BOARD ORDER: MGB 076/06

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 submitted by the City of Calgary in regard to its 2004 equalized assessment.

BETWEEN:

The City of Calgary - Appellant

- a n d -

Minister of Alberta Municipal Affairs as represented by Sharek Logan Collingwood van Leenen LLP – Respondent

- a n d -

The City of Edmonton, City of Red Deer, Municipality of Crowsnest Pass, Strathcona County, and the Town of Coalhurst – Intervenors

BEFORE:

Members:

D. Thomas, Presiding Officer
L. Lundgren, Member
P. Petry, Member
D. Scotnicki, Member
Dr. E. Thompson, Member

Secretariat:

M. d'Alquen
J. Dittrich

Assessed Amount: $85,815,845,255

This decision relates to an appeal filed with the Municipal Government Board (MGB) by the Appellant regarding its 2004 equalized assessment. The appeal was heard in the City of Calgary in the Province of Alberta from September 26 to November 9, 2005 after due notice was given to the affected parties.

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OVERVIEW

Introduction

Alberta's municipal taxation system allows municipalities to levy tax upon certain types of property within the municipality. Generally speaking, such taxes are levied on real property, subject to certain types of property being exempt. The *Municipal Government Act* (Act) ensures the tax burden is equitably shared between property owners through a few important principles. First, taxes are calculated by multiplying a municipally set mill rate by the property's assessed value. Second, assessors under the Act are obliged to be qualified for their task and to assess

property according to standards and procedures defined under statutory authority. Section 293 provides, in part:

293(1) 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.

(2) 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.

Third, assessed persons may challenge their particular assessments through the Act's complaint and appeal mechanisms.

Certain types of property run throughout the Province and are assessed centrally by a designated linear assessor (DLA) appointed by the Province. That official assesses linear property such as pipelines, telecommunication systems, power systems and so on as defined in section 284(1)(k) of the Act. The DLA does so using fairly complex formulae set out in subordinate legislation passed under the Act. This provincially assessed property is then apportioned between municipalities according to its location.

Other types of property, in particular farmland, railways and machinery and equipment are called regulated property under the Act. Unlike other property that is assessed using a market value approach, the Act contemplates that the assessment of such regulated property will be carried out using specialized rules for valuation, as is the case for linear property.

For the purposes of redistributing the burden of educational services, the Act provides for an equalization process. The assessment base of each municipality is used by the Minister of Alberta Municipal Affairs (Minister) to prepare an equalized assessment pursuant to section 318 of the Act. This results in an equalized assessment being sent annually to municipalities, upon which certain revenues are then based. That equalized assessment can become, subject to limitations, a matter for appeal to the MGB. As linear property forms a significant part of the municipal assessment base, a challenge to the fundamentals of the linear property assessment process has the potential to have profound consequences for the annual equalized assessment.

Overview of Appellant's position

The Appellant argued that its 2004 equalized assessment was not fair and equitable relative to equalized assessments for other municipalities in Alberta. Two main arguments were advanced in support of this position.

First, the Appellant argued that the Respondent failed in its capacity as a supervisory agency to ensure compliance with legislation, industry standards and appropriate assessment practises affecting data used for the purposes of equalization. The result led to unfair equalized assessment and distribution of the tax burden.

Second, the Appellant questioned the use of a non-market valuation standard for "regulated" property within the equalization process. It indicated that equity can only be achieved by using a consistent valuation standard. The procedures for valuing regulated property set out in the Alberta Minister's Guidelines Regarding the Assessment of Farm Land, Linear Property, Machinery and Equipment, Railway (Minister's Guidelines) require considerable discretion and do not establish a consistent valuation standard. Moreover, as regulated property is unevenly distributed throughout municipalities, the regulated standards affect municipalities to different degrees and thus create further inequity between equalized assessments.

In addition to the arguments identified above, the Appellant questioned the validity of the Minister's Guidelines that are intended to establish valuation procedures for regulated property in Alberta. It began by noting that the Act requires valuation standards to be set out in the regulations. Next, it argued that the Ministerial Orders used to establish the Minister's Guidelines are not regulations. Consequently, it said the Minister's Guidelines cannot be used to produce assessments. Since equalized assessments are based partly on regulated property assessments, the flaw inherent in regulated assessments was transferred to the Appellant's equalized assessment amount.

Lastly, the Appellant asserted that street lighting should not have been included in its equalized assessment, because municipally owned street lighting is exempt from assessment under the Act.

Overview of Respondent's position

The Respondent argued that the Appellant's submissions cannot support an appeal under the Act for at least two reasons. First, section 321 only allows the MGB to hear an appeal concerning the amount of an equalized assessment. The Appellant has not established an alternate equalized assessment amount; therefore, its appeal does not come within the right of appeal granted under section 321. Second, section 488.1 prohibits appeals based on differences between information provided in municipal returns and the value of property in a municipality. The Appellant's main argument is that the Respondent has not taken sufficient steps to correct assessment levels provided by certain municipalities; therefore, in view of the prohibition in section 488.1, this argument cannot support an appeal to the MGB.

In response to the argument that it failed to fulfill its duties as a supervisory agency, the Respondent asserted that it did take adequate steps to ensure accurate and appropriate municipal reporting. It also asserted that fairness is achieved by consistent application of legislation and that the MGB has no authority to deviate from legislated policies for assessment and equalization. The Respondent argued that it prepared the Appellant's 2004 equalized assessment by consistent application of the relevant legislation; hence, the result was fair, equitable and correct.

In response to the Appellant's arguments regarding the validity and effect of the Minister's Guidelines, the Respondent argued that the MGB has no authority to consider this question, but that in any event the Minister's Guidelines were established under appropriate legal authority.

In response to the Appellant's argument regarding street lighting, the Respondent submitted that the evidence presented does not establish that street lighting in Calgary was municipally owned as of the relevant date. Therefore, as assessable property, it was rightfully included with the equalized assessment. Furthermore, if the Appellant had wished to challenge the taxable status street lighting within its boundaries, it ought to have done so within the context of a linear assessment complaint.

BACKGROUND

Parties and Intervenors

Parties

The Appellant, the City of Calgary, filed its 2004 equalized assessment appeal on January 13, 2004. The Respondent is the Crown in Right of Alberta as represented by the Minister of Alberta Municipal Affairs (Minister) on behalf of the Assessment Services Branch. The Respondent prepares annual equalized assessments for all municipalities in Alberta.

Intervenors

The MGB notified all Alberta municipalities of the appeal. The City of Edmonton, the City of Red Deer, the Municipality of Crowsnest Pass, and the Town of Coalhurst filed applications within the initial time limit imposed by the MGB and were granted intervenor status. Strathcona County was later granted Intervenor status by a panel of the MGB pursuant to decision letter DL 112/04. Subsequently, the Town of Coalhurst withdrew. None of the Intervenors made submissions at the merit hearing except for Strathcona County and the City of Edmonton.

The property assessment regime in the Province of Alberta

By definition (section 317 of the Act), the equalized assessment for a given municipality reflects assessments for property within that municipality, including property taxable under Part 10 of the

Act. Therefore, a brief outline of some aspects of the property assessment system in the Province of Alberta is required to understand how equalized assessments are derived.

Regulated property

The *Matters Relating to Assessment and Taxation Regulation* (MRAT) requires regulated properties to be assessed by following procedures set out in the Minister's Guidelines. The Minister's Guidelines are prescribed annually by Ministerial Order. Regulated property includes: farmland, railway, machinery and equipment (M&E) and linear property (i.e., pipelines, telecommunications systems, electric power systems and street lighting).

Non-regulated property

MRAT requires non-regulated property to be assessed at market value and does not refer the assessor to procedures in the Minister's Guidelines for the purposes of valuation. Non-regulated property includes residential and non-residential improvements and land.

Responsibilities of municipalities and Respondent

Municipalities prepare assessments for all property except linear property. MRAT requires municipal assessors to prepare assessments for non-regulated property in conformity with certain quality standards. These standards involve specified median assessment ratios, or assessment levels, and coefficients of dispersion for various property strata or types. An assessment ratio (ASR) is the ratio of a property's assessed value to its sale price or to some other "indicator of value" such as an independent appraisal. MRAT defines coefficient of dispersion (COD) as the average percentage deviation of the assessment ratios from the median assessment ratio for a group of properties (section 1(c) of MRAT as amended by Alberta Regulation 330/2003).

The Respondent prepares assessments for linear property only. In addition to this function, it conducts both annual and "detailed" audits of the assessments prepared by municipalities. Detailed audits are conducted for each municipality at five-year intervals, unless deficiencies discovered in municipal filings during the annual audit prompt an earlier detailed review. The Respondent uses the assessment levels resulting from the audit process as inputs when preparing equalized assessments.

Equalized assessments

The Respondent prepares the annual equalized assessments using assessment information resulting from the audit process. In order to conduct the audits and prepare the equalized assessments, the Respondent requests information from the municipalities, including assessment totals and median ASRs for all property stratifications or "sub-municipalities" as determined by the municipal assessor. The data provided should support assessment levels that meet the quality standards for the property types specified under MRAT. Each municipality also provides the

Respondent with an annual "Municipality's Return" form showing assessment totals and a breakdown of totals for the property types specified by MRAT.

After receiving the assessment information from the municipalities, the Respondent must under MRAT: (1) determine whether the information is acceptable, and (2) adjust the assessments for non-regulated property to reflect an assessment level of 1.0. Adjustment to 1.0 is achieved by dividing the accepted assessment totals for the property categories specified in MRAT by their pre-equalization assessment levels. Regulated property assessment totals valued in accordance with MRAT and the Minister's Guidelines are not adjusted.

Varied Equalized Assessments

The *Equalized Assessment Variance Regulation (Alberta Regulation 364/2003)* permits the Minister to vary the equalized assessment prepared for a municipality. The Minister exercised this power for 2004 by means of Ministerial Order L:015/04. This Ministerial Order limits the varied equalized assessment for residential property and farmland to the lesser of three figures: namely, (1) the 2004 equalized assessment, (2) a value to ensure the school tax requisition is no more than 1.08 times the 2003 school tax requisition, and (3) average of the 2001, 2002, 2003, and 2004 equalized assessments. A largely similar formula determines the varied equalized assessment for non-residential properties.

School tax requisitions

The Respondent determines annual municipal school tax requisitions by reference to the varied equalized municipal assessments. Loosely speaking, the proportion of a given municipality's varied equalized assessment to the total of all municipal varied equalized assessments represents the proportion of the total provincial school tax to be paid by that municipality. More precisely, the Province determines and applies various rates to the varied equalized assessments for the property categories specified in MRAT. In 2004, the rate for residential and farmland was 0.00544, the rate for Non-Residential was 0.00799, and the rate for machinery and equipment was nil. Thus, a municipality's varied equalized assessment for machinery and equipment had no effect on its school tax payable.

Having determined the school tax payable by each municipality, the Respondent issues corresponding school tax requisitions. The municipalities then collect the requisitioned amounts for remittance to the Province at the same time they collect their municipal property tax. For the year under appeal, the total school tax requisition was $1,390,496,160 of which Calgary's portion amounted to $452,635,491.

Appeal of equalized assessment

It is important to distinguish the equalized assessment from the varied equalized assessment for the purposes of this appeal. Section 321 of the Act permits appeal of the amount of an equalized assessment. However, section 2 of the Equalized Assessment Variance Regulation, AR

364/2003 (Variance Regulation) bars the MGB from hearing an appeal of a varied equalized assessment.

History

The Appellant launched a series of appeals for prior years (1996, 1997, 1998, 1999, 2000, 2002, and 2003) raising issues similar to those now before the MGB. However, as the previous appeals concluded without recourse to a merit hearing, the 2004 appeal is the first of this series to be decided by the MGB.

The Appellant's current and past equalization appeals have occurred in the context of an evolving assessment and equalization regime in Alberta. Significant developments since 1995 include:

- Introduction of a new Act (i.e., the *Municipal Government Act*)
- Adoption of market value as the general standard for property taxation (with the exception of regulated standards for regulated property);
- Introduction of annual reassessments instead of general reassessments every eight years;
- Devolution of responsibility for preparing assessments for most classes of property from the Province to municipalities;
- Preparation for the introduction of ASSET, a computerized database designed to facilitate sharing of municipal assessment information for equalization purposes.
- Formation of an Equalized Assessment Panel to review the fairness and equity of the equalization process in Alberta and present recommendations for changes. The Panel was formed pursuant to an agreement executed upon condition that the Appellant withdraw its 1997, 1998, and 1999 Equalized Assessment appeals.

PROCEDURAL AND OTHER MATTERS

Preliminary hearings leading up to this appeal

The MGB held 11 preliminary hearings in relation to this appeal (decisions DL 016/04, DL 028/04, MGB 050/04, DL 072/04, DL 112/04, DL 114/04, DL 140/04, DL 023/05, DL 091/05, DL 128/05, and DL 143/05). These preliminary hearings established timelines for the merit hearing and dealt with issues concerning both the timing and scope of disclosure. During the weeklong hearing that gave rise to Board Order MGB 050/04, the parties led evidence to clarify the particulars of the appeal and the scope of disclosure required. The resulting preliminary decision, Board Order MGB 050/04, ordered the Respondent to provide the Appellant with the information used to prepare the equalized assessments for all of Alberta's municipalities. After reviewing this material (including six compact discs and two boxes of paper files), the Appellant provided the Respondent with its argument and supporting evidentiary material; the Respondent then provided the Appellant with its reply. Throughout this process and up to the time of the

merit hearing, the MGB scheduled further preliminary hearings to deal with challenges concerning sufficiency of disclosure and timing of the appeal.

Request for second hearing to determine appropriate relief

In opening statements, the Appellant suggested the present hearing should not be used to determine a remedy; rather, it said the immediate task is to determine whether the Appellant's equalized assessment is inequitable. If the Appellant establishes inequity, the next step would be to schedule a second hearing to determine a remedy or appropriate quantum by which the MGB panel should vary the assessment.

The Respondent objected to a separate hearing, arguing that the right of appeal relates to the "amount" of the equalized assessment; thus, the issue of quantum is central to the appeal. The Respondent also stressed it had not received notice that a separate hearing to determine a remedy was ever contemplated.

Having considered both parties' positions, the MGB denied the Appellant's request that a second hearing be scheduled to determine a remedy. The MGB noted that the prospect of a second hearing had never been raised during the extensive preliminary hearing process leading up to this appeal. Furthermore, the MGB suggested that if either party wished to rely on further evidence or material relating to remedy, then that material should be tabled in a timely fashion. The MGB anticipated that in this way, the parties and panel would have an opportunity to review the material and decide how to deal with it. As a result of this process, the Appellant submitted a document entitled "City of Calgary's Estimate of Overpayment based on 2004 Equalization" (Exhibit AG) to help quantify the remedy requested. This document reports an estimated overpayment of $105,799,694 based on the Respondent's alleged failure to tax and equalize all property at full market value, plus a further $361,039 relating to the inclusion of street lighting in the Appellant's equalized assessment.

The role of Strathcona County as an Intervenor

The appropriate role for Intervenors was addressed in the following decisions: Board Order MGB 050/04 and decision letter DL 112/04. However, the issue arose again during the merit hearing in relation to the right to question witnesses. In particular, the Appellant objected to its expert witness, Mr. O'Connor, being questioned by Counsel for the Intervenor Strathcona County (Strathcona).

The Appellant stated that whereas the proper role for an intervenor is to supplement areas where the parties have not provided information, Strathcona and the Respondent are identical in interest and outlook. In support, the Appellant drew the MGB's attention to a contractual relationship between the Respondent and one of Strathcona's employees; further, it noted Strathcona's stated intention to question only the Appellant's witnesses without tendering any witnesses of its own. The Appellant also argued that Strathcona ought to have clarified its intentions and position through written submissions or a "Notice of Intervention" as prescribed by Macaulay &

Sprague's text *Hearings Before Administrative Tribunals*. As a result of the foregoing, the Appellant argued that allowing Strathcona to participate further in the appeal would be both unfair and of little assistance to the MGB.

Before ruling on this question, the MGB noted the following points:

- The role of intervenors was considered at earlier preliminary hearings. Pursuant to the MGB's earlier decision, Intervenors were granted "full status", including the right to question witnesses.
- Strathcona's correspondence from before the hearing indicated that it supported the Minister's position and expressed an intent to cross-examine witnesses.
- The relationship of Strathcona's employee, Mr. Elzinga, with the Respondent was clearly disclosed and set forth on the record, and anything heard from that source will be taken in the context of that knowledge.
- Strathcona has an evident interest in the hearing, since a reduction of the Appellant's equalized assessment will have an impact on other municipalities.
- Exhibit FF appeared for the first time at the hearing and contains statements with regard to Strathcona on the matter of time adjustment. These statements do not appear to have been disclosed in earlier exchanges and would give rise to the right to raise questions in that regard.

In view of these considerations, the MGB permitted Strathcona to question Mr. O'Connor.

Disclosure issues

Both principal parties attempted to refer to or question witnesses on material from the Respondent's initial disclosure (per Board Order MGB 050/04) and exhibits from earlier preliminary hearings. Typically, such attempts were met with an objection from the opposing party that the material should have been reproduced in the written submissions for the merit hearing. Examples of such material include Exhibit DD, selections of information on the compact disks entered as Exhibit 29, summarized information regarding the effect of inferred ratios entered as Exhibit 22, and Exhibit C-9 from the Preliminary hearing of April 14 to 19, 2004 (Board Order MGB 050/04).

The MGB's ruling on these objections permitted reference to the material if it was potentially relevant and the questions within the competence of the witnesses involved; however, questioning was only permitted after a suitable opportunity for the parties to review the material in its original context. In this way, the MGB was satisfied that the parties had full opportunity to place all relevant information before it without prejudice or surprise to the others involved.

Further comments regarding fair process

The Appellant raised objections from time to time over continuing failures in disclosure by the Respondent and lack of fair opportunity to cross-examine certain witnesses. As indicated above, both parties also objected from time to time to the introduction of new documents from the other party. The MGB believes these objections are worthy of summary comment. In cases where documentation was presented and accepted as necessary to the hearing, the MGB granted time to the other parties to review the material prior to its use at the hearing so that they could respond to it fairly. With respect to the examination and cross-examination of witnesses, wide latitude was given to deal with all matters of potential relevance. Finally, at the conclusion of the hearing, no outstanding items or requests were identified relating to disclosure ordered by the MGB and both parties indicated they were satisfied with their opportunity to present their case.

Further issues related to disclosure are discussed in the "Reasons" section of Issue 4 later in this Order.

LEGISLATION

In order to resolve this appeal, the MGB examined the relevant legislation including the following provisions.

Municipal Government Act

The Act defines what must be included within an equalized assessment and who must prepare the equalized assessment.

317 *In this Division, "equalized assessment" means an assessment that is prepared by the Minister in accordance with this Division for an entire municipality and reflects*

(a) assessments of property in the municipality that is taxable under Part 10,

(b) assessments of property in the municipality in respect of which a grant may be paid by the Crown under section 366,

(c) assessments of property in the municipality in respect of which a grant may be paid by the Crown in right of Canada under the Municipal Grants Act (Canada),

(d) assessments of property in the municipality made taxable or exempt as a result of a council passing a bylaw under Part 10, except any property made taxable under section 363(1)(d), and

(e) assessments of property in the municipality that is the subject of a tax agreement under section 333.1 or 360,

from the year preceding the year in which the equalized assessment is effective.

317.1 *Despite section 317, supplementary assessments prepared under a supplementary assessment bylaw under section 313 must not be included in the equalized assessment for a municipality.*

The preparation of an equalized assessment occurs on an annual basis.

318 *The Minister must prepare annually, in accordance with the regulations, an equalized assessment for each municipality.*

Each municipality has a duty to provide information for the preparation of an equalized assessment. While the Act stipulates that returns must be submitted no later than April 1 (2003 for the 2004 equalized assessment), this date was extended to October 31, 2003 by Ministerial Order L:122/03 pursuant to authority granted under section 605(2) of the Act.

319(1) *Each municipality must provide to the Minister annually, not later than April 1, a return containing the information requested by the Minister in the form required by the Minister.*
(2) *If a municipality does not provide the information requested by the Minister, the Minister must prepare the equalized assessment using whatever information is available about the municipality.*

A report must be sent to each municipality identifying all the equalized assessments prepared. The Act stipulates that the Minister send such a report by November 1 (i.e., November 1, 2003 for the 2004 equalized assessment). However, this deadline was extended to December 15, 2003 by Ministerial Order L:135/03.

320 *The Minister must send to each municipality annually, not later than November 1, a report of all the equalized assessments prepared*

The Act sets 30 days from November 1 (2003 for the 2004 equalized assessment) as the deadline for which a municipality may appeal its equalized assessment. However, this deadline was extended until January 14, 2004 by Ministerial Order L:135/03.

