). The Panel finds that the Complainant's submission that it was "ambushed" is not correct as the Respondent clearly identified what Dr. Thompson intended to include in his sur-rebuttal disclosure.

[53] The Panel also finds that very little of the rebuttal disclosure from the Complainant and the Respondent had been spoken to prior to this Preliminary Matter being heard. Accordingly, the Participants' positions addressing the Preliminary Matter were heard on the basis of what was filed and not the testimony of the witnesses supported by their disclosure. Certain portions of rebuttal reports were referred to in the testimony heard prior to the hearing of this matter; however, not the testimony supported by the rebuttal, sur-rebuttal, and sur-sur-rebuttal disclosures. The Panel finds itself in the position of adjudicating a request by the Complainant to strike Dr. Thompson's report, as well as the discussion on the 2017 CARB Orders pre-settlement, without having the benefit of hearing the testimony.

[54] The Complainant submitted that Dr. Thompson's sur-rebuttal is "inappropriate, irrelevant, case-splitting, hearsay and beyond the role of an expert." The Panel finds that without the benefit of hearing the evidence, the Panel is unable to determine if that is correct. However, the Complainant will have the opportunity to cross examine Dr. Thompson on his initial disclosure (Exhibits 24-R, 25-R, 26-R, and 47-Rv2) at which time the Complainant will be able to test the veracity of Dr. Thompson's testimony. The Panel finds that the appropriateness, relevancy, hearsay, and opinions beyond the role of the expert are matters that can be explored by the Complainant and the Panel will apply the appropriate weight to Dr. Thompson's testimony and disclosure.

[55] The Respondent also argued that while the Complainant referred to the 2017 CARB Orders in its original disclosure, it also argued that the evidence was compelling that the adjustment was based on the Edmonton area adjustment. However, in rebuttal, the Complainant further expanded on the effect of the 2017 CARB Orders. As a result, the Respondent felt it necessary to respond to the rebuttal evidence. The Panel finds this reasonable; however, the Panel will assess the testimony of the Respondent to ensure it is appropriate, relevant, not hearsay, and within the role of an expert to determine the appropriate weight to be provided to the testimony.

[56] The Panel finds that the issues raised by the Complainant in its initial filings appear to be changing. The assertion by the Complainant is that the Respondent is case-splitting based on the role of estimates in the determination of the excluded costs for the assessment, as well as the role of the 2017 CARB Orders, and the settlement agreements in determining whether an Edmonton area adjustment is appropriate. The Respondent, on the other hand, submits that it was the Complainant who first "split" the issues, and the Respondent is merely responding to the new evidence introduced by the Complainant. The Panel finds that in this regard, it will examine the evidence, once heard, to determine if there is sufficient evidence of case-splitting, and the Panel will determine in its decision how it will be dealt with if needed.

[57] The Panel finds the Respondent's reference to ***Elgert v Home Hardware Stores Limited, 2010 ABKB 66*** and para**.** 25 includes the following:

> There is now an over-arching concern for fairness in admissibility. Courts must look to the relevance or the importance of the evidence on a case specific basis. This is often referred to as the contextual approach. If the probative value of the evidence outweighs any risk associated with its admission, the evidence generally will be admitted. In many cases, the risk is reliability of the evidence. In the case of reply evidence, it is the risk of unwarranted trial delay, or adjudicative unfairness.

[58] The Panel finds that while the Court Rules of Evidence are not binding on the Panel, they are instructive. In this matter, the issues are complex and the clearer the disclosure is, the better the ability of the Panel to make a reasonable decision. The Respondent has provided a reasonable argument that the Complainant has entered new evidence and the Respondent is merely responding to it. The Panel finds this is fair. The Complainant's arguments concerning volume and "ambush" are noted; however, it was the

Complainant who submitted it only required two days to file sur-sur-rebuttal and should have been aware of the Respondent's sur-rebuttal based on Dr. Thompson's submission in May 2023.

ISSUE #2– The Respondent Requested That All Participants Either Be Shown on the Full Screen or in a Separate Window

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Party Positions

Respondent Position

[59] The hearing was conducted by virtual technology. Upon the testimony of the first Complainant Witness, the Respondent requested that all participants be shown either on the full screen or in a separate window.

[60] The Respondent submitted that at an in-person hearing, all participants are within the hearing room. While this is similar in a virtual hearing setting, the participants are not always capable of being observed in a virtual setting. The Respondent requested that all participants be observable.