321 *A municipality may appeal the amount of an equalized assessment to the Municipal Government Board not later than 30 days from the date the Minister sends the municipality the report described in section 320.*

The Act empowers the Minister to make regulations establishing valuation standards for property and respecting equalized assessments.

322 *The Minister may make regulations*

. . .

(d) establishing valuation standards for property

…

(h) respecting equalized assessments;

(h.1)respecting the audit of any matters relating to assessments;

. . .

The Act sets specific limitations and authority for the MGB in dealing with an equalized assessment appeal.

488*(1) The Board has jurisdiction*

. . .

(b) to hear any appeal relating to the amount set by the Minister under Part 9 as the equalized assessment for a municipality,

. . .

488.1 *The Board has no jurisdiction under section 488(1) to hear an appeal relating to an equalized assessment set by the Minister under Part 9 if the reason for the appeal is*

(a) that the equalized assessment fails to reflect a loss in value where the loss in value has not been reflected in the assessments referred to in section 317,

(b) that information provided to the Minister by a municipality in accordance with section 319(1) does not properly reflect the relationship between assessments and the value of property in the municipality for the year preceding the year in which the assessments were used for the purpose of imposing a tax under Part 10, or

(c) that information relied on by the Minister pursuant to section 319(2) is incorrect.

While the MGB may change an equalized assessment, it must not alter an equalized assessment that is fair and equitable.

499(1) *On concluding a hearing, the Board may make any of the following decisions:*

. . .

(c) make a change to any equalized assessment, if the hearing relates to an equalized assessment;

. . .

(2) *The Board must not alter*

. . .

(b) any equalized assessment that is fair and equitable, taking into consideration equalized assessments in similar municipalities.

. . .

The MGB has power to set its own procedures:

523 *The Board may make rules regulating its procedures.*

MGB Procedure Guide

Sections 3 and 5 provide for further description of the MGB's procedures regarding exchange and disclosure for information. For purposes of brevity, these procedures are not reproduced in this Order.

Matters Relating to the Assessment and Taxation Regulation 289/99 **(MRAT)**

Sections 1 through 7 of MRAT identify the assessment valuation standards for non-regulated property and various forms of regulated property.

(1) *The valuation standard for a parcel of land is*

(a)market value, or
(b)if the parcel is used for farming operations, agricultural use value.

(2) *In preparing an assessment for a parcel of land based on agricultural use value, the assessor must follow the procedures set out in the Alberta Farm Land Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended from time to time.*

3 (1) *The valuation standard for a parcel of land is*
(a) market value, or
(b) if the parcel is used for farming operations, agricultural use value.
(2) *In preparing an assessment for a parcel of land based on agricultural use value, the assessor must follow the procedures set out in the Alberta Farm Land Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended from time to time.*
(3) *Despite sub-section (1)(b), the valuation standard for the following property is market value:*
(a) a parcel of land containing less than one acre;
(b) a parcel of land containing at least one acre but not more than 3 acres that is used but not necessarily occupied for residential purposes or can be serviced by using water and sewer distribution lines located in land that is adjacent to the parcel;
(c) an area of 3 acres located within a larger parcel of land where any part of the larger parcel is used but not necessarily occupied for residential purposes;
(d) an area of 3 acres that

(i) is located within a parcel of land, and
(ii) can be serviced by using water and sewer distribution lines located in land that is adjacent to the parcel;
(e) any area that
(i) is located within a parcel of land,
(ii) is used for commercial or industrial purposes, and
(iii) cannot be serviced by using water and sewer distribution lines located in land that is adjacent to the parcel;
(f) an area of 3 acres or more that
(i) is located within a parcel of land,
(ii) is used for commercial or industrial purposes, and
(iii) can be serviced by using water and sewer distribution lines located in land that is adjacent to the parcel.

5(1) *The valuation standard for railway is that calculated in accordance with the procedures referred to in sub-section (2).*
(2) *In preparing an assessment for railway, the assessor must follow the procedures set out in the Alberta Railway Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended from time to time.*

6(1) *The valuation standard for linear property is that calculated in accordance with the procedures referred to in sub-section (2).*
(2) *In preparing an assessment for linear property, the assessor must follow the procedures set out in the Alberta Linear Property Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended from time to time.*

7(1) *The valuation standard for machinery and equipment is that calculated in accordance with the procedures referred to in sub-section (2).*
(2) *In preparing an assessment for machinery and equipment, the assessor must follow the procedures set out in the Alberta Machinery and Equipment Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended.*

Section 11 of MRAT identifies assessment quality standards. Section 11 was amended by the Matters Relating to Assessment Amendment Regulation 330/03 (section 4), filed November 20, 2003. The main effect of the amendment was to reduce the number of property types from four to two and tighten the acceptable median assessment ratio to 0.95-1.05 (from 0.9-1.1). The amended version is shown below.

11 (1) *In this section, "property" does not include regulated property.*
(2) *In preparing an assessment for property, the assessor must have regard to the quality standards required by sub-section (3) and the procedures set out in the Assessment Quality Minister's Guidelines.*
(3) *The following quality standards must be met in the preparation of assessments of property:*

(a) for any stratum, the median assessment ratio and the corresponding coefficient of dispersion must be as follows:

Property Type	***Median Assessment Ratio***	***Coefficient of Dispersion***
Property containing 1, 2 or 3 dwelling units	*.950 - 1.050*	*0 - 15.0*
All other property	*.950 - 1.050*	*0 - 20.0*

....

(4) *The assessor must, in accordance with the procedures set out in the Assessment Quality Minister's Guidelines, declare annually that the requirements for assessments have been met.*

Section 17 requires the Minister to assess and determine whether information provided by the municipalities under section 319 of the Act is acceptable. Section 17 was subsequently repealed, but the repeal was not effective until after the extended deadline for the Minister to report equalized assessments to the municipalities (i.e.: after December 15, 2003.)

17(1) *On receiving information from a municipality pursuant to section 319(1) of the Act, the Minister must assess the information and determine if the information is acceptable.*

(2) *If the Minister determines that the information is acceptable, the Minister may use and rely on the information when preparing the equalized assessment for the municipality.*

(3) *If the Minister determines that the information is not acceptable, the Minister must prepare the equalized assessment using whatever information is available about the municipality.*

(4) *The information provided pursuant to section 319(1) of the Act must include assessment levels.*

Section 18 of MRAT requires the Respondent to adjust levels of assessment to 1.0 for specified property types. Section 18 was amended by the *Matters Relating to Assessment Amendment Regulation 330/03* (section 11), filed November 20, 2003. The amendment reflects the reduction in property types from four to two. The amended version is shown below.

18(1) *In preparing the equalized assessments for a municipality*

(a) the assessments for regulated property that have been valued in accordance with this Regulation require no adjustment, and

(b) the assessments for property other than regulated property must be adjusted to reflect an assessment level of 1.000 using the assessment levels determined by the Minister.

(2) *The total equalized assessment for residential property is calculated in accordance with the following formula:*

$$\text{Assessments for residential property} \times \frac{1}{\text{assessment level for residential property}}$$

(3) *The total equalized assessment for non-residential property other than regulated property is calculated in accordance with the following formula:*

$$\text{Assessments for non-residential property} \times \frac{1}{\text{assessment level for non-residential property}}$$

Special powers are granted to the Minister to limit the amount an equalized assessment can increase.

19 *Pursuant to section 325 of the Act, the Minister may by order limit the amount by which equalized assessments for any class of property listed in section 297 of the Act may increase from one year to the next.*

Equalized Assessment Variance Regulation 2003, AR 364/20039 **(Variance Regulation)**

Section 1 of the Variance Regulation permits the Minister to vary a municipality's equalized assessment by Ministerial Order.

1 In any year, the Minister may, by order, vary the equalized assessment prepared for a municipality under Part 9, Division 5 of the Act for the purposes of school requisitions required by and under sections 164 and 174 of the School Act.

Section 2 stipulates that the MGB has no authority to hear an appeal of relating to an Equalized Assessment Varied pursuant to section 1.

2 Where the Minister varies an equalized assessment under section 1, the Municipal Government Board has no jurisdiction under section 488(1) of the Act to hear an appeal relating to the varied equalized assessment.

ISSUES

Having considered the evidence, argument, and relevant legislation, the MGB identified the following substantive issues.

1. Does the Act require the Appellant to identify an alternate amount to that assessed by the Minister in order to appeal its equalized assessment before the MGB? This issue involves consideration of the following sub-issues.

   a. Does section 488(1)(b) require the Appellant to identify an alternate equalized assessment amount?
   b. Does section 321 require the Appellant to identify an alternate equalized assessment amount?

2. Is the Appellant appealing its varied equalized assessment?

3. Do the prohibitions in section 488.1 limit the MGB's authority to hear the issues raised in this appeal?

4. Did the Respondent fail to correct violations of legislated requirements or assessment standards identified through the audit process? This issue involves consideration of the following sub-issues.

   a. Did the Respondent ensure that the assessment quality requirements prescribed by MRAT with respect to CODs were met?
   b. Did the Respondent investigate CODs below 5% and respond appropriately to indications of potential sales chasing?
   c. Did the stratification used by municipalities and accepted by the Respondent affect the Appellant's equalized assessment?
   d. Did the Respondent's acceptance of ratios "inferred" from sub-municipalities with 0 to 15 sales affect the Appellant's equalized assessment?
   e. Did the Respondent ensure that the assessment quality requirements prescribed by MRAT with respect to levels of assessment were met?
   f. Are there any other indications that the Respondent failed to review and ensure data used to prepare equalized assessments was acceptable for that purpose? If so, did this failure result in an incorrect, unfair, or inequitable equalized assessment for the Appellant?

5. Did the Respondent's attempts to communicate assessment, reporting, and equalization procedures cause confusion? If so, did this confusion result in errors affecting the Appellant's equalized assessment?

6. Did the standards and procedures upon which the Respondent determined its assessments for regulated property lack a proper foundation under the Act? This issue involves consideration of three broad sub-issues:

a. Can the MGB, on an appeal from an assessment validly before it, consider the validity of subordinate legislation acted upon in the assessment process?
b. Is the subordinate legislation relied upon by the assessors in conducting these assessments validly adopted under the Act and Alberta's other laws dealing with the adoption of subordinate legislation?
c. If the MGB finds that the subordinate legislation relied upon lacks a firm statutory foundation, what follows from that finding? Is the Appellant's contention that the assessment should have been, and must now be, assessed on a market value standard correct?

7. Has the Respondent's assessment of regulated property resulted in equalized assessments that are either incorrect or inequitable? This issue involves consideration of the following sub-issues.

    a. Does the existence of discretion built into the Minister's Guidelines result in inequitable equalized assessments?
    b. Does the fact that the Appellant has a disproportionately low amount of regulated property in relation to many other municipalities result in an equalized assessment that is unfair or inequitable?
    c. Does a greater percentage increase in the Appellant's school tax requisition as compared with the Provincial total demonstrate that the Appellant's equalized assessment is unfair or inequitable?

8. Should the 2002 assessment of $45,000,000 for street lighting in the City of Calgary be removed from the Appellant's 2004 equalized assessment?

9. Summary and Conclusion: Is the 2004 equalized assessment for the Appellant fair and equitable?

ISSUE 1: Does the Act require the Appellant to identify an alternate amount to that assessed by the Minister in order to appeal its equalized assessment before the MGB? This issue involves consideration of the following sub-issues.

a. Does section 488(1)(b) require the Appellant to identify an alternate equalized assessment amount?
b. Does section 321 require the Appellant to identify an alternate equalized assessment amount?

Summary of Appellant's position concerning sub-issues 1a and 1b

The Appellant argued that neither section 321 nor section 488(1)(b) requires identification of a specific alternate equalized assessment amount. The Act does not require a fiscal remedy or "damages"; rather, it simply states that the MGB may alter an equalized assessment or refer an unfair assessment to the Minister for review.

The main thrust of the current appeal is that the Respondent purports - but fails - to fulfill its obligation to enforce corrections to municipal assessment data once the audit process has proven it to be suspect. Simply put, the application of an arithmetical equalization process to flawed data will not result in a valid "common" level of assessment; therefore, the resulting equalized assessment amounts will be incorrect. Accordingly, this appeal does relate to the Minister's equalized assessment "amount", pursuant to the right of appeal granted in section 321 and the MGB's jurisdiction under section 488(1)(b).

Summary of Respondent's position concerning sub-issues 1a and 1b

Pursuant to section 321, a municipality may appeal "the amount of an equalized assessment". Similarly, section 488(1)(b) only permits the MGB to decide an appeal concerning the "amount" of an equalized assessment. Therefore, it is the amount resulting from the equalization process - not the assessment and audit process - that may be the subject of an MGB appeal.

Having argued this point, the Respondent submitted that instead of appealing the amount of its equalized assessment, the Appellant has sought to challenge the assessment and audit process as a whole. The Appellant's witnesses concede they have not established the extent or amount of any claim. Therefore, the MGB has no authority under section 488(1)(b) to hear an appeal on the grounds advanced. In this regard, the Respondent cited Atco Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board) (2006 SCC 4) as authority for the proposition that a tribunal such as the MGB cannot exceed the powers granted in its enabling statute.

In further support of its argument, the Respondent pointed to two previous MGB orders (Town of Canmore v. Minister of Municipal Affairs, Board Order MGB 287/98, and Jasper Improvement District v. Minister of Municipal Affairs, Board Order MGB 041/99). It submitted these Orders recognize that an equalized assessment appeal involves an appeal of the equalization process as opposed to the assessment audit process. It also pointed to the evidence

of several witnesses, including Mr. Fegan, currently Deputy City Assessor (Valuation) with the City of Calgary, and the expert witnesses Mr. O'Connor, Mr. Dornfest, and Mr. Sauter. Mr. Fegan testified that while the Appellant had retained a number of experts to study the Respondent's data, he was unaware whether they had determined any specific number by which to adjust the equalized assessment. Similarly, Mr. O'Connor, Mr. Dornfest and Mr. Sauter indicated they were not instructed to quantify the impact on the Appellant's equalized assessment of the procedural deficiencies they identified. While Exhibit AG – prepared during the hearing itself - makes reference to a specific "Total Estimated Loss", this figure is based on hypothetical assumptions regarding market value assessment and is not supported by the evidence.

Findings

- It is not a requirement of an equalization appeal to identify an alternate amount to that issued by the Minister as the equalized assessment.
- Section 321 does not require the Appellant to identify an alternate equalized assessment amount.
- Section 488(1)(b) does not require the Appellant to identify an alternate equalized assessment amount.

Reasons concerning sub-issues 1a and 1b

At issue is the scope of an appeal that can be made by an Appellant or decided by the MGB under sections 321 and 488(1)(b) of the Act. Section 321 indicates that a municipality "may appeal the amount of an equalized assessment", while section 488(1)(b) grants jurisdiction to hear an appeal "relating to the amount set by the Minister … as the equalized assessment … ". The Respondent contends that in order to appeal the amount of an equalized assessment and have that appeal heard by the MGB, the Appellant must identify an alternate amount and show why it is preferable to the equalized assessment as assessed by the Assessment Services Branch of the Department of Alberta Municipal Affairs. In the MGB's view, the Respondent's interpretation improperly limits the right of appeal.

The Act permits a municipality to challenge the amount of an equalized assessment. It does not require the Appellant to quantify the difference between the equalized assessment set by the Minister and the amount requested by the municipality. An equalized assessment amount may be challenged by showing that the equalized assessment is unfair. It is evident that an appellant without access to the necessary information or resources to identify an alternate amount may still be able to show that the amount actually calculated by the Minister is incorrect or inequitable. In such circumstances, the Act provides a mechanism of appeal to the MGB. If the evidence proves an error or deficiency of sufficient concern, the MGB may either change the equalized assessment pursuant to section 499(1)(c), or refer the matter to the Minister for inspection pursuant to section 516.

Similar comments apply to section 488(1)(b). That sub-section grants the MGB jurisdiction to hear appeals "relating to the amount" of the equalized assessment. In this regard, the MGB notes that the words "relating to" allow a broader scope of enquiry than that suggested by the Respondent. In the MGB's view, matters "relating to" an equalized assessment amount include the procedures by which the amount was reached and the likelihood that those procedures will result in an equalized assessment amount that is fair and equitable within the meaning of section 499(2)(b) and otherwise conforms to relevant legislated requirements.

ISSUE 2: Is the Appellant appealing its varied equalized assessment?

Summary of Appellant's position

It is common ground that according to section 2 of the Variance Regulation, the MGB has no jurisdiction to hear an appeal relating to varied equalized assessments. However, the current appeal does not relate to a varied equalized assessment; rather, it relates to the amount of the Appellant's equalized assessment. Therefore, section 2 of the Variance Regulation does not apply.

The testimony of Mr. Fegan confirms that the figure of $85,815,845,255 appears on the Appellant's 2004 Equalized Assessment Report. This report was appealed by a letter to the MGB contained in Exhibit S, Tab 3. Thus, the Appellant clearly appealed its 2004 equalized assessment and not its varied equalized assessment. Furthermore, while the Appellant initiated its appeal by a letter dated January 12, 2004, the varied equalized assessment was not received until later and could not possibly have been the subject of this appeal.

The Appellant conceded that it referred to school requisitions in its evidence and argument; however, such references do not entail that the varied equalized assessment is the subject of the appeal. On the contrary, equalized assessments ultimately determine school requisitions. Therefore, the school requisition represents a clear indication of damages suffered by the Appellant through improper equalization. References to the school requisition merely help quantify damages suffered because of the Respondent's failure to equalize assessments properly.

Summary of Respondent's position

Section 2 of the Variance Regulation indicates the MGB has no jurisdiction to hear an appeal relating to a varied equalized assessment. However, the focus of the appeal is in fact the Appellant's varied equalized assessment. For example, the Appellant complains in its submissions of the relative increase in its school tax requisition compared to the increase in the Provincial tax requisition as a whole. Similarly, Mr. Fegan affirmed during questioning by counsel for the Respondent that the appeal relates to the amount of the 2004 varied equalized assessment as opposed to the 2004 equalized assessment.

Finding

The Appellant is appealing the $85,815,845,255 amount of its 2004 equalized assessment and not its 2004 varied equalized assessment.

Reasons

The Appellant's argument focuses on the adequacy and fairness of the processes whereby the Minister purported to create equalized assessments. An equalized assessment amount resulting from a flawed or unfair process cannot itself be fair and equitable; thus, the thrust of the

Appellant's argument targets the equalized assessment amount. It is obvious that a municipality's equalized assessment plays a role in determining its varied equalized assessment; however, the two amounts are distinct, and section 2 of the Variance Regulation should not be interpreted to restrict the right of appeal granted under section 321 of the Act. Accordingly, the MGB is satisfied that the Appellant has appealed its equalized assessment as opposed to its varied equalized assessment, and that section 2 of the Variance Regulation does not bar the MGB from hearing this appeal.

ISSUE 3: Do the prohibitions in section 488.1 limit the MGB's authority to hear the issues raised in this appeal?

Summary of Appellant's position

The Appellant conceded that section 488.1 puts data provided to the Minister by municipalities beyond challenge. However, it interpreted this limitation to mean that the MGB may not prevent a municipality from continuing to use its own assessment data for administrative purposes. Furthermore, it submitted that equalization means that the Province takes the assessment levels given to it by municipalities and adjusts them to determine a consistent set of assessment levels. Consequently, the Minister - in its role as a supervisory agency - must ensure that all values are brought to a common level of assessment for the purposes of equalization. To fulfill this role, the Minister purports to audit and adjust the municipalities' original data.

The Appellant submitted that its critique of the audit process demonstrates that the Minister has failed to equalize the data properly. This critique does not flout section 488.1, because it is not the municipalities' data that is relied on to prepare the equalized assessments, but rather the Minister's audited and adjusted data. It is what the Minister does with the adjusted information that is in issue – not the information provided by the municipality.

Summary of Respondent's position

The MGB's jurisdiction to hear appeals regarding the amount of an equalized assessment is limited by section 488.1(b). This sub-section prohibits the MGB from hearing an appeal related to an equalized assessment if the reason for the appeal is

> that the information provided to the Minister by a municipality … does not properly reflect the relationship between assessments and the value of property in the municipality for the year preceding the year in which the assessments were used for the purpose of imposing a tax under Part 10, … .

The Respondent submitted that to interpret this section properly, the MGB must distinguish between the equalization process on the one hand and the assessment audit process on the other. The evidence of the Respondent's employees, Mr. Husar (Director, Assessment Audit Unit), Ms. Young (Co-ordinator, Assessment Audit - South) and Ms. Downey (Director, Education Tax and Assessment Advisory Unit), shows that the Province receives data from municipalities, subjects that data to audit, and then uses the audited municipal data as inputs to the equalization process. The Respondent submitted that the clear wording of section 488.1(b) bars the MGB from hearing the Appellant's main ground for appeal alleging that information provided by the municipalities does not reflect assessment levels properly. The Respondent also submitted that the limits on the MGB's jurisdiction in relation to equalized assessment appeals are further reflected by section 325, where it says that "despite anything in this Act, the Minister may adjust an equalized assessment at any time."

Findings

- The prohibitions in section 488.1 do not limit the MGB's authority to hear the issues raised in this appeal.

- The Appellant is not challenging any of the information provided to the Minister by the Municipalities.

Reasons

The wording of section 488(1)(b) gives the MGB relatively broad jurisdiction to hear matters "relating to the amount set by the Minister … as the equalized assessment for a municipality, …". This scope is narrowed to some extent by section 488.1, whereby the MGB may not consider claims based on the following grounds:

> (a) that the equalized assessment fails to reflect a loss in value where the loss in value has not been reflected in the assessments referred to in section 317, or
>
> (b) that information provided to the Minister by a municipality in accordance with section 319(1) does not properly reflect the relationship between assessments and the value of property in the municipality for the year preceding the year in which the assessments were used for the purpose of imposing a tax under Part 10, ...

The MGB finds that sub-section 488(1)(a) does not apply to the present circumstances, because the Appellant has not suggested its equalized assessment be reduced owing to losses in value not reflected in assessments. On the contrary, the thrust of the Appellant's argument is that the Minister may have failed to correct for under-assessed property in other municipalities.

With regard to sub-section 488(1)(b), the MGB notes it has previously considered the effect of section 488.1 on the MGB's jurisdiction in City of Calgary v. Minister of Municipal Affairs (Board Order MGB 147/98). In that decision, the MGB considered whether inconsistent practices between municipalities concerning chattel adjustments and property stratification – and the alleged effects of these practices on data accepted by the Minister for equalization purposes - could constitute legitimate grounds for appeal. As the following passage shows, the MGB concluded that they could. In doing so, it rejected arguments similar to those now put forward by the Respondent.

> To decide this jurisdictional question, the Board must look at the scope of an appeal under section 488(1) as well as the scope of the restriction on jurisdiction under section 488.1. Restrictions on the general right to appeal granted by the Act should be interpreted narrowly. Cases establish that the taxpayer's right to

question the taxing authority's decisions should only be restrained by clear language in the legislation.

Section 499(2)(b) provides that, on an appeal, the Board must not alter:

a) any assessment that is fair and equitable, taking into consideration assessments of similar property in the same municipality, and

b) any equalized assessment that is fair and equitable, taking into consideration equalized assessments in similar municipalities.

These sections reflect the well established legal requirement that a taxing authority owes a duty to the taxpayers to exercise its taxing powers in a manner that produces taxes which are fair and equitable amongst taxpayers.

Section 157.3 of the School Act says specifically that "The Government of Alberta is a taxing authority for the purpose of applying property tax rates against the equalized assessment of a municipality." This section supports what section 499(2)(b) implies; that in compiling an equalized assessment the Minister owes municipalities a duty of fairness and equity similar in content to that duty owed by a municipality to its taxpayers.

The fairness and equity principle therefore applies to the inter-municipal taxation involved through equalized assessment. The Minister thus owed a duty to the City of Calgary in the preparation of its equalized assessment. The Minister's position is that in the equalization process, as distinct from the assessment and audit function, the duty is limited to ensuring the accuracy of the mathematical calculations submitted by the Municipalities and applying a formula to those figures. The Board finds this mathematical approach too narrow. The assessment and audit function may be distinct, but it is through this process that the Minister is able to identify those differences that may give rise to inequality or unfairness between municipalities and that may therefore require steps towards true equalization. The assessment and audit functions are still part of a process that results in the equalized assessment being prepared for each municipality. The Minister might allow figures to pass audit, and yet still, using information gained through that function, adjust the equalization to achieve fairness and equity between municipalities. This is a process and discretion that the Board can review on an appeal under 488(1)(b). The Board is not persuaded that Section 488(1) is so narrow as to preclude considerations of such factors on an appeal.

Section 488.1 bars an appeal by a municipality based solely on grounds alleging that information provided to the Minister by that municipality or another municipality was incorrect. In the Board's opinion the issues raised by the Appellant are not issues barred by section 488.1. This appeal is about what the

> Minister did (or failed to do) with the municipal inputs after the Department received them, not about the accuracy of the inputs themselves.

The MGB is still in agreement with the principles expressed above. The Minister has (or had at the relevant time) a duty under section 17(1) of MRAT to assess the information provided by a municipality and to determine if the information is acceptable. He used the audit process to perform this function. As with Board Order MGB 147/98 quoted above, the current appeal is about what the Minister did or failed to do with the municipal inputs after the Minister received them - not about the accuracy of the inputs themselves. Accordingly, the Appellant is not challenging any of the information provided to the Minister by the municipalities.

ISSUE 4: Did the Respondent fail to correct violations of legislated requirements or assessment standards identified through the audit process? This issue involves consideration of the following sub-issues.

a. Did the Respondent ensure that the assessment quality requirements prescribed by MRAT with respect to CODs were met?
b. Did the Respondent investigate CODs below 5% and respond appropriately to indications of potential sales chasing?
c. Did the stratification used by municipalities and accepted by the Respondent affect the Appellant's equalized assessment?
d. Did the Respondent's acceptance of ratios "inferred" from sub-municipalities with 0 to 15 sales affect the Appellant's equalized assessment?
e. Did the Respondent ensure that the assessment quality requirements prescribed by MRAT with respect to levels of assessment were met?
f. Are there any other indications that the Respondent failed to review and ensure data used to prepare equalized assessments was acceptable for that purpose? If so, did this failure result in an incorrect, unfair, or inequitable equalized assessment for the Appellant?

Summary of Appellant's position

The Appellant submitted that as a supervisory agency the Respondent has a duty to determine whether municipal data submitted for equalization purposes is acceptable for adjustment to a common level of assessment. This duty is reflected in the literature issued by the International Association of Assessing Officers (IAAO), as well as in section 17 of MRAT. This section requires the Respondent to assess and determine whether information provided by municipalities pursuant to section 319(1) of the Act is acceptable. The Respondent's duty is also reflected in the testimony of the Respondent's own equalization experts, Mr. Almy and Mr. Denne, who indicated that the responsibilities of a supervisory agency include supervising ratio studies performed by municipalities. The Respondent attempted to fulfill its duties as a supervisory agency by auditing the data submitted; however, it failed to follow up on substantive issues and correct standards violations when these were identified through the audits.

The IAAO is the primary professional assessment standard setting organization in North America. Section 5.5 of the IAAO's Standard on Ratio Studies indicates that a ratio study is only valid to the extent that it is representative of the population. However, as explained below, the Respondent failed to correct for signs of non-representative ratio studies, including: (1) CODs outside acceptable limits as flagged by statistical analysis audit procedures, and (2) over-stratification. This failure means that many of the ratio studies and assessment levels relied on by the Respondent to generate equalized assessments should not have been used for equalization purposes. As a result, the Appellant argued its 2004 equalized assessment was neither correct nor fair and equitable relative to equalized assessments in other Alberta municipalities.

COD warnings

The Appellant submitted that the Respondent failed to react to low and high COD warnings generated by its own audit procedures. The COD measures the dispersion of the ASRs used in a ratio study from the median of the ratios, and is expressed as a percentage of the median. High CODs indicate high levels of dispersion and suggest assessment procedures in the municipality are not generating accurate market values in a consistent fashion. In contrast, low CODs indicate a tight distribution of data. While lower CODs are desirable, extremely low CODs are considered a potential indicator of "sales chasing" – that is, the practice of altering the assessments of sold properties to approximate the sales price. One reason that extremely low CODs are unlikely to occur under ordinary conditions is that buyers and sellers have various motivations that affect individual sales transaction prices. It is common ground that the practice of sales chasing destroys the value of a ratio study, because the assessment level of sold properties may no longer be assumed to represent that of unsold properties.

MRAT requires a COD of 15% or less for residential properties and 20% or less for other properties. While there are no legislated guidelines for low CODs in Alberta, Mr. O'Connor, Mr. Dornfest, and Mr. Sauter all suggested that CODs of less than 5% show a potential for sales chasing. This figure is reflected in the IAAO literature and the Respondent's own draft manuals.

The Appellant submitted that even though the final assessment audit reports generated warnings about quality statistics outside recommended valuation standards, these warnings were not investigated or corrected. In fact, the Respondent's disclosure materials include numerous audit reports showing warnings for suspect CODs relating to final figures accepted by the Respondent from municipalities after consultation and audit. The failure to follow up and correct potential sales chasing invalidates the Respondent's equalization process and makes the Appellant's resulting equalized assessment inequitable.

In further support of its position, the Appellant pointed to the evidence of Mr. Dornfest, Mr. Sauter, and Mr. O'Connor. Mr. O'Connor has testified as an expert concerning equalization processes before courts and tribunals throughout North America and other parts of the world. In his report presented to the MGB, Mr. O'Connor reviewed information from 40 municipalities accepted by the Province for equalization purposes. He concluded that for 27 of the 40 municipalities surveyed, the Respondent's audited assessment levels were suspect and not reliable. Furthermore, even after giving the benefit of the doubt to a few municipalities, Mr. O'Connor testified that 20 still have questionable CODs with no explanation evident in the Respondent's disclosure materials.

The Appellant submitted that Mr. Dornfest and Mr. Sauter's testimony was consistent with that of Mr. O'Connor. All three of these witnesses suggested the Respondent failed to investigate and take corrective action once CODs outside the IAAO recommended range had been identified. The expert witnesses acknowledged that CODs of less than 5% are not conclusive proof of sales chasing and may sometimes have other explanations: e.g., sales of homogenous property (such as bare lots for development), screening of outlier ASRs, and lack of sales in

smaller rural jurisdictions. Nevertheless, they indicated that the Respondent failed to fulfill its duties as a supervisory agency, because it did not investigate and correct potential indicators of sales chasing when these were identified. Furthermore, Mr. Dornfest indicated that the Respondent's failure to investigate is not consistent with the recommendations of a report entitled "Review of Audit and Equalization Process" (1997) commissioned by the Respondent from the consulting firm Almy, Gloudemans & Jacobs (Gloudemans Report). The Gloudemans Report recommends that the Province "aggressively monitor and guard against sales chasing". In this regard, the Appellant also noted that comparison of the 2003 and 2004 assessment audit files shows no improvement. Suspect levels of assessment based on CODs are prevalent in both the 2003 and 2004 assessment audits.

Over-stratification

The Appellant noted that each assessor in Alberta defines sub-municipalities within his or her municipality and submits the corresponding assessment totals, levels, and supporting ratio studies to the Province. If the assessor uses a sub-municipality that is too small, there may be too few sales within it to ensure a statistically valid or representative sample. Furthermore, assessors may be tempted to rely on there being few or no sales in a sub-municipality as a false justification to "infer" a ratio for that sub-municipality to suit their own purposes. The issue of over-stratification is recognized not only in IAAO literature, but also in the recommendations of the Gloudemans Report. The Gloudemans Report indicates that while stratification is desirable, overly small strata compromise the integrity of the ratio study. It also recommends that strata have a minimum number of parcels or sales and suggests approximately 15 sales as a guideline. In this connection, the Gloudemans Report indicates specifically that "strata with less than five sales are totally unacceptable for equalization purposes."

Mr. Dornfest's report documents various deficiencies connected with over-stratification in the ratio studies relied on by the Respondent. For example, his report shows that only 19% of the 5,364 sub strata in the Province of Alberta, excluding the City of Calgary, had 15 sales or more. Moreover, 53% (2,853) had inferred ratios owing to insufficient data submitted, and 23% (1,249) had an inferred ratio of 1.0, meaning the level of assessment was inferred to be 100%, because there were insufficient sales to estimate the actual assessment level.

Mr. Dornfest and Ms. Young, among others, agreed that over-stratification can be remedied using various techniques. Such techniques are also recognized by the IAAO Standard on Ratio Studies and include:

- Restratification
- Extending the period from which sales are drawn
- Enlarging the sample by validating previously rejected sales
- Using appraisals in lieu of or in addition to sales prices

Rather than enforcing these techniques to reduce over-stratification, the Respondent accepted information from a large number of sub-municipalities with few or no sales for equalization purposes. The Appellant argued that in so doing, the Respondent determined levels of assessment using ratio studies that may not have been representative of property within the sub-municipalities. Consequently, the equalized assessment amounts calculated using those levels were likely incorrect.

Other matters

In addition to sales chasing, over-stratification and excessive inferred ratios, the Appellant noted several other factors that it believed were not conducive to correct and equitable equalized assessments. For example, the Appellant noted audit report warnings reproduced in Mr. O'Connor's report that flag sub-municipalities with median ASRs outside 0.95 to 1.05. It also noted similar warnings regarding price related differentials (PRD) outside recommended levels. PRD is a measure of regressivity or progressivity in the assessment of high versus low valued properties. As evidence of further deficiencies, the Appellant noted Mr. O'Connor's testimony that some municipalities apparently did not adjust prior years' sales for the effect of inflation, or lowered the number of years of sales history to reduce sales in non-residential strata. It also noted Mr. Dornfest's testimony that some municipal data show chattel adjustments greater than IAAO recommended levels. Although the Appellant placed less emphasis on these issues, it regarded them as contributors to the unfairness and inaccuracy of its 2004 equalized assessment.

Summary of Respondent's position

The Respondent submitted that the evidence before the MGB - including evidence regarding potential sales chasing and excessive stratification - does not establish any error in equalized assessment. Furthermore, it said the Appellant was unable to establish or quantify any injury owing to the alleged deficiencies concerning ASRs relied upon during the equalization process. In fact, it said the Appellant actually benefited from features of the audit process that it challenges.

The Respondent acknowledged that it has regard for - and generally follows - the IAAO standards. Mr. Dornfest, for example, confirmed that the Province follows a number of the principles recommended in the IAAO Standards. Nevertheless, the IAAO standards do not have the force of law in Alberta; consequently, they cannot be used to judge whether equalization processes were followed properly.

CODs

With respect to warnings regarding CODs below 5%, the Respondent noted that the regulated standard requires CODs between 0 and 15% (for residential property) or 0 and 20% (for other property) - not 5 and 15% as recommended by the IAAO. Furthermore, it stressed the evidence of all the qualified witnesses who appeared before the MGB that CODs of less than 5% are not

evidence of sales chasing, but at most flag a potential for sales chasing. In this regard, both Ms. Young and Mr. Denne outlined other explanations for low CODs including the following:

- Trimming of outliers: excluding outlier sales both above and below the median narrows the range of ASRs and lowers the COD.
- Homogeneous property: Many municipalities – particularly around the City of Calgary – have experienced rapid growth resulting in houses of consistent age and type. Other forms of homogenous property include condominiums, controlled markets (such as when a developer sells vacant land), and multiple parcel sales. Homogenous properties tend to be assessed similarly and sell at a similar price. These circumstances tend to narrow the range of ASRs and lower the COD.
- High level of information and sophisticated assessment techniques: low CODs are sometimes attainable if the assessor uses sophisticated valuation models and has accurate information about the property he or she is assessing. For example, Mr. O'Connor, Mr. Gloudeman and Mr. Denne report a COD of 6% - a figure very close to the recommended cut-off of 5% - in literature referenced in the Complainant's disclosure material.

Ms. Young went on to testify that the Respondent's audit software automatically flags CODs below 5% with a warning. The audit department investigates these warnings during the audit process and enforces changes where necessary. The fact that warnings remain on the final audited reports does not mean that they have not been investigated, since CODs below 5% with acceptable explanations will still generate warnings.

In view of Ms. Young's testimony, the Respondent submitted that the allegation that the Province took no corrective action to remedy problems flagged during audit is factually incorrect. Thus, Ms. Young confirmed that if an auditor had concerns when reviewing data submitted by the municipality, he or she would contact the assessor to discuss the information provided. Based on these discussions, the auditor would determine whether corrections were required. If corrections were required, the auditor would request the municipal assessor to make changes and resubmit data. In almost all cases, the municipality would correct and resubmit the data when requested to do so. If they refused, the audit department would make the necessary changes itself.

The Respondent also stressed Ms. Young's evidence that corrective actions were taken in municipalities throughout the Province as a result of the audit process. In fact, she indicated that for the year under appeal, the audit department changed the assessment levels for 64 municipalities in relation to residential properties and 114 municipalities in relation to non-residential properties. These changes were made for various reasons, including failure to submit an assessment level, the need for additional sales in a ratio study, the need to remove adjustments made by the municipal assessor, and the need for changes in audit coding.

Potential effect of low CODs

The Respondent submitted that although the Appellant claimed failure to correct for low COD warnings is a deficiency in the audit process, it did not attempt to quantify the impact of this alleged deficiency or establish how it might affect the amount of the Appellant's 2004 equalized assessment. Furthermore, the Respondent submitted its own evidence to establish that any potential impact would be small. For example, Mr. Denne's report indicated:

> The total of the assessments of the property classes subject to question in connection with ratios possibly affected by sales chasing is in the order of one percent of the total equalized assessments for the municipalities and analysis categories of interest in the appellant's report.

Having argued that the potential effect of understated assessments in municipalities with low CODs would be small, the Respondent observed that the Appellant had not analyzed the Appellant's assessment data to provide a basis for comparison with other municipalities. Therefore, it argued the Appellant has submitted insufficient evidence to support an appeal based on inequitable treatment with respect to other municipalities. The Respondent then went on to provide its own expert evidence through Mr. Denne, who analyzed the Appellant's assessment data and concluded that it is subject to the same issues with respect to potential sales chasing. Furthermore, Mr. Denne testified that not only is the Appellant subject to this potential in principle, but also in roughly the same order of magnitude.

Over-stratification

With respect to over-stratification, the Respondent emphasized Mr. Denne's testimony that the existence of a large number of sub-municipalities does not necessarily indicate an attempt to subvert ratio studies. Rather, it suggested that according to Mr. Denne, stratification is an appropriate tool for developing assessment valuation models and ratio studies, as well as grouping neighbourhoods for data analysis. Thus, there may be a number of reasonable explanations for the strata and groupings selected and used by the municipalities and submitted to the Province. For example, Mr. Denne stated in his report that on-site research into matters connected with this appeal revealed at least two cases where high strata counts were:

> at least partially attributable to an administrative convention designed to ensure that properties associated with (but not among the operating components of) unit valuations, such as sleeping quarters associated with pipeline outposts, are equalized at the same rate as the associated properties.

Impact of Stratification

The Respondent submitted that its policy of accepting sub-municipalities with inferred ratios did not have a significant effect on the Appellant's 2004 equalized assessment and, if anything, benefited the Appellant. In support, it pointed to the evidence of Ms. Young and Mr. Denne.

For example, Ms Young indicated that ratios were only inferred for sub-municipalities with no sales and these represent only 5.6% of the provincial assessment total. Of these, some were assessed at 1.0 while others were assessed at values obtained from similar sub-municipalities. Ms. Young testified that if ratios inferred at 1.0 had been inferred at 0.95 instead, the resulting change would work out to only about 0.2% of the total of all the assessed values reported by assessors in the Province.

Mr. Denne's evidence went even further than Ms. Young's, since his report quantified the effect that restratifying sub-municipalities into larger units with more sales (as recommended by the Appellant) would have on the Appellant's equalized assessment. According to his analysis not only is the impact of the alleged over-stratification small, but it in fact slightly benefits the Appellant. Thus, the Respondent stressed the findings in his report that:

- Although 68% of strata within municipalities studied by Mr. O'Connor have inferred ratios, the corresponding percentage of the total assessments within those municipalities was only 12%.
- Collapsing strata with fewer than 15 sales to form larger strata (as recommended by the Appellant) would increase (not lower) the Appellant's school tax requisition. The effect of collapsing such strata was to increase by about 2.1% the City of Calgary's share of the total equalized assessment of itself plus the municipalities in Mr. O'Connor's report.

In view of the above, the Respondent submitted that while the Appellant has alleged imperfections in the relevant processes, it has not shown conclusively that any error ever occurred. Furthermore, it has not shown the magnitude of any such error to justify a remedy from the MGB. In fact, the evidence before the MGB suggests the Appellant benefited from the practices about which it complains.