Complainant Position

[61] The Complainant noted that it was the only party this appeared to apply to. It was agreeable to widen its lens for viewing, and to have witnesses when testifying on a separate screen. It also agreed to identify all those participating in the hearing, and in its board room to be identified each morning, as well as if participants left or joined the hearing.

Intervenor Position

[62] The Intervenor supported the Respondent position.

Decision and Findings

[63] The Parties agreed, and the Panel accepted, that all parties with multiple participants in the same room would be shown on a full screen, so that they could all be seen. Each morning, any party with multiple participants would identify who was in the room, and any persons leaving or joining would be identified.

ISSUE #3– The Intervenor Raised a Procedural Matter concerning the Capacity of Ms. K. Perry, Who was with the Complainant Participants

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Party Positions

Intervenor Position

[64] The Intervenor raised a procedural matter as to the capacity of Ms. K. Perry, who was attending as a participant with the Complainant. The Intervenor submitted that its belief of Ms. Perry's capacity was

that she was an employee of Suncor. It learned later that she is a lawyer. The Intervenor queried who Ms. Perry represented.

Complainant Position

[65] The Complainant submitted that the Intervenor had limited ability to raise procedural issues; however, advised that Ms. Perry was previously a Suncor employee in the property tax group at the time of the assessments. She recently began employment with PricewaterhouseCoopers ("PwC") in its legal department. She has been engaged by Suncor in her role at PwC.

Respondent Position

[66] The Respondent had no position on this matter; however, noted it was not the spokesperson for the Intervenor, and it was its position that the Intervenor could raise procedural issues.

Decision and Findings

[67] Ms. Perry's position was clarified, and the Intervenor was satisfied with the Complainant's response.

[68] The Panel also determined that the Intervenor was entitled to raise procedural issues.

ISSUE #4– The Intervenor Objected to the Complainant's Witnesses' Use of Power Point Presentations

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Party Positions

Intervenor Position

[69] The Intervenor raised its objection with the first Complainant witness and raised its objection with each ensuing witness. The Intervenor's position was that the power point presentations were disclosed too late and were deemed by the Intervenor as being new information. As a result of being filed late, often the day prior to the testimony or the day of testimony, the Intervenor did not have the opportunity to review or respond to the information. In addition, the Intervenor submitted that the presentations were a "script" for the witness, were created by legal counsel, and there was no case law or basis to consider allowing this type of disclosure. The Intervenor also submitted that if legal counsel created them, then in the rules of achieving a fair hearing, legal counsel ought to be examined as to why it chose the evidence it referred to.

Complainant Position

[70] The Complainant submitted that all the information on the power points comes from the witness disclosure which was filed on time. Each point raised also had a source reference to the witness's testimony shown on the corresponding power point slide.

[71] The Complainant also noted that previous Panels have allowed the use of power point presentations as an aid to the witness if it did not contain new evidence.

[72] The Complainant also noted that in normal circumstances the witness would prepare the power point. However, as previously identified to the Panel, Suncor experienced a significant data breach in early July 2023 and as a result, witnesses lost their access to Suncor's data and were unable to access their witness reports. Those reports had been provided electronically and without hard copies. To keep the hearing schedule, the Complainant legal counsel offered to assist the witnesses in the preparation of the power points.

[73] Legal counsel for the Complainant conceded that these were unusual circumstances; however, reaffirmed there was no new evidence introduced.

Respondent Position

[74] The Respondent confirmed it agreed with the Complainant that witnesses would be allowed to the use of power points to be expedient in the delivery of witness testimony. This understanding was on the basis that the presentations were verbatim from testimony that was in the disclosure.

[75] The Respondent's only issue was it would have preferred to have seen them submitted earlier.

Decision and Findings

[76] The Panel finds that the Complainant and Respondent had agreed earlier to allow the use of power point presentations. In that there is no new information contained within the power point presentations, the points raised are cross referenced to the source referenced.

[77] The Panel requested that power point presentations be provided as soon as possible prior to the witness testimony.

[78] The Panel also finds that the presentations are limited to information within the witness disclosure and cross referencing is required. The power points are witness aids provided to condense witness testimony to the highlights intended to be considered.

[79] The power points are to be provided to all parties and will be listed as Exhibits to this matter.