Other matters

The Respondent submitted there is no evidence to suggest that data used for equalization purposes failed to conform to the standards set out in MRAT. Neither does the evidence suggest that the Respondent failed to take reasonable steps to fulfill its supervisory duties. In this regard, it noted Mr. Almy's testimony that the Province's detailed audit process is among the top quarter of those jurisdictions that attempt detailed audits. Mr. Dornfest and Mr. Sauter gave similar evidence regarding positive aspects of the assessment and audit regime in the Province of Alberta. For example, Mr. Dornfest acknowledged under cross-examination that the Province of Alberta is one of only three Canadian jurisdictions mentioned in a 2003 survey - co-authored by Mr. Dornfest - that audit assessment procedures. The same survey reported (among other things) that the Province of Alberta is one of the few jurisdictions in Canada that perform annual ratio studies. For his part, Mr. Sauter confirmed that, like his own jurisdiction of New York, the Province of Alberta attempts to follow IAAO guidelines, uses auditing reports, and attempts to give education and feedback to municipalities. He also indicated that the level of professional assessors in the Province of Alberta is generally higher than that available in New York, where

smaller sub-jurisdictions may be administered by personnel without assessment training. Regarding assessor qualifications in the Province of Alberta, the Respondent noted that along with the municipal return, each Alberta municipal assessor furnishes an "Annual Return Declaration" outlining his or her qualifications and confirming that sold and unsold properties have been assessed fairly and equitably.

Findings

- The Respondent investigated violations of assessment standards identified through the audit process and made corrections where necessary.
- The Respondent ensured that the assessment quality requirements prescribed by MRAT with respect to CODs were met.
- The Respondent investigated CODs below 5% and responded appropriately to indications of potential sales chasing.
- The stratification used by municipalities and accepted by the Respondent did not have an adverse effect on the Appellant's equalized assessment.
- The Respondent's acceptance of ratios "inferred" from sub-municipalities with 0 to 15 sales did not have an adverse effect on the Appellant's equalized assessment.
- The Respondent ensured that the assessment quality requirements prescribed by MRAT with respect to levels of assessment were met.
- There are no other indications that the Respondent failed to review and ensure data used to prepare equalized assessments was acceptable for that purpose or that such failure resulted in unfair or inequitable equalized assessments.

Reasons

Section 319(1) is under Division V of the Act relating to equalized assessments. It requires municipalities to provide returns containing information requested by the Minister. Section 17 of MRAT, although now repealed, was in effect at the time of assessment and reads as follows:

17(1) *On receiving information from a municipality pursuant to section 319(1) of the Act, the Minister must assess the information and determine if the information is acceptable.*

The MGB interprets these legislative provisions to impose a supervisory role upon the Minister regarding the quality of the information used for the purposes of equalization. Essentially, the Appellant's argument is that the Respondent failed to fulfill this duty, and that this failure resulted in unfair, inequitable and incorrect assessments.

In support of its position, the Appellant stressed the evidence of Mr. O'Connor, Mr. Dornfest, and Mr. Sauter. These witnesses identified various circumstances that could affect the reliability of the audited information used to create equalized assessments. Chief amongst these were the following:

(1) narrow distributions of ASRs that may indicate sales chasing and violate standards recommended by the IAAO, and;
(2) over-stratification resulting in sub-municipalities with fewer than the acceptable number of sales recommended by the IAAO and the Gloudeman's report. Associated with over-stratification are large numbers of sub-municipalities with inferred ratios.

The Appellant argued that failure to correct for these circumstances rendered the audited assessment levels relied on by the Respondent non-representative and hence unsuitable for equalization purposes. The MGB does not accept this argument for reasons outlined below.

(1) narrow distributions of ASRs (COD and concentration tests)

Two measures concerning ASR distributions were discussed before the MGB: (i) COD and (ii) percentage distribution within plus or minus 2% of the median (concentration test). The legislated standards do not refer to a concentration test, but do require a COD between 0 and 15% for residential property and 0 to 20% for other property. The IAAO Standard on Ratio Studies recommends a tighter range of COD between 5 and 15% and a concentration of less than 32% of sales within plus or minus 2% of the median.

The Appellant did not identify any case where data submitted with CODs outside the legislated range remained uncorrected after audit. Rather, the data sets brought to the MGB's attention where CODs fell outside the legislated range, were all corrected as a result of the audit process. Accordingly, the MGB is satisfied that the Respondent ensured data with CODs outside the legislated range was corrected for the purposes of equalization. Having said this, there were numerous instances of sub-municipalities with CODs outside the IAAO recommended range. While the IAAO standards do not have the force of law, they do represent best practices that many jurisdictions, including the Province of Alberta, generally attempt to follow.

The expert witnesses attached particular importance to sub-municipalities for which the Respondent's audit software generated low COD warnings (COD less than 5%). Mr. Dornfest also focussed on instances where more than 32% of sales fall within 2% of the median, contrary to IAAO recommendations. The main reason for concern regarding low CODs (or alternatively, high concentrations of sales surrounding the median) is the possibility that they result from sales chasing. However, the uncontradicted evidence before the MGB established that CODs below 5% are not necessarily caused by sales chasing or non-representative ratio studies. Rather, they may have a number of other causes, such as sub-municipalities with sales of homogenous property or an accurate assessment model.

The Appellant conceded that low CODs do not necessarily prove sales chasing; however, it argued that the Respondent should have investigated sub-municipalities flagged by the audit software to determine whether assessments of sold properties had been assessed differently from unsold properties. Based partly on the continued existence of low COD warnings in the Respondent's final audited assessment reports, Mr. O'Connor, Mr. Sauter and Mr. Dornfest

concluded that no little or such investigation had occurred - or if it had, that the Respondent had not acted to enforce corrective action.

This conclusion is evidently mistaken, given the testimony of Ms. Young and the data contained on the discs entered as Exhibit 29. According to Ms. Young, IAAO certified staff from the Respondent's audit section discussed data flagged by warnings with municipal assessors to determine the reason for the guideline violations. If the explanations were acceptable, then no changes were required, although warnings continued to be generated automatically in subsequent reports. On the other hand, if changes were necessary, the audit unit required municipal assessors to resubmit their data with appropriate corrections. Changes made during the audit process are marked clearly on the information submitted by the Respondent.

For the year in question, Ms. Young demonstrated that changes were made for 64 and 114 municipalities regarding residential and non-residential property categories respectively. Furthermore, she testified that changes were made to at least one assessment level in 18 of the 40 municipalities featured in Mr. O'Connor's report. Changed data was highlighted in yellow in electronic Excel files contained on the discs produced by the Respondent as part of its disclosure and entered as Exhibit 29. The Appellant failed to identify the changes made by the Respondent's auditors in the data produced as a result of Board Order MGB 050/04.

Ms. Young also indicated that where the auditor suspects sales chasing, the audit unit undertakes a detailed audit of the municipality in question. In such cases, the audit unit carries out further analytical and substantive audit procedures such as the following. It compares the assessment per square metre of properties that have sold with those that have not sold to determine whether the assessments of sold properties have been adjusted to approximate sales price. It visits the municipality to examine sold and unsold properties and determine whether they have been treated differently. It investigates the assessor's assessment processes through further discussion with the assessor. It also increases sample size to broaden the ratio study, and may restratify property to perform additional ratio studies. If the audit unit confirms sales chasing, it determines what corrective changes must be made.

In summary, the MGB observes that the warnings on the final reports concerning audited information appear to be an integral part of the Respondent's audit program. As indicated by Ms. Young, they are automated alerts that flag potential issues and prompt requests for more information. Thus, they provide a useful tool to communicate potential problems to assessors and track trends in the quality of assessments. In the case of low COD warnings, they do not indicate violation of any regulated standard, since the regulated minimum COD is zero. Rather, their function is to flag potential issues with respect to sales chasing or other inappropriate assessment procedures. The evidence before the MGB established that all warnings regarding CODs were investigated and corrective action taken where necessary. In view of the above, the MGB concludes that while the Appellant raised sufficient evidence regarding low CODs to suggest a potential for sales chasing, the Respondent showed that it initiated appropriate procedures to investigate and correct for such instances, thereby meeting the obligations of a supervisory agency responsible for preparing equalized assessments.

(2) over-stratification and inferred ratios

The term "inferred ratios" was used differently by different witnesses at the hearing. The Appellant's expert witnesses spoke of ratios as "inferred" if there were fewer than 15 sales in a sub-municipality, and therefore – in their view – insufficient sales to form a representative set. In contrast, Mr. Husar and Ms. Young explained that ratios were only inferred if there were no sales within a sub-municipality and therefore no median ASR.

Semantics aside, the facts appear to be that if the Respondent deemed one or more sales to be acceptable within a sub-municipality, it used the median ASR for those sales to represent the assessment level of that sub-municipality. There are no legislated requirements concerning the number of sales that must be used for a ratio study within a municipality or sub-municipality. Accordingly, no legislated requirements were breached in this regard. Nevertheless, assessment levels of a substantial proportion of sub-municipalities within Alberta were calculated using fewer sales than those recommended in the assessment literature. Without a reasonable explanation, this circumstance could raise concern about the equalization procedure applied by the Respondent.

An explanation was provided by Mr. Husar, Director of the Assessment Audit for the Respondent, who indicated that municipal assessors report sales stratified according to use (i.e.: residential, commercial or industrial) and geographical location. Since municipal assessors are most familiar with changes in value according to location and use within their own municipalities, the Respondent's policy was to allow them to define the sub-municipalities within their respective jurisdictions. Based on their knowledge of property characteristics within their municipalities, many assessors identified small areas with highly distinct valuation characteristics (for example, a gas plant) as separate sub-municipalities. Such sub-municipalities had few or no sales. In cases with no sales, the assessor was forced to infer a ratio. In some cases, the Respondent encouraged assessors to infer a ratio of 1.00 to avoid influencing other sub-municipalities. In other instances, the preferred approach was to infer a median ratio from a neighbouring sub-municipality.

Mr. Husar indicated that the policy outlined above has resulted in approximately 50% of sub-municipalities receiving an "inferred" ratio based on zero sales. However, as noted by both Ms. Young and Mr. Husar, the effect of these municipalities on equalized assessments is mitigated, because they represent a small percentage of the total assessment.

Mr. Denne provided further evidence about the impact of the Respondent's policy regarding sub-municipalities with few or no sales. Table 5 of his Report (Exhibits 8 and 25) shows the results of collapsing sub-municipalities and restratifying subject to at least 15 sales. Mr. Denne concluded that the Appellant's share of the total equalized assessment of itself plus the "top 40" municipalities studied in Mr. O'Connor's report would actually increase from 44.7% to 45.6%, suggesting the Appellant may be getting a small advantage under the Respondent's stratification policy.

In view of the above, and in particular the evidence of Mr. Denne, the MGB is satisfied that the Respondent's policy of stratification did not prejudice the Appellant with respect to its 2004 equalized assessment.

Other issues concerning the Respondent's audit and equalization processes

To a lesser extent, the Appellant also questioned various other issues concerning the Respondent's treatment of data. These issues include: (1) practices in relation to chattel, time and other adjustments to sales prices, (2) the use of the median rather than the mean ASR, (3) the number of years of sales history used by different municipalities, (4) warnings generated by the Respondent's statistical analysis software concerning median ASRs for certain sub-municipalities, as well as the price related differential (PRD) warnings for certain sub-municipalities flagging potential regressive or progressive assessment of high versus low priced properties. While less emphasis was placed on these considerations, the following comments apply.

First, the MGB is satisfied that staff attached to the Respondent's audit unit analyzed and reviewed municipal data submitted in accordance with the Act and that corrections were made where the auditors deemed necessary. The evidence of Ms. Young is clear that the propriety of adjustments (including time and chattel adjustments) made by municipal assessors was a factor considered by the audit unit, and the MGB is satisfied that the Respondent fulfilled its supervisory duties in this regard. The MGB also accepts the evidence of Mr. Dornfest and Mr. Sauter that the Respondent's processes for review and detection of potential problems with municipal inputs were in many ways exemplary. Although criticism was levelled at the Respondent's activities to enforce corrective action once difficulties were discovered, the evidence of Ms. Young together with a review of changes documented in Exhibit 29 are sufficient to dispel such concerns. As indicated previously, the evidence establishes that members of the Respondent's audit department reviewed adjustments and other potential problems flagged during the annual audit with municipal assessors and enforced corrections where required. Corrections were documented for numerous municipalities by yellow highlighting in the Excel files contained in Exhibit 29. If the audit department suspected problems requiring further investigation, it scheduled a detailed audit. Detailed audits were also performed on a rotating five-year basis for all municipalities, regardless of their annual audit results.

Second, PRD and median ASR warnings generated by statistical analysis software appear to have been reviewed and discussed with municipal assessors and changes required where the audit unit deemed necessary. With respect to median ASRs, the MGB notes that despite outstanding warnings at the sub-municipality level, there was no suggestion that the overall assessment levels for the specified property categories in any municipality violated the legislated assessment quality. Furthermore, the MGB notes that when the assessments were prepared, the regulated standard required levels between 0.9 and 1.1. Shortly thereafter, the regulated range narrowed to between 0.95 and 1.05. Thus, many of the median ASR warnings relate to the

upcoming standards and were intended for analysis in subsequent years. Such warnings also would have helped to educate assessors as to the potential impact of the upcoming standards on future ratio studies.

Third, the use of median rather than mean ASR as the assessment level is required under MRAT; consequently, there can be no question the Respondent was correct to use the median ASR to determine assessment levels.

Comments on Disclosure

The MGB notes that it held several preliminary hearings to deal with the Appellant's requests for additional disclosure subsequent to Board Order MGB 050/04. Nevertheless, the Appellant made a number of complaints during the course of the hearing regarding the ease and sufficiency of disclosure. For example, the Appellant indicated it had difficulty making use of the disclosure owing to the volume of electronic files produced and the lack of co-operation or assistance provided by the Respondent to access, process, or make sense of the information they contained.

In this connection, the MGB notes that as an Alberta municipality, the Appellant was itself required to submit assessment information to the Respondent. Therefore, while the format of the data as contained in the Respondent's disclosure may have been new, the Appellant should have been familiar with the general nature of the assessment information it contained.

In addition, while a large number of files were certainly produced, the MGB finds nothing to suggest that the Respondent's actions hindered the Appellant in its use of the information. The Appellant had access to the files since late July 2004, allowing it well over a year before this hearing to make itself and its consultants familiar with the data they contain. This length of time allowed ample opportunity to inspect the files to discover the changes made to municipal data as highlighted in the Excel files contained on the discs provided. Furthermore, correspondence produced at the merit hearing demonstrates that the Respondent's staff met the Appellant to provide instruction on how to access the files. For example, the memorandum located in Exhibit OO at Tab 10(a) shows that a meeting took place on September 13, 2004 between Ms. Young and the Appellant's representatives to explain in detail the nature of the files disclosed. Testimony heard during the present hearing confirms that counsel for the Appellant as well as Mr. Lionel St. Amand were amongst the Appellant's representatives present. It also appears that Ms. Young explained information regarding the nature of the both the raw data and ARC (output) files and indicated that older files are replaced by new versions as they are produced.

The Appellant also complained that it had no access to information concerning unsold properties that would have helped to check the validity of the reported municipal assessment levels. However, based on the evidence of Mr. Husar and Ms. Young, the MGB is satisfied that the Respondent had no such information in its possession. In fact, it appears that the data collection system in place (prior to ASSET) was physically incapable of receiving it.

The Appellant also complained its consultants were forced to spend unnecessary months reproducing the Respondent's audit results and that the Respondent ought to have provided access to Oracle and SAS (Statistical Analysis Software) to facilitate analysis. In this regard, the MGB notes database and analytical software are presumably subject to licensing restrictions and an order that they be made available for the Appellant's use appears unrealistic. In any event, Mr. O'Connor indicated that he was able ultimately to reproduce the Respondent's results from the information provided.

In conclusion, the MGB is satisfied that the Appellant received all the information used to prepare the equalized assessments, as requested at the preliminary hearings. It bears repeating that the Appellant had access to this information for over a year before the hearing began. Furthermore, the MGB notes the Appellant made no further specific requests during the merit hearing for an order for additional disclosure; neither did it identify any undisclosed item in the possession of the Respondent that would have had a bearing on the outcome of this hearing.

ISSUE 5: Did the Respondent's attempts to communicate assessment, reporting, and equalization procedures cause confusion? If so, did this confusion result in errors affecting the Appellant's equalized assessment?

Summary of Appellant's position

The Appellant submitted that a supervisory agency such as the Respondent has a duty to establish and communicate clear procedures for assessment equalization. The Respondent failed to fulfill this role, as shown by the following considerations.

Changing deadlines for submission of municipal returns and preparation of assessments. The legislated date for municipalities to provide assessment information to the Respondent for equalization purposes was April 1, 2003. However, this date was extended to September 30, 2003 (MO L:014/03) and then again to October 31, 2003 (MO L:122/03). Similarly, the legislated date for the Minister to report equalized assessments to the municipalities was November 1, 2003. This date was extended to December 15, 2003 (MO L:135/03). Finally, the legislated date to file an appeal of an equalized assessment was December 1, 2003. This date was extended to January 14, 2004 (MO L:135/03).

Various communications regarding assessment standards and submissions of data. The Respondent attempted to communicate policy and procedural changes to municipalities using a wide variety of media, including: imprecisely dated periodic bulletins and circulars such as "Advisory Aspects", reporting manuals in various drafts, correspondence, and Ministerial Orders. The Appellant submitted that the result was a confusing mass of information not conducive to fair and consistent reporting of assessment data.

Changes in regulations. Changes in the regulations occurred midway through the reporting and equalization process resulting in different quality standards. When the Municipal Returns became due, MRAT established that the assessment quality standards included a median assessment ratio of 0.9 – 1.1 for four property types: Residential, Income Cities, Income Rural, and Vacant. Sections 4 and 13 of the MRAT Amendment Regulation *(AR 330/03)* – effective November 20, 2003 - changed the acceptable Median Assessment Ratio range to .95 – 1.05 and reduced the property types to include only residential and non-residential. Thus, a new set of standards was in effect on December 15, 2003 when the Respondent's extended deadline for sending the equalized assessments to the municipalities occurred. Further sections of *AR 330/03* were scheduled to take effect at a still later date.

Confusion as to whether ASSET to be used for reporting in 2003. The Respondent first advised that it intended to phase in the operation of its ASSET information reporting system starting 2002 with full implementation in 2004 ("Advisory Aspects", Winter 2001/2). This development would involve a new reporting format for submission through ASSET. However, Ministerial Order L:003/02 provided that all municipalities should use the schedule "Reporting Information for Assessment Audit", which does not use ASSET. A succession of "Advisory Aspects" bulletins first confirmed that ASSET would be operational for the 2004 equalized returns (due

October 31, 2003), but then indicated that information submitted into the ASSET system in 2003 would not be used to prepare the 2004 equalized assessments, and that the old reporting method would be retained.

Draft documents. The Respondent produced a succession of draft manuals regarding reporting, assessment standards, and ratio studies. Although the intent of these documents was to prepare consistent ratio studies, the succession of differing drafts left no single authoritative version to provide direction. Ms. Young and Mr. Husar, who are both employees of the Respondent, testified that the Assessment Audit and Equalized Assessment Manual, Assessment Quality Minister's Guidelines and Reporting Information for Assessment Audit Manual were in draft form during the assessment year in question.

The Appellant submitted that the Respondent's failure to publish and adhere to clear reporting and equalization procedures increased the potential for inconsistency, conflict and error. Furthermore, this failure means that the Respondent did not meet industry standards intended to promote clarity set by the IAAO. In support of this position, the Appellant pointed to the evidence of Mr. Dornfest. Mr. Dornfest is currently Property Tax Policy Supervisor for the Idaho State Tax Commission. He also has extensive experience establishing or reviewing equalization processes for various government authorities and has written extensively on the subject in connection with the IAAO. Mr. Dornfest acknowledged that while the IAAO standards do not carry the weight of legislation, they are widely accepted as best practices throughout North America and beyond, and are recognized by the Respondent itself throughout its publications.

Mr. Dornfest indicated that the many changes noted above add to confusion about the process, both in the area of data submission and with regard to quality standards. Further, the Respondent's confusing communications do not conform to sections of the IAAO "Standard on Ratio Studies" intended to promote the goal of transparent, effective administrative systems, including ratio study processes (eg. section 12.5, "Training and Education", and section 13.3, "Data Integrity"). The Appellant noted that the Respondent's own expert witness, Mr. Almy, agreed that a hypothetical chronology including (a) three time extensions within ten months made by Ministerial Order appearing two weeks before the previous deadlines, (b) six pieces of communication regarding information submission and (c) two changes in the regulatory regime, could lead to confusion amongst municipalities as to what was required.

Summary of Respondent's position

The Respondent did not address directly the issue of deficient communication in final written submissions. Nevertheless, it acknowledged during the hearing that significant changes have taken place in the assessment and equalization process in recent years, beginning with the move to a market value based system for non-regulated properties in 1995 and the still more recent move toward the ASSET data base and reporting system. This transformation has posed significant challenges and required certain changes in reporting practices. In this connection, the Respondent noted Mr. Almy's testimony that while transformation to a market system presents

technical and institutional challenges that are difficult to manage, the Province of Alberta has established an audit and equalization regime to help with this transformation that is worth emulating.

Findings

- The Respondent has issued an evolving collection of reporting manuals, advisories and other documents.
- There is no evidence that the reporting manuals, advisories and other documents referred to above caused or contributed to confusion resulting in error on the part of any municipality when reporting assessments.
- There is no evidence that the reporting manuals, advisories and other documents referred to above had an adverse effect on the Appellant's 2004 equalized assessment.

Reasons

It is common ground that the Respondent has initiated a series of changes to its reporting, audit and equalization process over the last decade, including the recent introduction of ASSET. The Appellant contends that the volume of the Respondent's draft manuals, Ministerial Orders, and other reporting instructions as well as their mode of publication has produced a confusing mass of material not in keeping with a supervisory agency's role of promoting clear and consistent standards. While it is possible that the Respondent's publications and other communications could cause confusion, the Appellant produced no evidence that any municipality did in fact experience confusion resulting in unfairness or error concerning the Appellant's Equalized Assessment amount; neither did the evidence establish any other errors resulting from the alleged confusion.

ISSUE 6: Did the standards and procedures upon which the Respondent determined its assessments for regulated property lack a proper foundation under the Act. This issue involves consideration of three broad sub-issues:

a. Can the MGB, on an appeal from an assessment validly before it, consider the validity of subordinate legislation acted upon in the assessment process?
b. Is the subordinate legislation relied upon by the assessors in conducting these assessments validly adopted under the Act and Alberta's other laws dealing with the adoption of subordinate legislation?
c. If the MGB finds that the subordinate legislation relied upon lacks a firm statutory foundation, what follows from that finding? Is the Appellant's contention that the assessment should have been, and must now be, assessed on a market value standard correct?

Introduction to Issue 6

In addition to arguments directly regarding the equity of its equalized assessment, the Appellant questioned whether the Minister had established legitimately valuation standards for regulated property. During the preliminary hearings, the Respondent requested that the "validity of the Minister's Guidelines issue" - or alternatively, the sufficiency of legal authority for the Minister's Guidelines and their effect on the 2004 equalized assessment - be severed from the main appeal. To this end, the MGB ordered separate written submissions on the matter (between March 11 and May 16, 2005 per DL 023/05), but warned that a decision might be deferred until after the main merit hearing. After the parties' submissions on the validity of the Minister's Guidelines were filed, the MGB issued a letter through its counsel suggesting the matter be resolved through an expedited application to the Court of Queen's Bench. In support of this suggestion, the MGB noted that the issue is one of law and has been raised in several other appeals now before the MGB.

The MGB's suggestion was not favoured by all of the participants in this and other relevant appeals. Therefore, the MGB did not make the application to the Court of Queen's Bench. Nevertheless, the Appellant communicated its support for the idea and signalled its intent to make an expedited application of its own. At the MGB's request, the Appellant undertook to provide notification should the Court of Queen's Bench consent to hear the application. The MGB's intent was to reserve its decision on the validity of the Minister's Guidelines in deference to the anticipated Court ruling. However, as of the date of this decision, the MGB has not received notification of any expedited Court application from the Appellant. The MGB notes that originating notices concerning applications connected with Telus Communications Inc.'s past linear assessments have been filed with the Court of Queen's Bench, and that these notices raise the validity of the Minister's Guidelines as an issue. Nevertheless, it is unclear whether these applications have been pursued. The MGB therefore proceeded to decide the matter based on the parties' submissions.

Summary of Appellant's position

The Appellant submitted that the Minister's Guidelines were used to set valuation standards for regulated property and that these guidelines are invalid and of no legal effect. Moreover, because the equalization scheme uses assessed values for regulated property derived from the Minister's Guidelines to calculate equalized assessments, the invalidity of the Minister's Guidelines also affects the legitimacy of the resulting equalized assessment amounts. The Appellant made the following arguments attacking the validity of the Minister's Guidelines.

Valuation standards were established under the Minister's Guidelines instead of the Regulations

Those granted power by legislation may only exercise their powers in accordance with the legislation. The Respondent's power to establish valuation standards stems from section 322(d) of the Act, which authorizes the Minister to make regulations "establishing valuation standards for property".

The Minister purports to establish valuation standards in sections 3, 5, 6 and 7 of MRAT. However, these sections simply refer to procedures set out in the Minister's Guidelines, as attached to Ministerial Orders from year to year (Ministerial Order L:153/03 for the year under appeal). For example, section 3 stipulates that the valuation standard for farmland is "agricultural use value", which must be calculated by following procedures in the "Alberta Farm Land Assessment Minister's Guidelines". Similarly, sections 5, 6 and 7 stipulate that the valuation standards for railways, linear property and machinery and equipment are those calculated by following procedures set out in the relevant portions of the Minister's Guidelines.

It is evident from the wording of the regulation that the substance of the valuation standards for regulated property is set out in the Minister's Guidelines. As noted above, sub-section 322(d) of the Act only authorizes the Minister to establish valuation standards for property by regulation. The Minister's Guidelines are not regulations. Therefore, the Minister's attempt to establish valuation standards via the Minister's Guidelines does not represent a valid exercise of authority under the Act.

The Minister's Guidelines are not Regulations authorized under the Act

In support of the view that the Minister's Guidelines are not regulations, the Appellant noted that sub-section 1(2)(d) of the *Regulations Act* provides that documents "incorporated or adopted by reference in a regulation" are not regulations within the meaning of the *Regulations Act*.

Neither can it be argued that Ministerial Order L:153/04 (to which the Minister's Guidelines are attached) is a regulation. Sub-section 1(f) of the *Regulations Act* provides that "'regulation' means a regulation as defined in the *Interpretation Act* that is of a legislative nature." According to section 1(1)(c) of the *Interpretation Act*, a regulation

> means a regulation, order, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted (i) in the execution of a power conferred by or under the authority of an Act, or (ii) by or under the Authority of the Lieutenant Governor in Council …

Ministerial Order L:153/03, which purports to establish the Minister's Guidelines, was not made in the execution of a power conferred by the Act; neither was it made under authority of the Lieutenant Governor in Council. Therefore, it is not a regulation, but rather represents an attempt to exercise pure executive power.

Even supposing the Ministerial Order were a regulation, the Minister's Guidelines themselves would not qualify as regulations, because they are referentially incorporated into the Order, and the *Regulations Act* expressly states that a "document adopted or incorporated by reference in a regulation is not a regulation".

The Minister's Guidelines constitute an invalid subdelegation of power

The Appellant submitted that the Minister's Guidelines also represent the use of an invalid subdelegation of power. Section 578(2) confirms that the Minister may not delegate his power to make regulations. This provision conforms to the well-established principle that legal instruments must be made by those authorized to make them ("Delegatus non potest delegare."). The Act authorizes the Minister to make regulations that set valuation standards. Instead of exercising this power, the Minister made regulations that incorporate valuation standards in the Minister's Guidelines. The Assessment Services Branch, being a department of the Ministry of Alberta Municipal Affairs (Department), produces the Minister's Guidelines; thus, the Minister invalidly delegated his power to the Department.

In the alternative, if the Minister (as opposed to the Department) established the Minister's Guidelines, they are still invalid, because a delegated decision maker must exercise its decision making power in the form granted by the legislation. Thus the Minister, as the delegated decision maker, cannot delegate to itself the power to decide administratively what the legislation requires it to decide legislatively - Florence v. Canada (Air Transport Committee) (1988), 34 Admin L.R. (FCTD), Brant Dairy Co. v. Milk Commission of Ontario [1973] SCR 131, and Dene Nation v. R (1984) 6 Admin L.R. 268 (FCTD).

The Minister's Guidelines represent use of executive rather than legislative power

The Appellant submitted that the distinction between the Minister's Guidelines and regulations is critical, because regulations are subject to publication requirements mandated in the *Regulations Act*. They are also drafted in a particular manner and any changes must take place under public scrutiny. In short, they are public and easily accessible.

In contrast, the Appellant argued that neither MO L:153/03 nor the Minister's Guidelines satisfy the stringent publication requirements and other elements of accessibility, transparency, due

process, and accountability attributable to effective regulations. In support of this argument, the Appellant pointed to section 2(3) of the *Regulations Act*, which indicates that

2(3) *Unless expressly provided to the contrary in another Act, a regulation that is not filed as provided in this Act has no effect.*

Filing requirements under the Act require publication in the Alberta Gazette and neither the Minister's Guidelines nor MO L:153/03 were so published. Therefore, neither document is an effective regulation.

In further support of its position that the Minister's Guidelines are not drafted and communicated in the same manner as regulations, the Appellant pointed to the evidence of Mr. Driscoll, Director of Regulated Standards and Utilities Assessment with the Assessment Services Branch of the Department. Mr. Driscoll indicated that he worked with a team responsible for developing the Minister's Guidelines and that he himself was in charge writing them. Mr. Driscoll has no legal training, although a private law firm did review some of the documents his team was responsible for drafting. Although somewhat unclear as to the precise mechanisms involved, Mr. Driscoll testified that "the review process for the Minister's Guidelines is less than that for regulation and less than that for legislation." The Appellant concluded from these and similar comments that the Minister's Guidelines (which administer approximately $61.5 billion dollars worth of property) were drafted by a layperson without public scrutiny.

The Appellant also drew the MGB's attention to what it claimed to be the confusing nature of the Minister's Guidelines, and did not agree with Mr. Driscoll's testimony that regulated assessments are determined by the simple formula A x B x C x D, where

A is an asset's "base cost",
B is an assessment year modifier factoring base cost to the year of assessment,
C is depreciation, and
D is additional depreciation where there is evidence of an additional loss in value.

The Appellant argued that the process for determining regulated assessments is far more complex and confusing than this description implies. The Minister's Guidelines contain important undefined terms such as "base cost" and "loss of value". In addition, the Minister's Guidelines are comprised of various documents, including the titular "Minister's Guidelines" as well as several "Appendices" or Manuals which are distinct documents within the Ministerial Order. Appendices I to IV concern the assessment of farmland, linear property, machinery and equipment and railways. Appendix V – the Construction Cost Reporting Guide (CCRG) - concerns asset costs to be included (or excluded) from "base cost" calculations. Thus, Appendix V is not a valuation standard and has no legislative authority. An additional document entitled "Interpretive Guide to Appendix V" is not part of the Minister's Guidelines, but assists company representatives report costs to the Respondent.

Mr. Gagne, President of AEC Valuations (Western) Inc., has significant experience in tax management and litigation support as well as expertise in linear property taxation in the Province of Alberta. Mr. Gagne gave testimony regarding the confusing nature of the Minister's Guidelines. He testified that the assessment regime is arbitrary and allows for a great deal of assessor (or owner) discretion at each stage of the calculation process.

Summary of Respondent's position

MGB authority

The MGB is an administrative tribunal established under the Act and as such may only exercise powers expressly or impliedly granted thereunder. Therefore, while the MGB may consider questions of law directly connected to the extent and scope of its jurisdiction, it has no authority to declare a regulation invalid (Nova Scotia (Worker's Compensation Board) v. Martin and Nova Scotia (Worker's Compensation Board) v. Laseur 2 SCR 504). The Minister's Guidelines constitute legislation; consequently, the MGB cannot decide on a question of law relating to their validity.

Valuation standards for regulated property established by MRAT

The Respondent took issue with the Appellant's position that valuation standards for regulated property were not established through regulation as authorized by the Act. It submitted that the valuation standards for regulated property are set out unequivocally in sections 3, 5, 6, and 7 of MRAT, as contemplated by section 322 of the Act.

In support of this position, it noted the evidence of Mr. Driscoll, who indicated that the valuation standards for regulated property are set out in MRAT. For example, section 6 of MRAT indicates that the valuation standard for linear property is " … that calculated in accordance with the procedures referred to in sub-section (2)." In turn, sub-section (2) stipulates that "In preparing an assessment for linear property, the assessor must follow the procedures set out in the … Minister's Guidelines …". In this way, MRAT identifies a valuation standard that is calculated in accordance with procedures laid out for convenience in the Minister's Guidelines. This view is supported by Telus Communications Inc. v. the Crown in Right of the Province of Alberta (Board Order MGB 124/04). In that decision, the MGB determined that MRAT set the valuation standards for regulated property and that only the procedures for calculating the valuation standards were delegated.

The legislative status of the Minister's Guidelines

The Respondent argued that even if the valuation standards are contained in the Minister's Guidelines as opposed to MRAT, the Minister's Guidelines are themselves regulations as contemplated in section 322 of the Act. In support of this position, the Respondent noted there is a rebuttable presumption that if the substance and effect of an order is legislative, it will be

presumed to be a regulation (R v. Simmermon, [1996] AJ No. 76 (CA)). It also noted the definitions of "regulation" in the *Regulations Act* and *Interpretation Act*.

The *Regulations Act* (RSA 2000, c. R-13) defines "regulation" by reference to the *Interpretation Act* (RSA 2000 c. I-8). The *Interpretation Act* then defines a regulation to mean, among other things, an order enacted in execution of a power conferred by an Act. The Ministerial Orders that establish the Minister's Guidelines are Orders established through the execution of a power to make regulations granted under the Act. Therefore, the Ministerial Orders are regulations, as are the Minister's Guidelines to which they refer.

Delegation

The Respondent conceded that the Minister delegated the duty for drafting and maintaining the Minister's Guidelines to administrative officials. However, it said such delegation was entirely proper and not equivalent to the delegation that occurred in Brant Dairy as argued by the Appellant. In Brant Dairy, the delegated regulation maker left the standard entirely to his own discretion through a "deem proper" clause in the regulation. In contrast, the Minister's Guidelines establish an ascertainable arithmetic formula A x B x C x D.

Where discretionary power is entrusted to a Minister of the Crown, it may be presumed that acts will be performed, not by the Minister in person, but by responsible officials in his department (Carltona v. Commissioners of Works [1943] 2 All E.R. 560 (CA) and R v. Harrison [1977] 1 SCR 238). Thus, the delegation of duties to draft and maintain the Minister's Guidelines was entirely proper. Once drafted, the Minister exercised his legislative power directly by making MRAT and establishing the Minister's Guidelines contemplated by MRAT.

Market value as a valuation standard

The Respondent submitted that even if the regulations do not contain a valuation standard for regulated property, the legislation does not support a claim that market value should be the default standard. If no procedures are established in the regulations, section 293(2) of the Act requires assessments to be based on assessments of similar property in the same municipality. Likewise, fairness and equity under section 499(2) requires consideration of assessments of similar property in the same municipality. Thus, if regulated property is not similar to non-regulated (market value) property, the market value standard should not apply. The Respondent suggested at least three reasons why regulated property should not be considered similar to market value property.

First, market value - as defined under section 1(n) of the Act - means the amount that a property as defined in section 284(1)(r) might be expected to realize if sold on the open market by a willing seller to a willing buyer. Section 284(1)(r) then indicates that "property" means (i) a parcel of land, (ii) an improvement or (iii) a parcel of land and the improvements to it. The Respondent submitted that the apparent objective of these definitions is to distinguish regulated properties from "property" as defined under the Act. Consequently, the effect of these

provisions is that market value assessment cannot be a default valuation standard for regulated property assessment.

Second, in GT Group Telecom Services Corp v. DLA (Board Order MGB 117/04), the MGB found that property is similar for the purposes of regulated assessment if it is assessed by means of the same process. Therefore, even if the Appellant were correct that the regulations do not contain valuation standards or procedures for regulated property, market value does not automatically become the appropriate standard.

Third, Mr. Driscoll and Mr. Halkett testified that unlike ordinary residential and non-residential land and improvements, regulated properties have no ready market; this difference means that reversion to a market value standard would not necessarily be feasible. Mr. Halkett held various positions with the British Columbia government, including Deputy Minister, and completed a review of the Assessment Act applicable to that jurisdiction. As a member of the Board of Directors of the British Columbia Assessment Authority he also has considerable expertise concerning assessment legislation.

Fairness and equity

As indicated above, the MGB must not alter equalized assessments that are fair and equitable taking into consideration equalized assessments in similar municipalities. The Appellant's 2004 equalized assessment was based on 2002 assessments (2003 tax year). Those assessments were prepared in accordance with the 2002 Minister's Guidelines. The 2004 equalized assessments for all other Alberta municipalities were prepared in the same fashion. Therefore, the Respondent submitted the Appellant's 2004 equalized assessment is fair and equitable taking into consideration assessments of all other municipalities. Accordingly, it said the MGB must not alter the Appellant's 2004 equalized assessments pursuant to section 499(2)(b).

Wrong Minister's Guidelines questioned

In addition to the above arguments, the Respondent submitted that the Appellant has challenged the 2003 Minister's Guidelines, whereas it is the 2002 Minister's Guidelines that apply to the 2004 equalized assessment. The Respondent indicated that the application could be dismissed solely on this ground.

Findings

- The MGB cannot make declarations of invalidity in the same manner as a Court. However, where the MGB concludes that legislation or subordinate legislation is, as a matter of law, invalid, then it must exercise its jurisdiction based on that conclusion of law, subject to judicial review.
- A valuation standard, in the assessment context, is a reference to an ascertainable method by which values may be set.

- The valuation standards for regulated property are expressed properly in the provisions of MRAT.
- If the valuation standards as expressed in MRAT and the Minister's Guidelines developed by Ministerial Order are inapplicable to value regulated property, the valuation standard for such property need not become market value by default.
- There has been no improper subdelegation by the Respondent in the establishment of assessment standards and procedures for regulated properties.

Reasons

(a) MGB Jurisdiction

The question of whether the MGB may, in the course of exercising its statutory jurisdiction, consider the validity of subordinate legislation when that question is relevant to the subject matter of the proceedings is an important one. Fortunately, it appears to the MGB that both the scope and the limitation upon the MGB's authority in this area are resolved by the reasons of the Alberta Court of Appeal in Canada Mortgage and Housing Corporation v. City of Calgary [1998] A.J. 597 (Alta. C.A.) and of the Supreme Court of Canada in Nova Scotia (Workers' Compensation Board) v. Martin [2003] 2 S.C.R. 504. In the CMHC case, the Assessment Appeal Board (ARB) had to decide a matter which turned in part on the validity of a regulation. The ARB decided the case based on the statutory definition, not the modified definition introduced in the regulation. The Court upheld this approach saying at paragraph 15:

> 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.

In the Nova Scotia case, the Supreme Court of Canada revisited certain earlier decisions about if and when administrative tribunals could apply the provisions of the Canadian Charter of Rights and Freedoms in the course of their proceedings. The Court canvassed a series of fundamental legal principles that are as applicable to ordinary challenges to the validity of subordinate legislation as they are to challenges based on the Charter. At paragraph 28 the Court said:

> Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the

> constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

A subordinate instrument that lacks a firm statutory foundation is an invalid law. If the MGB can and must under this Act answer questions of law that arise in the course of its proceedings, then challenges to the validity of the rules said to have been relied upon must fall within the scope of that power and duty.

The Court held that tribunals mandated to decide questions of law also have the related power to consider Charter challenges. The Court said at paragraph 31:

> Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks*, *supra*, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.

This paragraph confirms a tribunal's limited role. As the Respondent argues, it cannot declare for all purposes, that a law (or in this case a piece of subordinate legislation) is invalid. However, contrary to the Respondent's implicit argument, it can, and is indeed obliged to nonetheless consider the provision's validity and, if it finds it invalid, to treat it as such for the purpose of its proceedings. This is made clear by the following passages from paragraphs 33 and 34 of that same case:

> When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision of its enabling statute, the tribunal is asked to interpret the relevant *Charter* right, apply it to the impugned provision, and if it finds a breach and concludes that the provision is not saved under s. 1, to disregard the provision on constitutional grounds and rule on the applicant's claim as if the impugned provision were not in force.
>
> …

> This question is answered by applying a presumption, based on the principle of constitutional supremacy outlined above, that all legal decisions will take into account the supreme law of the land. Thus, as a rule, "an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid." *Cuddy Chicks, supra*, at p. 13; or, as stated in *Cooper, supra*, at paragrah 46:
>
> > If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52(1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute.