ISSUE #5– The Intervenor Raised a Point of Procedure as to Its Ability to Question Witnesses

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Party Positions

Intervenor Position

[80] The Intervenor submitted that its ability to question witnesses should not be restricted to having any of its questions be submitted to the Respondent, who would then determine whether or not to advance the question.

[81] The Intervenor submitted this put them in a difficult position, especially with respect to questions it may have to the Respondent's testimony.

Complainant Position

[82] The Complainant submitted that the role of the Intervenor was clearly enunciated in LPRT Decision ***Fort Hills Energy Corp. v Provincial Assessor, 2022 ABLPRT 1333***. The Complainant noted that the role of the Intervenor was based on prior Panel decisions and that it was the Intervenor who brought forward the proposal for its role. The Complainant did not support an amendment to the role of the Intervenor.

Respondent Position

[83] The Respondent stated it understood the difficult position the Intervenor considered it faced; however, the Respondent did not take a formal position.

Decision and Findings

[84] The Panel finds that the Intervenor was the party who suggested its role in this matter. It was based on a similar role of the Intervenor in a prior LPRT hearing.

[85] The Panel also finds the Panel Decision in ***Fort Hills Energy Corp. v Provincial Assessor, 2022 ABLPRT 1333*** was clear, and agreed to by the Intervenor. Accordingly, the Panel does not intend to stray from the agreed upon role of the Intervenor.

END OF PRELIMINARY AND PROCEDURAL MATTERS

APPENDIX "B"

EXHIBIT LIST FOR THE MERIT HEARING

LPRT Files: DIP19/FORT/WILS-01; DIP20/FORT/WILS-01; DIP21/FORT/WILS-01

Hearing Dates: July 18, 2023 to August 25, 2023 – Merit Hearing
Continued: September 12 – 15, 2023
October 4 – 6, 2023
November 6 – 10, 2023

Panel Members: Harold Williams (PO), Donald Roberts, Lana Yakimchuk, Bill Johnston, Dierdre Mullen

Exhibit #	Title/Author	Length (in pages)	Submission Date
1-C	Ryan Jackson Overview Report (Redacted)	195	2022-05-25
1-C	Ryan Jackson Overview Report (Unredacted)	195	"
1-C	Ryan Jackson Overview Report, Appendix 8 - Video	(mins)	"
2-C	Witness Report – Ryan Jackson SE (Redacted) (Secondary Extraction)	53	"
2-C	Witness Report – Ryan Jackson SE (Unredacted) (Secondary Extraction) (print – 3 volumes)	1033	"
3-C	Witness Report – Chris Woloshyn – OPP (Redacted) (Ore Processing Plant)	10	"
3-C	Witness Report – Chris Woloshyn – OPP (Unredacted) (Ore Processing Plant)	97	"
4-C	Design Changes – E&T – Chris Woloshyn (Redacted) (Extraction & Tailings)	12	"
4-C	Design Changes – E&T – Chris Woloshyn (Unredacted) (Extraction & Tailings)	257	"
5-C	Design Changes – F&CS – Chris Woloshyn (Redacted) (Facilities & Common Services)	6	"
5-C	Design Changes – F&CS – Chris Woloshyn (Unredacted) (Facilities & Common Services)	45	"
6-C	Witness Report – Matthew Colden – AET (Redacted) (Automation, Electrical, and Telecommunications)	17	"
6-C	Witness Report – Matthew Colden – AET (Unredacted) (Automation, Electrical, and Telecommunications)	335	"

7-C	Jeff Yarcky – Design Changes – U&C (Redacted) (Utilities and Cogeneration)	18	"
7-C	Jeff Yarcky – Design Changes – U&C (Unredacted) (Utilities and Cogeneration)	238	"
8-C	FH – SE Witness Report for Lubo Lliev (Fort Hills – Secondary Extraction)	38	"
9-C	FH – OPP Witness Report for Lubo Lliev (Fort Hills – Ore Processing Plant)	37	"
10-C	FH – U&C Witness Report for Lubo Lliev (Fort Hills – Utilities & Cogeneration)	38	"
11-C	FH – AET Witness Report for Lubo Lliev (Automation, Electrical, and Telecommunications)	39	"
12-C	FH – ET Witness Report for Lubo Lliev (Extraction and Tailings)	36	"
13-C	Soil Conditions Report - Parm Parmar (Redacted)	158	"
13-C	Soil Conditions Report - Parm Parmar (Unredacted)	158	"
14-C	Ben Matthews – Fort Hills Overview Witness Report (Redacted)	57	"
14-C	Ben Matthews – Fort Hills Overview Witness Report (Unredacted)	635	"
14-C Revised	Ben Matthews – Fort Hills Overview Witness Report (Unredacted) *(Appendix 31 Replaced)*		2023-09-29
14	Appendix 6 – Ben Matthews Witness Report – Secondary Extraction Rendition	Excel (3 sheets)	"
14	Appendix 7 – Ben Matthews Witness Report – Ore Preparation Plant Rendition Workbook	Excel (3 sheets)	"
14	Appendix 8 – Ben Matthews Witness Report – Utilities Cogen Rendition Workbook	Excel (4 sheets)	"
14	Appendix 9 – Ben Matthews Witness Report – Extraction and Tailings Rendition Workbook	Excel (3 sheets)	"
14	Appendix 10 – Ben Matthews Witness Report – Automation Electrical and Telecommunications Rend.	Excel (3 sheets)	"
14	Appendix 11 – Ben Matthews Witness Report – Facilities and Common Services Rendition	Excel (3 sheets)	"