The question then becomes, for Charter issues and inferentially for other challenges to legislative validity of the kind raised here: does the MGB have the jurisdiction to decide questions of law? As the Court stated at paragraph 36:

> Rather, one must ask whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, then the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of the *Charter*, unless the legislator has removed that power from the tribunal. Thus, an administrative tribunal that has the power to decide questions of law arising under a particular legislative provision will be presumed to have the power to determine the constitutional validity of that provision. <u>In other words, the power to decide a question of law is the power to decide by applying only valid laws.</u> *(emphasis added)*

The Court went on to hold that a legislative intent that a tribunal be able to decide questions of law could be explicit or implicit. Of implied jurisdiction it said, at paragraph 41:

> Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

The Act does not explicitly say the MGB has the power to decide questions of law. However, innumerable Court decisions reviewing decisions of the MGB have presumed just that in their analysis of the MGB's role and function in light of the pragmatic and functional test for judicial review. Many aspects of the MGB's jurisdiction and statutory powers make it clear that the MGB has the power to decide questions of law. There may be questions about the level of deference to be accorded to those decisions, but not about the MGB's initial authority to make them. The MGB could not deal with many of the matters confined to its jurisdiction under section 488 without such a power. Its processes are clearly adjudicative and its decisions are final and not subject to appeal (section 506).

The MGB finds that it has the power to decide questions of law. This power must include fundamental questions such as whether, following the rule of law, subordinate legislation upon which reliance has been placed are validly passed under the legislation said to give them validity. The MGB cannot make declarations of invalidity in the same manner as a Court but, where it concludes that legislation or subordinate legislation is, as a matter of law, invalid, then it must proceed to exercise its jurisdiction based on that conclusion of law, subject to judicial review. The Martin case makes this clear not only for *Charter* cases, but for other legal questions. As the Court said in its conclusion at paragraph 45:

> An administrative body will normally either have or not have the power to decide questions of law. As stated above, administrative bodies that do have that power may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard: see, e.g., *McLeod v. Egan* [1975] 1 S.C.R. 517; *David Taylor & Sons Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.); *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157. Absent a clear expression or implication of contrary intent, such administrative bodies will also have jurisdiction to subject the statutory provisions over which they have jurisdiction to *Charter* scrutiny, while those tribunals without power to decide questions of law will not.

(b) Validity of the Regulations and Minister's Guidelines

The Appellant challenges the validity of the subordinate legislation relied upon by assessors in preparing assessments for regulated property. As noted before, section 293(1) of the Act requires assessors to:

293(1)
(a) apply the valuation standards set out in the regulations, and
(b) follow the procedures set out in the regulations.

The Appellant's position is that if (as it argues) there is no legal valid valuation standard or procedure to follow, then the resulting assessments must fall and with them the whole equalized assessment.

The subordinate legislation in a question

The Act provides the Minister with broad regulation making power in respect to assessments.

Regulations

322 *The Minister may make regulations*

…

(d) establishing valuation standards for property;

(e) respecting procedures for preparing or adopting assessments;

…

(f) respecting the allowance of depreciation on machinery and equipment;

(g) prescribing standards to be met by assessors in the preparation of assessments;

(h) respecting equalized assessments;

(h.1) respecting the audit of any matters relating to assessments;

(i) respecting any other matter considered necessary to carry out the intent of this Act.

The Minister has passed the *Matters Relating to the Assessment and Taxation Regulation* AR 289/99. The Appellant concedes that this is a regulation duly passed and published in the Alberta Gazette.

That Regulation purports to set standards for the assessment of the various types of property. It has since been repealed and replaced by AR 220/2004. Nothing turns on this because the former Regulation was in force at the relevant time and the important provisions have not changed in any event. Part 1 of the Regulation is entitled "Standards of Assessment". Section 3 sets the valuation standard for an ordinary "parcel of land". It provides:

Valuation standard for a parcel of land

3(1) *The valuation standard for a parcel of land is*

(a) market value, or

(b) if the parcel is used for farming operations, agricultural use value.

(2) In preparing an assessment for a parcel of land based on agricultural use value, the assessor must follow the procedures set out in the Alberta Farm Land Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended from time to time.

For linear property (defined by section 284(1)(k) of the Act) section 6 of the Regulation provides:

Valuation standard for linear property

6(1) *The valuation standard for linear property is that calculated in accordance with the procedures referred to in subsection (2).*

(2) In preparing an assessment for linear property, the assessor must follow the procedures set out in the Alberta Linear Property Assessment Minister's Guidelines established and maintained by the Department of Municipal Affairs, as amended from time to time.

Other sections provide similar standards, with similar references to other guidelines, for other types of assessable regulated property.

Part 2 of AR 289/99 deals with equalized assessments and shows the link between the standards for regulated (included linear) property and a municipality's equalized assessment. Section 18 provides:

Preparation of equalized assessment

18(1) *In this section, "regulated property" means property in respect of which an assessment is prepared using the valuation standard referred to in section 3(1)(b), 5, 6 or 7.*

(2) In preparing the equalized assessment for a municipality,

(a) the assessments for regulated property, reported in accordance with section 319(1) of the Act or derived from information in accordance with section 319(2) of the Act or section 17(3) of this Regulation, must be adjusted to reflect a common year by applying factors that the Minister considers appropriate, and

(b) the assessments for property other than regulated property, reported in accordance with section 319(1) of the Act or derived from information in accordance with section 319(2) of the Act or section 17(3) of this Regulation, must be adjusted in the manner the Minister considers appropriate

(i) to reflect a common year, and

(ii) to reflect an assessment level of 1.00.

There are in fact a series of documents entitled, for example, the Alberta Linear Property Assessment Minister's Guidelines and the Alberta Farm Land Assessment Minister's Guidelines. These documents have been changed at times for different assessment years. Each year, the Minister has purported to adopt or prescribe the Minister's Guidelines by appending them to a Ministerial Order which the Minister has signed. Ministerial Order No. L:153/03 provides, for example:

I, Guy Boutilier, Minister of Municipal Affairs, pursuant to sections 3(2), 5(2), 6(2) and 7(2) of the Matters Relating to Assessment and Taxation Regulation (AR 289/99) make the following order:

- The 2003 Alberta Farm Land Assessment Minister's Guidelines,
- The 2003 Alberta Linear Property Assessment Minister's Guidelines,
- The 2003 Alberta Machinery and Equipment Assessment Minister's Guidelines, and
- The 2003 Alberta Railway Assessment Minister's Guidelines,

as set out in the attached consolidated document, are established.

Dated at Edmonton, Alberta this 18 day of December, 2003.

Guy Boutilier
Minister of Municipal Affairs

Ministerial Orders L:171/01 and L:143/02 are to like effect.

The Rule of Law

The Appellant prefaces its argument by reminding the MGB that all government authority must ultimately be grounded in the law. It cites several cases that discuss the rule of law and its fundamental importance to Canadian society. An important element in the rule of law is that subordinate legislation, to be relied upon, must have a firm foundation in the Act that authorizes its passage, must be adopted by the person or body authorized to make that subordinate legislation and must meet any procedural requirements set out in the enabling act or in legislation like the *Regulations Act.*

The MGB takes those principles as a given. It is implicit in the cases referred to in the previous section that requires tribunals not to give effect to invalid laws and this includes subordinate instruments. The more difficult question is to decide whether in fact the documents relied upon in this case are validly passed and relied upon within the context of this Act's assessment scheme, and the legislation governing the use of subordinate instruments.

Did the Appellant impugn the wrong rules?

The Respondent suggests the Appellant impugns the wrong Minister's Guidelines adopted under the wrong Ministerial Order for the equalized assessment year in question. For that reason alone, it argues, the Appellant's concerns should be dismissed. The Respondent does not maintain, however, that if the correct Minister's Guidelines' year and Ministerial Order reference was used, the result would be different. The form of these various documents, from year to year, has not materially changed. If the arguments the Appellant advances are valid for the it cites, it is

equally valid for the correct reference year. The MGB proposes to analyze the Appellant's arguments as made, relying on the fact that that analysis would in any event be the same were the correct annual references substituted.

The Telus decision

The question of the validity of the Minister's Guidelines was dealt with in a prior Municipal Government Board Order MGB 124/04 involving Telus Communications Inc. and the Designated Linear Assessor. That Board Order is the subject of a motion for judicial review, but as yet neither party has moved to have the matter heard by the Court of Queen's Bench.

In that case, the complainant Telus Communications Inc. (Telus) challenged the validity of the Minister's Guidelines as an invalid subdelegation of the Minister's regulation-making power. It also and more particularly challenged another document called a Ministerial Prescription that purported to prescribe a particular way of assessing feature software used in telecommunication systems equipment; the very property that had been the subject of dispute in an earlier Telus decision. The arguments advanced included the argument that a Minister cannot subdelegate a legislative power to himself to be exercised in an administrative manner (see Board Order MGB 124/04, page 22 of 60).

In that same case, the DLA also took the position that the MGB had no power to hold, as a matter of law, that the statutory instruments in question lacked validity (see Board Order MGB 124/04, page 24 of 60).

The MGB, in Board Order MGB 124/04 found, at page 27 of 60 (leaving aside the question of the prescription):

> 5. The Minister has the authority to adopt guidelines for the assessment of linear property.
>
> 6. The Minister, in adopting the Minister's Guidelines, has not created an improper sub-delegation of authority.

The MGB answered the objection to its ability to decide the matter by saying that the question of law raised had to be decided in order for it to adjudicate upon the totality of the subject matter of the complaint before it. The MGB viewed the validity of the prescription and of the Minister's Guidelines as two separate legal issues. Its analysis of the arguments on the Minister's Guidelines was as follows:

> The MGB then considered, within the context of the legislation, what exactly are the Minister's Guidelines. Under section 322 of the Act, the Minister may make regulations, within the context of the assessment provisions, respecting any matter considered necessary to carry out the intent of the Act. Under section 1(f) of the Interpretation Act a "regulation" means a regulation, order, rule, form, tariff of

costs or fees, proclamation, bylaw or resolution enacted in the execution of a power conferred by or under authority of an Act, or by or under the authority of the Lieutenant Governor in Council. However, the Regulations Act, in section 1(2)(d), specifically excludes "adopted or incorporated by reference in a regulation". The Minister's Guidelines are incorporated by reference in section 6 (2) of Alberta Regulation 289/99.

The Complainant argued on two basic points: the Minister adopted the Guidelines when they properly should be a regulation and in doing so, the Minister has undertaken a legislative function or, the Regulation has improperly delegated the authority to make the Guidelines to the Department of Municipal Affairs. Support for the second point is based on the words used in the Regulation that the Guidelines are to be "established and maintained by the Department of Municipal Affairs". To answer the first question, the MGB finds that the Act, in reality, delegates the establishment of a valuation standard to a regulation, which in the case of linear property the Regulation says the valuation standard is a regulated process. The Regulation then establishes the procedures to calculate the assessed value are set out in the Minister's Guidelines. The Regulation then further qualifies that the procedures are to be established and maintained by the Department of Municipal Affairs. The valuation standard is set by the Regulation and that standard is whatever result is gained in each year under complaint by following set procedures. The Act and Regulation have not delegated the establishment of a valuation standard to the Minister, but only the procedures to be followed in determining an assessment. In the view of the MGB, this seems a reasonable approach to address the need to adjust procedures in the context of changing situations to ensure that assessments reflect ongoing changes in technology and costs. Linear property is characterized by specialized equipment, which in a global and competitive economy requires innovations and rapid changes in equipment and technology, so the assessment procedures must be able to respond to these rapid changes.

In regard to the issue of the Guidelines being established and maintained by the Department of Municipal Affairs, the MGB sees this as a reflection of fact regardless of how it is termed. The test, as the MGB sees it, is whether the Guidelines have been sanctioned by the Minister, which the Minister has done by virtue of the Ministerial Order adopted for each year under complaint. In the normal course of affairs, a Department prepares and updates many documents for the Minister, but such documents only carry weight if sanctioned by the Minister, as is the case with the Guidelines.

The parties' positions

Using section 6 of the *Matters Relating to the Assessment and Taxation Regulation*, dealing with linear property, as an example, the Appellant takes three broad objections to the statutory instruments involved in this case:

- Section 6, it is said, does not itself set a standard.
- Section 6 purports to set as the standard a procedure set out in another document – The Alberta Linear Property Assessment Minister's Guidelines – "established and maintained by the Department of Municipal Affairs, as amended from time to time." This, it is argued is an improper subdelegation; contrary to the statutory restriction on Ministerial delegation and contrary to the general principle against subdelegation known by the Latin maxim "delegatus non potest delegare."
- The Minister's Guidelines referred to in AR 289/99 are of an executive not a legislative nature and themselves call for references to other documents, none of which are statutory instruments.

The Respondent replies that:

- Section 6 does set a standard.
- If section 6 does not itself set a standard it does so by validly incorporating by reference the Minister's Guidelines which give meaning to the standard in section 6.
- Ministerial Order L:153/03 is itself an exercise of the Minister's statutory powers to make regulations, despite the nomenclature.
- A Minister is not required to author personally each statutory instrument. Departmental authorship or a document established by the Minister is not indicative of invalid subdelegation.

Subdelegation

Section 578 of the Act authorizes the Minister to delegate most powers, but expressly excludes the power to make regulations.

578(1) *The Minister may delegate in writing to any person any power, duty or function of the Minister under this Act, including any power, duty or function that involves the Minister forming an opinion or belief.*

(2) Subsection (1) does not apply to any power or duty to make regulations.

The Appellant argues that not only can the Minister not delegate the power to make regulations; the Minister cannot "re-delegate powers to himself in a different form". The Appellant argues that here the Minister, by purporting to adopt guidelines authored by the department, has in fact subdelegated statutory powers contrary to section 578(1). The Appellant relies upon the following authorities.

Florence v. Canada (Air Transport Committee) (1988) 34 Admin L.R. 36 (F.C.T.D.) at 47:

> It is a well established principle of law that a body to which legislative power is delegated by Parliament or a provincial Legislature cannot redelegate that power either to itself or to another body to be exercised in a purely administrative, discretionary fashion.

Brant Dairy Co. v. Milk Commission of Ontario [1973] SCR 131 at paragraphs 22-27:

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades exercise of the power and, indeed, turns a legislative power into an administrative one. It amounts to a re-delegation by the Board to itself in a form different from that originally authorized; and that this is illegal is evident from the judgment of this Court in Attorney General of Canada v. Brent [[1956] S.C.R. 318.].
>
> In the Brent case, what was in issue was the exercise of power delegated to the Governor in Council by the Immigration Act to make regulations respecting enumerated matters. What the Governor in Council did was to embody the very powers in a regulation which confided their application to a special inquiry officer. This was held to be an invalid subdelegation; it converted the required reflection in a regulation of the opinion of the Governor in Council into an unregulated exercise from time to time of the opinion of a special inquiry officer.
>
> The principle is the same here. The Board was required to legislate by regulation. Instead, it has purported to give itself random power to administer as it sees fit without any reference point in standards fixed by regulation.

The facts in Brant Dairy were that the body in question was given the statutory power to set up by regulation a quota system for the sale of milk. The regulation it passed included terms like:

(2) *The marketing board may fix and allot to persons quotas for the marketing of milk on such basis as the marketing board deems proper.*

The Court held that the Marketing Board, rather than set out in regulations how the quota system was to operate, simply repeated the terms of the grant of authority in a way that purported to let it decide from time to time how to set and apply quotas. By just repeating the grant of authority, the Marketing Board had put nothing in the Regulation against which its exercise of authority

from time to time could be judged. It had failed to establish a quota system or allot quotas. Rather "it has simply repeated the formula of the statute, specifying no standards and leaving everything in its discretion." This, the Appellant argues, is what has happened here. The MGB will return to this issue once it examines the other arguments advanced by the parties.

On the face of section 6 of AR 289/99 alone, it appears as if the "Alberta Linear Property Assessment Minister's Guidelines" it refers to are departmentally authored, changed at will, and as their title suggests, only guidelines. However, in fact the Minister's Guidelines have been promulgated with somewhat more formality than the reference in AR 289/99 suggests. The Minister in fact signed Ministerial Order No. L:153/03 establishing and appending the various guidelines referred to in AR 289/99. While the Minister's Guidelines are indeed amended from time to time, the Minister in fact signs a new Ministerial Order establishing and appending those amended Minister's Guidelines. There is no evidence before the MGB that the Department amends or that assessors apply guidelines except those thus established by the Minister.

Is the Ministerial Order a Regulation?

The Minister's adoption of Ministerial Order L:153/03 might be thought to be a second exercise of the Minister's regulation making powers under section 322 of the Act and the Respondent says that is the case. Not so argues the Appellant; the Act gives the Minister the power to do the things listed in section 322 by Regulation, but not by Ministerial Order. The Respondent argues that the Act empowers the Minister to make Regulations and that a Ministerial Order falls within the scope of that term. The Act does not, of itself, define the word Regulation. However, there are definitions within two other Acts.

This argument requires us to consider the impact of section 1(1) of the *Interpretation Act* which reads:

1(1) *In this Act,*

…

(c) "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted

(i) in the execution of a power conferred by or under the authority of an Act, or

(ii) by or under the authority of the Lieutenant Governor in Council, but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

This section must be read in conjunction with section 1(1)(f) of the *Regulations Act* which provides:

1(1) *In this Act*

…

(f) "regulation" means a regulation as defined in the Interpretation Act that is of a legislative nature.

The Appellant argues that the Ministerial Order cannot meet the definition in the *Interpretation Act* because it was not adopted in the execution of a power conferred by the Act. That Act, it argues, only authorizes the Minister to pass a regulation, not an order.

The Respondent cites R. v. Simmermon [1996] A.J. No. 76 (Alta. C.A.) for the proposition that in the absence of some express statutory distinction based on nomenclature, the nature of a statutory instrument should be decided on its substance not its form: (from paragraph 14) "If the substance and effect of the instrument is legislative, it will be treated as a regulation. The Court's ruling on this point is based upon and supported by the decision in Canadian Pacific Limited v. Canadian Transportation Commission (1985) 60 N.R. 298 at 307 (Fed. C.A.).

The MGB accepts the Respondent's argument on this point and finds the Appellant's argument circular. If the Act authorizes the Minister to act by regulation, and the word regulation is sufficiently wide to include an order, then the instrument itself may be a regulation notwithstanding the choice of nomenclature. The MGB finds that the Minister was entitled to exercise the powers granted by section 322 by a document called a Ministerial Order which in its form met the definition of a Regulation as described in the cases and as defined in the *Interpretation Act* at least for the purposes of that Act.

The Appellant argues that, even if one assumes the Ministerial Order could be a regulation within the meaning of the *Interpretation Act* [and by inference section 32 of the Municipal Government Act], it is nonetheless ineffective. Regulations have no effect until they are filed pursuant to section 2(3) of the *Regulations Act*, a filing the Minster has failed to prove.

2(3) *Unless expressly provided to the contrary in another Act, a regulation that is not filed as provided in this Act has no effect.*

It appears that the Ministerial Order has not in fact been filed, and the Respondent offers no explanation as to why that is the case or why filing would be unnecessary if the Ministerial Order is, in substance, a Regulation.

Incorporation by Reference

A key component of the Appellant's argument is that a Regulation cannot include an incorporation of some external document by reference.

The *Regulations Act* further provides that:

1(2) *The following are not regulations within the meaning of subsection (1)(f):*
…
(d) a document adopted or incorporated by reference in a regulation.

The Appellant argues that even if the Ministerial Order is a Regulation, the Minister's Guidelines, if indeed they are authorized by the Ministerial Orders and incorporated by reference into AR 289/99, cannot be Regulations because of section 1(2)(d) of the *Regulations Act* which excludes from the definition of a Regulation, under that act, "a document adopted or incorporated by reference in a regulation." The implication of this argument is that a properly authorized delegate may not, in the exercise of a delegated power, pass a regulation that incorporates by reference some external document. The MGB disagrees with that analysis. Indeed, the article cited in support of the proposition: "Power Tools: The Form and Function of Legal Instruments for Government Action, John Mark Keyes, 10 Canadian Journal of Administrative Law and Practice 133", clearly says otherwise:

> (f) Documents Incorporated by Reference
>
> When a document is incorporated by reference in a legal instrument, it has the same legal effect as that instrument. A document can be incorporated by reference in any of the legal instruments described above. This means that incorporation by reference can be used to invest one type of instrument with effects associated with another. For example, licensing decisions are sometimes subject to terms and conditions stated in a quasi-legislative document and contracts can be given legislative force.
>
> Incorporation by reference is also subject to limits on the effects it can achieve. Incorporated documents cannot contain rules or standards that are not authorized to be contained in the instruments that incorporate them.

The impact of section 1(2)(d) of the *Regulations Act*, which is concerned particularly with promulgation and publication of statutory instruments, is to preclude the incorporated document from the need for filing and publication, not to proscribe its use. The MGB is of the view that a Regulation may validly incorporate by reference some external document, and may equally (as is argued by the Respondent) incorporate by reference some other Regulation or other statutory instrument. That incorporated document itself does not thereby become a Regulation in its own right, but the incorporating document is still valid and to the extent it relies upon the external document to give it meaning, still has the force of law.

The MGB accepts Mr. Keyes last point that "incorporated documents cannot contain rules or standards that are not authorized to be contained in the instruments that incorporate them." However, the clear implication from this limitation is that they can contain rules or standards that are authorized to be contained in the incorporating instrument.

What is a standard?

The Appellant says AR 289/99 contains no standard other than the "market value" standard, and based on the arguments set out above, efforts to save this through the Ministerial Order and the Minister's Guidelines are ineffective.

This argument requires us to assess just what is meant by a "standard". The legislation itself does not provide a definition. The Oxford Dictionary definition that fits best with its use in this context is "serving or fitted to serve as a standard of comparison or judgment." The standard for ordinary parcels of land is very simple. It is market value. The Appellant takes no exception to that simple expression as a standard and indeed sets it up as the default standard to be applied if the Regulations covering regulated property are invalid. The reason the two simple words "market value" are capable of being a standard is because they are understood to refer to other processes that can be used to establish the value of the property. The assessor's art, involving the systematic comparison of one property to others that have been exposed to the market, yields an expert opinion as to the likely market value of the property in question.

The "standard", expressed only as "market value" is the result; the assessor's processes are the means and methodology by which that result is calculated. The MGB finds what is meant by a standard, in the assessment context, is a reference to an ascertainable method by which values may be set. The standard will connote some process of ascertaining the nature of the property and determining its value, by equitable comparison to similar property, so as to yield an objective result capable of reference back to that common standard. The standard is a reference to the methodology, connoting the result that methodology will yield.

Adopting the definition of a standard set out above, it is the MGB's view that (again using the example of linear property) section 6(1) itself sets the valuation standard for linear property and that that standard is validly set provided that the procedures that are referred to are (a) validly authorized by the Minister and (b) provide a clear and ascertainable method of arriving at a valuation based on that methodology. What makes it a standard is that, by applying the same methodology to similar properties, an equitable result will ensue in a way that will withstand subsequent scrutiny. It will give others the road map to determine how the result was arrived at.

The MGB, after examining the Minister's Guidelines, finds that they provide the necessary ascertainable method of arriving at a valuation for the properties they cover. Contrary to the Appellant's submissions, this is not a case of the Minister delegating executive powers to himself that were intended to be exercised in a legislative manner. The Minister's Guidelines provide detailed and relatively clear methodology of the type necessary to deal with the very complicated types of regulated (including linear) property that need to be assessed to carry out the Act's purposes. The Minister has not said to an official (or indeed, to himself) – "you decide as you will". There is nothing in the Minister's Guidelines involving the type of pseudo-subdelegation involved in the Brent case. The word guideline implies more discretion than the document in fact gives. While some discretion is involved in all assessment, not the least of which in ascertaining

market value, these guidelines in fact set out detailed and ascertainable approaches to the uniform assessment of diverse properties.

The MGB finds that the Minister's Guidelines have in fact been authorized by the Minister annually and that it is those guidelines, as authorized, which are incorporated by reference into Regulation AR 289/99. The MGB has no evidence that the Minister's Guidelines are changed by the Department other than in anticipation of the Ministerial Order but even if they were, this is immaterial since it is only the Minister's Guidelines as approved by the Minister that are relevant for the purposes of AR 289/99. As such, the Minister has not subdelegated the authority to legislate to another person; he has incorporated by reference into AR 289/99 a document he himself has sanctioned. The MGB agrees with the Respondent that the Carltona principle (see Carltona, Ltd. v. Commissioner of Works and others [1943] 2 All E.R. 560 C.A.) and the other authorities it cites are sufficient to overcome the suggestion that the Minister must himself author the document he chooses to sanction and incorporate into the Regulation by which he sets the valuation standard.

Since, in the MGB's view, AR 289/99, which is conceded to be a Regulation validly enacted and filed, itself sets the valuation standard, it is not necessary that the Ministerial Order be a Regulation in its own right. The necessary authority for assessors to use the processes set out in the Minister's Guidelines derives directly from AR 289/99 which can and does incorporate the Minister's Guidelines by reference.

In summary, the MGB finds that AR 289/99 validly sets valuation standards for regulated (including linear) property. It does so by validly stating and incorporating ascertainable standards and procedures. Those standards and procedures carry Ministerial authority exercised within the scope of matters assigned to the Minister under section 322 of the Act, albeit without their being Regulations in their own right. The infirmities the Appellant raises are dependent on the assumption that it is the Ministerial Order alone that sets the standard and that it must therefore itself be a valid Regulation. The MGB now, as in the earlier Telus decision, finds this unconvincing along with the related argument that nothing can be incorporated by reference into a Regulation. Here, Regulation AR 289/99 itself sets ascertainable valuation standards.

(c) Default to Market Value

The Appellant's assumption is that, if the Minister's Guidelines lack statutory validity, then the default position must be that assessments must be undertaken following a market value approach. It argues "In a nutshell, if the Province has not provided a legally authorized valuation standard for regulated property, the entire regime must be reconstructed according to the market value valuation standard."

The Appellant maintains that the scheme of the Act, supported on this point by section 153 of the *School Act*, is that all property is assessable, subject to certain statutory exemptions. Its more specific argument is based on section 293(2) which provides:

293(2) *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.*

The difficulty with the argument that this sub-section implies a market value assessment is that it assumes that for the types of property for which the regulations are arguably invalid there could be similar property within the municipality that has been assessed and to which these types of properties could then be compared. The MGB cannot accept that proposition. All the types of property that the regulations purport to cover fall within a number of statutory definitions. As such, this defined property – whether it be railways, linear property (pipelines, telecommunications systems, etc.) or the other forms of regulated property is all excluded from the types of property that municipal assessors assess. The MGB believes it would be a strained reading of the Act to say that these types of property, defined by the legislation as distinct for the purposes of the assessment scheme, could suddenly become similar to ordinary property simply because of a defect in the passing of a regulation or standard. The statutory distinctions remain the same notwithstanding any such defect in the subordinate legislation. Could a pipeline, for example, become similar to an office block or a residence for the purposes of section 293(2)?

The MGB comes to a similar conclusion from an examination of the provisions of AR 289/99. It provides, in part:

8 *When an assessor is preparing an assessment for a parcel of land and the improvements to it, the valuation standard for the land and improvements is market value*

(a) unless the land is a parcel used for farming operations, in which case the valuation standard in section 3(1)(b) applies to the land, and

(b) unless the improvement is railway, linear property or machinery and equipment, in which case the valuation standard in section 5, 6 or 7, as the case may be, applies to the improvement.

Superficially, this might appear to provide market value as the default value. However, on a closer reading it does not say "market value unless it is linear property (etc.) covered by a regulation". Rather it says "market value, unless it is linear property, in which case [a] valuation standard applies." The difference is crucial, because even if the regulation is invalid, the general rule setting up market value still excludes the listed types of property. The consequence of an invalid regulation is simply to leave the question of how such property is to be assessed unanswered, not to default back to market value as the standard.

This leaves open the question of what might have been done had the Appellant convinced the MGB of the invalidity of the Minister's Guidelines. It may be that it would be an appropriate case for a reference to the Minister under the provisions of section 516, since assessments based on the application of invalid Minister's Guidelines might be termed unfair or inequitable due to the underlying illegality.

516 *The Board may refer any assessment that it considers unfair and inequitable to the Minister and the Minister may deal with it under sections 571 and 324.*

There may be other remedies that would be appropriate in such unusual circumstances. However, given the conclusions set out above the MGB does not need to decide such issues. It is sufficient at this point to indicate that the MGB is not persuaded that the inevitable result of any such finding would be a default to a market value assessment for all regulated property under the Act.

ISSUE 7: Has the assessment of regulated property resulted in equalized assessments that are either incorrect or unfair and inequitable? This issue involves consideration of the following sub-issues.

a. Does the existence of discretion built into the Minister's Guidelines result in inequitable equalized assessments?
b. Does the fact that the Appellant has a disproportionately low amount of regulated property in relation to many other municipalities result in an equalized assessment that is unfair or inequitable?
c. Does a greater percentage increase in the Appellant's school tax requisition as compared with the Provincial total demonstrate that the Appellant's equalized assessment is unfair or inequitable?

Summary of Appellant's position

The Appellant argued that regulated property should be assessed at market value in order to achieve fair and equitable equalized assessments as contemplated by the Act. In support of this position, it pointed to the testimony of Mr. Gagne. He indicated that equity cannot be tested without a known valuation standard such as market value. Furthermore, regulated property in the Province of Alberta has no valuation standard for assessment purposes. Rather, assessments are set by reference to appendices to the Minister's Guidelines and other interpretive documents. This regime purports to establish a valuation standard in accordance with the formula A x B x C x D, where A represents cost factored to a common year, B represents a time adjustment to bring A to the year of assessment, C represents depreciation, and D represents additional depreciation.

Discretion under the regulated assessment regime

The Appellant submitted that the formula A x B x C x D does not constitute a consistent valuation standard. As testified by Mr. Gagne, owners and assessors apply discretion at each stage of the calculation, thus ensuring inconsistent assessment of similar regulated property belonging to different owners or located in different municipalities. Such inconsistency means there is no objective criterion to measure and compare values within the Province.

With respect to the regulated cost amount "A", the Appellant noted that some assessable properties do not have costs described in the Minister's Guidelines, while others do. Costs for assessable properties not specified in the Minister's Guidelines are reported by the owner and then adjusted and accepted by the assessor using the Construction Cost Reporting Guide (Appendix V of the Minister's Guidelines). Mr. Gagne indicated that adjusted base costs are often negotiated with the assessor; moreover, discretionary additions and subtractions are used to reflect subsequent changes in the asset. These circumstances result in reported costs that bear no resemblance to actual market value. As for properties with costs that are specified in the Minister's Guidelines, discretion is built into the definitions and explanatory notes in the Minister's Guidelines and other interpretive documentation. For example, the rules relating to

oil and gas well assessments allow significant discretion in determining well depth, a key component in the regulated rates for wells.

Values for B and C often depend on a property's "effective age". Again, the Appellant argued that the Minister's Guidelines allow the assessor considerable discretion when determining effective age.

With respect to D, the assessor may apply additional depreciation for some properties if he or she deems that there is acceptable evidence of an additional loss in value. Thus, the Schedule D factor depends heavily on each assessor's interpretation of the property's characteristics.

Mr. Gagne's testimony establishes that the variability and discretion built into the regulated assessment regime result in haphazard property assessments. Since there is no formal audit process to standardize regulated property assessments before equalization, the inconsistencies inherent in the regulated assessments are carried without impediment into the equalized assessments. Furthermore, the Appellant submitted that the Respondent's failure to audit regulated property assessments tends to foster mistrust and non-compliance.

The need for a consistent valuation standard

Mr. Gagne's testimony concerning the need for an objective valuation standard is supported by the Gloudemans Report. That report recommends that all linear and machinery and equipment assessments be assessed at market value to achieve fairness and equity. Regulated rates clearly do not meet this recommendation. For example, Mr. Gagne testified that in the late 1990s, the Appellant commissioned a study that concluded farmland had been assessed at about 20 – 25% of its real value. This conclusion is consistent with Exhibit U showing 670 agricultural sales with a median ASR of 21%.

Mr. Gagne's testimony is also consistent with that of Mr. Fegan, Deputy City Assessor for the City of Calgary. He noted that further unfairness arises, because some municipalities have a large proportion of regulated property within their assessment base, while others – such as the Appellant – have very little regulated property. Mr. Fegan indicated that since regulated and non-regulated properties are valued differently, municipalities containing regulated and non-regulated property in different proportions are treated consistently but numerically differently for the purposes of equalized assessment.

Mr. Fegan also suggested that the inequity described above is reflected in statistics regarding relative year over year changes for market, regulated, and equalized assessments. For example, whereas total market value and equalized assessments for property in the Province of Alberta increased steadily between 1997 and 2003 (a cumulative increase of 56.7% and 54.0% respectively), the corresponding increase for regulated assessments is much smaller (10%). Rates for regulated property have also remained relatively constant since 1999 and have not kept pace with rising market values. Mr. Fegan indicated that these circumstances are partly responsible for the disproportionate increase in the Appellant's education tax requisition

compared to increases experienced by other Alberta municipalities. In this regard, he noted that the Appellant's tax requisition increased by 4.4%, 8% and 7.3% respectively for 2002, 2003, and 2004, whereas the total Provincial requisition rose only 3.4%, 6.5%, and 6.4% for the same years.

Farmland

Finally, the Appellant noted that MRAT treats farmland differently from other types of regulated property in that it defines a distinct valuation standard for farmland, namely: "agricultural use value" (section 3(1)(b)). However, having set agricultural use value as the valuation standard for farmland, MRAT then goes on to refer assessors to procedures in Appendix I of the Minister's Guidelines (section 3(2)). Thus, even in the one case where MRAT does specify a valuation standard for regulated property, assessors are nevertheless issued a conflicting direction to use procedures set out in the Minister's Guidelines instead, thus further invalidating the regulated and equalized assessment regimes.

Summary of Respondent's position

The Respondent submitted that pursuant to section 499(2)(b), the MGB must not alter any equalized assessment that is fair and equitable taking into consideration equalized assessments in similar municipalities. Section 499(2) has been interpreted by previous MGB decisions to support the conclusion that fairness and equity is achieved through consistent application of the law (eg, in MD Bighorn v. Alberta Municipal Affairs, Board Order MGB 098/99). In this regard, Mr. Driscoll established – and Mr. Fegan confirmed during cross examination - that regulated properties were assessed using the same procedures in all municipalities throughout the Province of Alberta. Similarly, the testimony of Ms. Young and Ms. Downey shows that the Minister acted reasonably in applying its audit and equalization programmes to all Alberta municipalities. Therefore, the Appellant's equalized assessments are fair and equitable and must not be altered by the MGB.

The Respondent conceded that the Appellant's tax requisition increased 7.19% from 2003 to 2004, as compared the overall increase of 5.93%. However, such figures cannot establish inequity in the absence of further information regarding the Appellant's own assessment base to provide a basis for comparison. Since the Appellant presented no analysis of its own assessments or equalized assessments, it cannot argue that it received unfair treatment in relation to similar municipalities. In this regard, the Respondent noted that many other municipalities have also experienced increases in their school tax requisitions. For example, Strathcona's requisition increase between 2003 and 2004 amounted to 7.52%, while the City of Edmonton's was 6.88%, and the City of Grande Prairie's 14.6%.

In summary, the Respondent indicated that regulated assessments for Alberta Municipalities were prepared consistently according to the valuation standards specified in MRAT, namely, the procedures set out in the Minister's Guidelines. Furthermore, the Respondent submitted that the Minister applied the audit and equalization scheme to all Alberta municipalities in a fair and

consistent manner, as provided under the legislation. Consequently, the resulting equalized assessments are fair and equitable and must not be altered by the MGB.

Findings

- The existence of discretion to be exercised by the assessor in valuing regulated property need not cause inequity between assessments of regulated property.
- Equity, within the context of regulated property assessment, is achieved by the consistent application of the legislated standards and procedures.
- The fact that the Appellant has a disproportionately low amount of regulated property in relation to many other municipalities does not result in an equalized assessment that is unfair or inequitable.
- A greater percentage increase in the Appellant's school tax requisition as compared with the Provincial total does not demonstrate that the Appellant's equalized assessment is unfair or inequitable.
- The Appellant has provided no evidence of unfair or inequitable application of MRAT or the Minister's Guidelines.

Reasons

Section 499(2) forbids the MGB to alter an equalized assessment that is fair and equitable, taking into account equalized assessments in similar municipalities. The MGB has held in many previous decisions that the obligation to produce fair and equitable assessments does not allow the assessor or the MGB to disregard legislative provisions. Rather, fairness and equity is achieved through correct and consistent application of the legislation.

The MGB saw no evidence of inconsistency in the processes used to identify the equalized assessments of other municipalities as compared to the Appellant's; neither was there any evidence that the Respondent treated assessment information from other municipalities in a different fashion before performing the equalization calculations. Thus, there was no evidence to contradict the assertions of Mr. Driscoll and Ms. Young to the effect that regulated and equalized assessments were reached by applying the same rules to all municipalities, and that audit and equalization procedures were applied consistently. The MGB concludes that the Appellant's equalized assessment was fair and equitable having regard for equalized assessments in other municipalities - at least in so far as these were influenced by regulated property assessments.

In reaching this conclusion, the MGB considered the Appellant's argument that the discretion given to property owners and assessors under the Minister's Guidelines result in inconsistent assessment practices that are ultimately reflected in the equalized assessments. However, a brief consideration of the market value standard is enough to show that the existence of discretion in property assessment need not cause unfairness or inequity in the sense contemplated by the legislation.

The Act via MRAT has adopted market value as the appropriate standard for non-regulated property. It is a platitude that the market value standard itself requires the use of considerable discretion. For example, to estimate market value, an assessor must choose between the cost, income, and sales approach. Each of these choices then requires further application of judgment that can affect the final estimate. While in theory all accepted approaches will lead to market value, the assessor is required to use his or her discretion to choose the method best suited to the circumstances and make the appropriate adjustments.

Despite the considerable degree of discretion inherent in the market value standard, the legislative scheme uses market value as the standard for non-regulated property assessment. It would be highly inconsistent to conclude that the legislative scheme considers the existence of discretion when calculating regulated assessments sufficient to impair the fairness and equity of the equalization process. In short, while the MGB accepts that the Minister's Guidelines contemplate a degree of discretion when determining assessments for regulated properties, it sees no evidence that the existence of discretion in the determination of the regulated rates caused unfairness or inequity. The need for municipal and designated provincial assessors to use discretion does not result in improper or inequitable assessments or inconsistency in the application of the regulated valuation standards.

In accepting that the Minister's Guidelines involve a degree of discretion, the MGB does not accept Mr. Gagne's characterization of the regulated assessment formula of A x B x C x D as overly complex or confusing. As indicated by Mr. Driscoll, the formula embodies a modified cost approach to valuation, where included costs and depreciation are subject to specific rules laid out in the Minister's Guidelines. These rules tend to reduce rather than increase the choices and discretion that would exist under a market value standard.

The MGB also considered the Appellant's argument that the absence of an audit procedure for regulated properties encourages non-compliance and incorrect (or at least inconsistent) regulated property assessments that remain unadjusted for equalization purposes. While the MGB recognizes that the Respondent does not subject regulated property assessments to annual audit, it is inaccurate to say that there is no audit of regulated assessments. As indicated by Ms. Young, the Respondent's audit department looks at regulated assessments in context of its detailed audit program. Moreover, the Respondent itself undertakes the assessments of linear property on behalf of municipalities, thus ensuring consistent application of the Minister's Guidelines for Linear Property. Keeping in mind the comparatively straightforward assessment procedure relating to regulated property, the MGB finds that the Respondent took reasonable steps to ensure that the regulated assessments performed by municipalities and the assessor are appropriate for use in calculating equalized assessments.

The MGB also considered the Appellant's argument that the City of Calgary's disproportionately low amount of regulated property has led to it receiving an unfair and inequitable equalized assessment in relation to other municipalities. Again, this argument cannot be supported in view of the legislative scheme governing assessments and equalized assessments.

First, the legislative scheme clearly contemplates valuation standards other than market value for regulated property. For example, section 292(2) of the Act requires linear property assessments "must reflect the valuation standard set out in the regulations for linear property". Similarly, section 322(d) empowers the Minister to establish valuation standards for property by regulation. Sections 3 through 7 of MRAT then purport to set different valuation standards for regulated and non-regulated property. Thus, the legislative scheme clearly contemplates the existence of different valuation standards for different classes of property.

Second, the legislative scheme is specific in its instructions as to the calculation of equalized assessments. For example, section 317(a) defines the equalized assessment for a municipality as an assessment that "reflects assessments of property in the municipality that is taxable under Part 10". Similarly, MRAT (established pursuant to section 322(h) of the Act) requires the inclusion of both regulated and non-regulated assessments in the equalized assessment.

The direct consequence of the legislative scheme is that the various valuation standards will affect a municipality's equalized assessment to different degrees according to the distribution of regulated and non-regulated property within it. The legislative scheme must be assumed to have contemplated such direct and obvious consequences. Therefore, the fact that other municipalities have a proportionately lower amount of regulated property than the Appellant cannot base an appeal that its equalized assessment is unfair or inequitable within the meaning of section 499. The MGB repeats that its role is to ensure that the Respondent exercises its powers with consistency and fairness to produce equalized assessments as mandated under the legislation. The requirement of fairness and equity under section 499 does not permit either the Respondent or the MGB to alter the provisions set out in the legislation.