14	Appendix 29 – Ben Matthews Witness Report – 2007 to 2018 reported projects	Excel (1 sheet)	"
14	Appendix 51 – Ben Matthews – Witness Report – Summary of Project Renditions	Excel (1 sheet)	"
15a-C	Worley Report on Productivity Standard Practice	7	"
15b-C	Worley - Wong, Felix – CV, Feb 2022	4	"
16-C	Report of Fumio Otsu – Productivity Adjustments for Tax Assessment	64	"
17-C	Report of Ian Fluney, DMA – Witness Fort Hills	390	"
18-C	Legal Brief of the Complainant	42	"
19-C	Book of Authorities of the Complainant (print – 2 volumes)	1121	"
20-R	Witness Report of the Provincial Assessor, Michael Minard (print – 4 volumes)	1671	2023-01-13
21-R	Witness Report of Sheila Young	29	"
22-R	Witness Report of Dan Driscoll	46	"
23-R	Witness Report of Brad Pickering	14	"
24-R	Report of Dr. Edward Thompson – Response to the Lliev Report	79	"
25-R	Report of Dr. Edward Thompson – Response to the Matthews Report	20	"
26-R	Report of Dr. Edward Thompson – Response to the Otsu Report	90	"
27-R	Legal Brief of the Respondent	70	"
28-R	Book of Authorities (print - 3 volumes)	1018	"
29-C	Rebuttal: CONFIDENTIAL Appendices to the Rebuttal Report of Ryan Jackson: Secondary Extraction Project Area Documentation – Adullah Shruklullah (+ 3 Excel atts: Group A-6, Group B(1), Group C(b)(10)	794+	2023-04-21
30-C	Rebuttal Report of Ryan Jackson, with Schedule A	35	"

31-C	Rebuttal Report of Chris Woloshyn – OPP	59	"
32-C	Rebuttal Report of Chris Woloshyn – E&T	141	"
33-C	Rebuttal Report of Chris Woloshyn – F&CS	6	"
34-C	Rebuttal Report of Matthew Colden – AE&T	131	"
35-C	Rebuttal Report of Jeff Yarycky – Utilities & Cogen	124	"
36-C	Rebuttal Report of Lubo Iliev	25	"
37-C	Rebuttal Report of Ben Matthews	1111	"
38-C	Rebuttal Report of Fumio Otsu	5	"
39-C	Rebuttal Report of Ian Fluney	18	"
40-C	(Rebuttal) FINAL Legal Brief & Authorities	1063	"
P16C	Witness list Suncor FHPTA	3	2023-06-08
P17C	Resumes: • Lubo Iliev, P.Eng. • Fumio Otsu • Ian Fluney • D Benjamin Matthews • Felix Wong (Worley), CET, CEP • Ryan Jackson, P.Eng. • Shukrullah Imdadullah, P.Eng. • Chris Woloshyn, P.Eng. • Jeffrey Yarycky • Parmjit Parmer, P.Eng., BSc, MSc. • Matthew Colden • Krishna Pavathaneni • Monalisa Ghosal, B. Tech, Industrial Electronics	58	2023-06-08
P18R	Revised - Proposed Witness Qualifications of Respondent, the Provincial Assessor	2	2023-06-12
41-R	Sur-rebuttal Brief of the Respondent (Brownlee LLP) (Appendix C – RMWB Sur-Rebuttal Submissions)	172	2023-07-12
42-R	Sur-rebuttal Witness Report of Michael Minard	682	"

43-R _v.1	Sur-rebuttal of Edward Thompson	849	"
43-R_v.2	Sur-rebuttal of Edward Thompson – "Corrected" and submitted 2023-07-13	123	2023-07-13
43-R_ Appendix	Appendix D to Sur-rebuttal of Dr. Edward Thompson	16	2023-07-12
44-R	Sur-rebuttal Report of Dan Driscoll	50	"
45-R	Sur-rebuttal Witness Report of Brad Pickering	13	"
46-R	Sur-rebuttal Witness Report of Sheila Young	98	"
47-C	Sur-sur-rebuttal Brief of the Complainant	9	2023-07-14
48-C	Sur-sur-rebuttal of Ben Matthews – Response to Dr. Thompson	50	"
49-C	Sur-sur-rebuttal of Ben Matthews – Response to Mike Minard	10	"
50-C	Sur-sur-rebuttal of Shukrullah Imdadullah	3	"
51-C	Sur-sur-rebuttal of Lubo Iliev	3	"
52-C	Sur-sur-rebuttal of Ian Fluney	2	"
53-C	Ryan Jackson FHP Overview Presentation (PPT)	41 Slides	2023-07-19
54-C	Jeff Yarycky – U and C PowerPoint	40 Slides	2023-07-19
55-C	Shukrullah Imdadullah PowerPoint – Secondary Extraction	21 Slides	2023-07-24
56-C	Matt Colden PowerPoint (AET)	35 Slides	2023-07-25
57-C	Ben Matthews PowerPoint	91 Slides	2023-07-31
58-C	Lubo Iliev PowerPoint	130 Slides	2023-08-03
59-C	Krishna Pavathaneni Witness PowerPoint	21 Slides	2023-08-11
60-C	Fumio Otsu PowerPoint	61 Slides	2023-08-14
61-R	Respondent's Brief – Response to Application to Strike Sur-Rebuttal (August 16, 2023)	48 pages	2023-08-16

62-I	Intervenor's Position on Application to Strike Sur-Rebuttal Materials (as Ltr to D.Graham)	2 pages	2023-08-21
63-R	Article – Oil Sands & Producers, Bouchard (dated January 23, 2012)	43 pages	2023-10-06
64-C	Summary Assessment Comparison (Oct 6 2023)	Excel – 1 sheet	2023-10-26
65-C	Wilson Laycraft Ltr to LPRT re Suncor Settlement Agreement	2 pages	2023-11-02
66-R	Respondent's response to Complainant's Summary (letter)	3 pages	2023-11-03
67-R	Summary of Respondent's Position	Excel – 1 sheet	2023-11-03
68-I	Harper Lee Law Ltr to LPRT re Complainant's position	2 pages	2023-11-05
69-R	Brownlee Ltr to LPRT re Complainant on settlement agreements	2 pages	2023-11-05
70-C	Revised Spreadsheet – FH Summary Assessment Comparison (Lubo Update – Nov. 6, 2023)	Excel – 1 sheet	2023-11-07
71-I	The 5 Closing Argument Points of the RMWB	1 page	2023-11-10

APPENDIX "C"

COMMONLY USED ACRONYMS OR ABBREVIATIONS

3G	Third Generation Modularization
AET	Automation, Electrical and Telecommunications
APNS	Approved Non-Scope PCNs
bpd	Barrels Per Day
DBM	Design Basis Memorandum
E&T	Extractions and Tailings
EDS	Engineering Design Specification (same as FEED)
EPC	Engineering, Procurement, Fabrication& Construction
EPN	Electrical Protection Network
F&CS	Facilities and Common Services
FEED	Front End Execution and Design
FEL	Front End Loading
FHEC	Fort Hills Energy Corporation
ISBL	Inside Battery Limit (Inside the project boundary)
MAC	Main Automation Contractor
MEC	Main Electrical Contractor
MTC	Main Telecommunications Contractor
NDE	Non-destructive Testing
OAB	Quantity Adjusted Budget
OPP	Ore Processing Plant
OPTA	Out of Pit Tailings Aera
PCN	Project Change Notice
PFP	Passive Fire Protection'
PM0C	Project Management of Change
QAB	Quantity Adjusted Budget
QRA	Quantative Risk Assessment
RFI	Request for Information
SE	Secondary Extraction
U&C	Utilities and Cogeneration