Finally, the MGB considered the Appellant's argument that statistics regarding relative year over year changes in its own versus the total provincial school tax requisition reflect inequity inherent in its equalized assessment. Again, the MGB is unable to accept this argument. While the Appellant's percentage increases have outstripped province-wide percentage increases, the Appellant produced no data or analysis concerning its own assessments to give them context. Consequently, the reasons for the increases in the Appellant's equalized assessments and school tax requisitions remain largely speculative. Real property assessment growth is a by and large a function of economic development or growth, which occurs at different rates between regions of the Province and between municipalities. Thus, rather than reflecting a failure in the equalized assessment process as contemplated under the Act, the increases may simply reflect higher growth in the Appellant's tax base in comparison to the collective tax base of other Alberta municipalities.

ISSUE 8: Should the 2002 assessment of $45,000,000 for street lighting in the City of Calgary be removed from the Appellant's 2004 equalized assessment?

Introduction to Issue 8

Another issue raised by the Appellant relates to whether the assessment for street lighting ought to have been reflected in the Appellant's equalized assessment. After hearing the submissions from both parties, the MGB raised the question as to whether the matter was properly before it in the context of an equalization appeal. It also requested the parties to include with their written summations further submissions as to whether the exempt status of the City of Calgary's street lighting should have been raised first in the context of a linear property assessment appeal.

Summary of Appellant's position

The Appellant made the following argument in relation to street lighting. First, it noted that municipally owned assets are exempt from assessment under the Act. Second, it claimed that it owned street lighting in the City of Calgary as of the relevant date. Consequently, it said that street lighting ought to have been exempted from assessment under Part 10 of the Act and should not form part of the equalized assessment.

The Appellant pointed to the Master Agreement Between the City of Calgary and ENMAX Corporation (Exhibit V, Tab 1) as conclusive evidence that it owned street lighting in the City of Calgary as of the relevant date. That document excludes street lighting from the Electric System assets purchased by ENMAX from the City of Calgary. Since street lighting was excluded from the agreement, the Appellant argued they must still be owned by the City of Calgary. As further evidence of ownership, the Appellant pointed to the testimony of Mr Fegan, who confirmed in redirect examination that the City of Calgary owned its street lighting. Finally, the MGB's attention was drawn to a document entitled "City of Calgary 2004 Asset Management Inventory" (Exhibit V, Tab 4) where replacement value for street lighting is recorded at $712,717,000.

It is common ground that theDLA classified the City of Calgary's street lighting as "taxable" and assessed it at $45,186,340. Furthermore, this amount was included in the Appellant's 2004 equalized assessment. In contrast, the City of Edmonton's $49,096,320 assessment for street lighting was classified as non-taxable and was not included in its equalized assessment. Moreover, in Board Order MGB 32/97 the MGB ordered that the City of Edmonton's street lighting be removed from its equalized assessments. The Appellant argued that such disparity in treatment of street lighting in different municipalities is inequitable. The MGB has jurisdiction to change an assessment that is inequitable; therefore, it should exercise this jurisdiction by removing the amount for street lighting from the Appellant's 2004 equalized assessment.

Summary of the Respondent's position

The Respondent argued that the Appellant failed to prove that it owned the street lighting in question in 2002. Consequently, it failed to show either incorrectness or inequity through the inclusion of the 2002 street lighting assessment (for the 2003 tax year) in the 2004 equalized assessment.

In support, the Respondent noted that the Appellant's employee, Mr. Fegan, testified in cross-examination that ENMAX owned the street lighting, although he contradicted this evidence in other portions of his testimony. Furthermore, the evidence of Ms. Downey suggests that ENMAX reported itself as the owner of taxable street lighting during the relevant time period, and this evidence is supported by the 2001 and 2002 Linear Property Assessment Records entered as Exhibit 2, Tab 33. Finally, the Master Agreement relied on by the Appellant does not prove ownership, because it relates to an agreement made several years prior to the year under appeal and simply shows that the street lighting was not transferred under that agreement. The Respondent concluded that the Appellant has not shown on a preponderance of the evidence that it owned street lighting in the City of Calgary as of the relevant date. Consequently, there is no reason to conclude that it should have been exempted from assessment or excluded from the equalized assessment.

As a second argument, the Respondent noted that neither the City of Calgary nor ENMAX filed a linear property assessment complaint concerning the relevant street lighting assessments pursuant to sub-sections 492(1)(g), 492(1.1)(a) and 492(1.1)(b) of the Act. The prescribed linear property assessment complaint period has now expired. Having failed to challenge the taxable status of its street lighting within the prescribed complaint period, the Appellant may not now question ENMAX's 2002 street lighting assessment through an appeal of the 2004 City of Calgary equalized assessment.

The Respondent also submitted that Board Orders MGB 31/97 and MGB 32/97 do not assist the Appellant's argument. In Board Order MGB 32/97, the MGB acknowledged that it had already found the street lighting exempt from taxation in the context of a linear assessment complaint. In the absence of a similar conclusive order pursuant to a linear assessment complaint, the MGB should not alter the applicable linear assessment or the 2004 equalized assessment under appeal.

Findings

- The proper venue for the determination of ownership for linear property is a linear complaint.
- In any event, the evidence does not establish that the Appellant owned the street lighting in the City of Calgary as of the relevant date.

Reasons

The Act sets out a scheme for notification and complaints regarding linear assessments. In particular, section 308 requires the DLA to prepare assessment notices for all assessed linear property and to provide copies to the assessed persons and relevant municipalities. Section 309 then authorizes the DLA to include on the assessment notice the date by which a complaint must be made - so long as that date is not less than 30 days after the notice has been sent. Finally, section 492 enables both municipalities and tax payers to file a complaint regarding a linear assessment during the stipulated complaint period on various grounds, including the ground that the property is exempt under the Act.

Either ENMAX or the Appellant could have filed a complaint pursuant to section 492(1)(g) on the grounds that street lighting in the City of Calgary should be exempt from taxation. Subject to the outcome of that complaint, the Appellant could then have appealed its equalized assessment on the grounds that its street lighting was not taxable. This was the procedure followed by the City of Edmonton in Board Orders MGB 31/97 and MGB 32/97. However, neither ENMAX nor the Appellant filed a linear assessment complaint in relation to the street lighting as authorized under the legislation, and the complaint period has now expired. Consequently, the status of the street lighting for the 2002 assessment was and must remain "taxable". It follows that the Appellant's 2004 equalized assessment properly includes the 2002 street lighting assessment.

In the MGB's view, the above considerations are fatal to the Appellant's claim for a reduction in its 2004 equalized assessment based on the ownership status of street lighting. Yet even if such impediments were overcome, the evidence before the MGB is mixed and would not support a finding that the Appellant owned the assessed street lighting as of the relevant date. On the one hand, it is true that the Master Agreement concerning the sale of the City of Calgary's Electric System assets to ENMAX shows that street lighting was exempted from that sale. On the other hand, the Master Agreement is dated December 1997, several years before the relevant 2002 assessment date. Furthermore, the testimony of Ms. Downey and the 2001 and 2002 Linear Property Assessment Records suggest that ENMAX reported itself as the owner of the street lighting in the City of Calgary. This suggestion counters the inference from the Master Agreement exemption that the City of Calgary retained ownership until 2002. Finally, Mr. Fegan - the only City of Calgary employee to testify – gave conflicting evidence on the matter. Having failed to establish ownership, the Appellant's claim of inequitable treatment in comparison with other municipalities concerning street lighting cannot be sustained.

ISSUE 9 - SUMMARY AND CONCLUSION: Is the 2004 equalized assessment for the Appellant fair and equitable?

Summary of Appellant's position

Pursuant to section 499(2) of the Act, the MGB must consider whether the Appellant's 2004 equalized assessment was fair and equitable taking into consideration equalized assessments in similar municipalities. The Appellant's 2004 equalized assessment was not fair and equitable.

In support of its position, the Appellant argued that equalized assessments for various municipalities across Alberta were calculated using flawed data and inconsistent valuation standards, and that these deficiencies resulted in unfair and inequitable assessments. The Appellant argued further that the flaws and inconsistencies in assessment data and equalized assessments resulted from the Respondent's failure to fulfill its duty as a supervisory agency responsible for equalized assessment. For example, it said the Respondent failed to enforce procedures to ensure that the information derived from assessment data for municipalities was reliable for equalization purposes. The Respondent also failed to establish consistent and clearly articulated reporting procedures. Finally, the Respondent failed to establish a consistent valuation standard for regulated property. The Minister's Guidelines do not result in market value estimates and involve considerable discretion and lack of clarity. The errors and inconsistencies resulting from all these factors resulted in an equalized assessment for the Appellant that is unfair and inequitable taking into consideration the equalized assessments of similar municipalities.

In addition to the above considerations, it is the Appellant's position that the Minister purported to create valuation standards and procedures for regulated property by illegitimate means. In particular, instead of establishing them by regulation – as required under the Act – he attempted to create them through Ministerial Orders and Minister's Guidelines that do not meet the procedural requirements of regulations. The assessments resulting from such illegitimate use of executive power cannot be considered fair and equitable.

Finally, a clear example of inequity between the Appellant's equalized assessment and that of a similar municipality involves the treatment of street lighting. Whereas the City of Edmonton's street lighting was excluded from its equalized assessment, the Appellant's was not.

Summary of Respondent's position

The Respondent submitted that the Appellant's 2004 equalized assessment was fair and equitable. It said fairness and equity in a regulated context means correct and consistent application of the legislated standards and procedures. As with other Alberta municipalities, the Respondent prepared the Appellant's 2004 equalized assessment by consistent application of the relevant legislation; hence, the result was fair, equitable and correct.

With respect to the legitimacy of the Minister's Guidelines, the Respondent asserted that the Minister established them correctly under authority of the Act. However, if there were an imperfection in the process whereby the Minister's Guidelines were created, the MGB has no power to declare them invalid. Furthermore, section 499(2) indicates that fairness and equity of assessment must take into consideration the assessment of similar property. Again, fairness and equity of equalized assessment requires consideration of equalized assessments in similar municipalities. Regulated property was treated in a similar fashion throughout the Province of Alberta; likewise, equalized assessments were prepared using the same procedures for all municipalities. Hence, the Appellant's equalized assessment is fair and equitable.

With respect to the Appellant's other allegations, the Respondent argued that it in fact took reasonable steps to ensure that the assessment information gathered from municipalities was reliable for equalization purposes. Neither is there any inequity in the treatment of street lighting as it relates to the equalized assessments of the Appellant and the City of Edmonton. Rather, the difference in treatment results from consistent application of the legislation in different circumstances. In the City of Edmonton's case, street lighting was not municipally owned; consequently, it was exempt from assessment and excluded from the equalized assessment. In contrast, ENMAX appears to have owned street lighting in the City of Calgary; consequently, it was not exempt from assessment and was included in the equalized assessment.

Finding

The Appellant's 2004 equalized assessment is fair and equitable.

Reasons

As indicated under Issue 4 of this Order, the MGB is satisfied that the Respondent took appropriate steps to supervise the audit process and ensure that the data used for equalization purposes was reliable and conformed to the legislated standards. The MGB is also satisfied that the Respondent prepared the Appellant's 2004 equalized assessment by consistent and proper application of the legislation.

With respect to regulated property, the MGB is satisfied that clear and ascertainable valuation standards are identified correctly in MRAT. Furthermore, the procedures necessary to calculate assessments in accordance with those standards were established legitimately in the Minister's Guidelines. The evidence does not establish that the regulated standards imposed by the Minister were applied improperly or contributed to differences between equalized assessments not contemplated by the legislative scheme. The MGB notes parenthetically that even if the Appellant were correct that the Minister's method of establishing the valuation standards for regulated property was flawed, it would not follow that the market value is the appropriate standard. As noted by the Respondent, the regulatory scheme appears to contemplate distinct standards for regulated property.

Section 499(2)(a) implies that in determining the fairness and equity of an assessment, the MGB must take into consideration assessments of similar property in the municipality. The evidence

does not establish inconsistency or unfairness in the treatment of similar regulated (or non-regulated) property either within or across municipalities. Likewise, section 499(2)(b) implies that in determining the fairness and equity of an equalized assessment, the MGB must take into consideration equalized assessments in similar municipalities. Again, the evidence does not establish inconsistency or unfairness in the calculation of the Appellant's equalized assessment when those of other municipalities are considered.

In this regard, the MGB recognizes that the City of Edmonton's street lighting was excluded from its equalized assessment, whereas street lighting in the City of Calgary remained included. This apparent difference does not show inequity, since - unlike the City of Edmonton's street lighting - the Appellant's was not exempted from taxable status in the context of a linear assessment hearing. Neither did the evidence before the MGB at the current hearing establish that the Appellant's street lighting was municipally owned as of the relevant date.

Conclusion

In conclusion, the MGB is satisfied that the Appellant's 2004 equalized assessment is fair and equitable taking into consideration the equalized assessments of other municipalities. The MGB examined the evidence and argument presented by both parties. After careful consideration, it is satisfied that the Respondent took reasonable and sufficient measures to ensure the data used to prepare equalized assessments was acceptable for that purpose and that it met all statutory requirements.

With respect to regulated property, the Act contemplates the existence of different valuation standards for non-regulated property. Further, the MGB is satisfied that the Minister established the valuation standards for regulated property correctly in MRAT, as authorized under the Act. The evidence does not establish incorrect or inconsistent application of these standards or demonstrate other flaws in the regulated property assessments - including street lighting - that might result in an unfair or inequitable equalized assessment.

DECISION

The 2004 equalized assessment for the City of Calgary is hereby confirmed.

No costs to either party.

Dated at the City of Edmonton, in the Province of Alberta, this 30th day of June 2006.

MUNICIPAL GOVERNMENT BOARD

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(SGD.) D. Thomas, Presiding Officer

APPENDIX "A"

APPEARANCES

NAME	CAPACITY
Susan Trylinski	Counsel for the Appellant
Gordon Sharek	Counsel for the Respondent
Deborah Fisher	Counsel for the Intervenor, City of Edmonton
Ted Rommings	Representative for the Intervenor, City of Edmonton
Carol Zukiwski	Counsel for the Intervenor, Strathcona County
Roy Fegan	Witness for the Appellant
Patrick O'Connor	Witness for the Appellant
Robert Gagne	Witness for the Appellant
Allan Dornfest	Witness for the Appellant
Bruce Sauter	Witness for the Appellant
Jerry Husar	Witness for the Respondent
Lynda Downey	Witness for the Respondent
Sheila Young	Witness for the Respondent
Robert Denne	Witness for the Respondent
Dan Driscoll	Witness for the Respondent
Richard Almy	Witness for the Respondent
Philip Halkett	Witness for the Respondent

APPENDIX "B"

DOCUMENTS RECEIVED AND CONSIDERED BY THE MGB:

NO.	ITEM

Exhibit/Document List – City of Calgary 2004 Equalized Appeal

APPELLANT

A1	Legislation Volume 1
A2	Legislation Volume 2
B	Board Orders and Decisions
C	IAAO Standards
D	Minister's Guidelines
E	AMA: Assessment Services/Quality Guidelines
F	AMA: Reports and Recommendations on Equalized Assessment in Alberta – July 2000
G	Other Reports
H	AMA: Advisory Aspects
I	AMA: ASSET News Bulletins
J	AMA: Education Tax Bulletins
K	Equalized Assessment Panel Technical Committee
L	Advisory Bulletins
M	Resumes and Will Say Statements
N	Further Historical Reports
O	Further Background Documents
P	Historical Transcripts
Q	Draft and Other Manuals
R	Miscellaneous Correspondence
S	Further Miscellaneous Correspondence and Documents
T	Charts, Maps and Powerpoint Presentations
U	Farm
V	Streetlighting
W1	Report of Robert Gagne
W2	Report of Robert Gagne – Appendices 1-2
W3	Report of Robert Gagne – Appendices 3-5
W4	Report of Robert Gagne – Appendices 6-7
W5	Report of Robert Gagne – Appendices 8-9
X	Report of Patrick M. O'Connor
Y	Report of Alan S. Dornfest
Z	Submission of the City of Calgary and List of Authorities
AA	Statutory Argument Submission of the City of Calgary, May 2nd, 2005

(APPELLANT CONT'D)

BB	Rebuttal of the City of Calgary
CC	Further rebuttal of the City of Calgary
DD	Document with headings "City of Calgary Equalized Assessment", "Provincial Equalized Assessment", and "Significance of Provincial Equalized Assessment"
EE	Flip chart – Mr. O'Connor – 3 pages
FF	PowerPoint presentation – Patrick M. O'Connor
GG	Flip Chart – Mr. Gagne – 1 page
HH	Flip Chart – Mr. Gagne – 1 page
I I	Flip Chart – Mr. Gagne – 1 page
JJ	Flip Chart – Mr. Gagne – 1 page
KK	Flip Chart – Mr. Gagne – 1 page
LL	PowerPoint presentation IAAO – Mr. Dornfest
MM	Table 10 from Exhibit Y with cross – references
NN	Excerpt from Chapter 6 of IAAO publication: Mass Appraisal of Real Property – 1999.
OO	Package of 10 tabs with correspondence between Appellant and Respondent re: disclosure matters
PP	City of Calgary's Response to Undertakings
QQ	Single sheet responding to undertaking re: unsold property data: Headed Page 685, Line 19-23
RR	Power point presentation – Mr. Fegan
SS	Flip Chart – Mr. Sauter – 2 pages
TT	Ministerial Order L:074/99
UU	Copy of SAN00002.csv
VV	Copy of SAN00302.xls
WW	Copy of Excel spreadsheet: List of changes over 5 percent of 051030.xls
XX	Chronology Prepared by the City of Calgary in Response to Board's request
YY	Basic Example of Ratio Statistics
ZZ	Summary of Indicators of Value Counts by Sub-Municipality
AB	Graph of Assessment Level Distributions as derived by the Respondent from Exhibit 27 (Residential)
AC	Graph of Assessment Level Distributions as derived by the Respondent from Exhibit 27 (Non-Residential)
AD	Extract from Standard on Assessment Ratio Studies IAAO – 1980
AE	Affirmations of Municipal Assessors included with returns
AF	Affirmation of Assessor for S.V. of Betula Beach
AG	City of Calgary's Estimate of Overpayment

Written summation and argument

S1	Appellant's Submission
S4	Reply of the City of Calgary to Minister's Submission

NO.	ITEM

Exhibit/Document List – City of Calgary 2004 Equalized Appeal (CONT'D)

RESPONDENT

1	Brief of Legal Argument of the Respondent: Relative to the 2004 Equalized Assessment Appeal
2	Book of Authorities of the Respondent
3	Curriculum Vitae, Will Say Statement, and Report of Richard Almy
4	Curriculum Vitae, Will Say Statement, and Report of Robert C. Denne
5	Curriculum Vitae, Will Say Statement, and Report of Philip Halkett
6	Curriculum Vitae, Will Say Statement, and Report of Dan Driscoll
7	Will Say Statements of Steve White/Jerry Husar, Lynda Downey, and Sheila Young
8	Respondent's Submissions Regarding the Validity of the Minister's Guidelines
9	Respondent's Rebuttal Submissions Regarding the Validity of the Minister's Guidelines
10	Respondent's Surrebuttal Submissions Regarding the Validity of the Minister's Guidelines
11	Letter dated September 20, 2005 from Sharek Logan Collingwood van Leenen to the City of Calgary
12	Article by Mr. Dornfest: State and Provincial Ratio Study Practices: 2003 Survey Results
13	Idaho Ratio Study Manual: 2004/2005
14	Alta Reg 330/223 /Ministerial Order L:139/03 (MRAT Amendment)
15	Legislative Regime & Significant Dates for the 2004 equalized assessment
16	Flip Chart: Mr. Husar - 1 page
17	Letter from Sharek Logan Collingwood van Leenen dated July 15, 2004 to the City of Calgary
18	Footnotes to the 2003 Annual Assessment Audit Reports (Exhibit O, Tab 8)
19	Printed copies of Excel Spreadsheets beginning with SAL00302.xls relating to files for the City of Airdrie from disks contained in Respondent's disclosure.
20	Copy of 2002 Annual Audit Report for the City of Airdrie
21	Printout showing path to files reflected by printouts comprising Exhibit 19
22	Table showing submunicipalities with Inferred Ratios
23	Printout of Changed Ratios.xls – Improved Residential and Improved Non-Residential
24	Amended Curriculum Vitae for Robert C. Denne
25	Amended tables from Mr. Denne's Report: Tables 1 to 8
26	Second set of amended tables from Mr. Denne's Report: Tables 2 to 8
27	Printed copy of "median vs. wt. mean.xls"
28	Summary of Legal Authorities and important dates for the 2004 equalized assessment

RESPONDENT (CONT'D)

29	Set of six CDs included with the Respondent's initial disclosure to Appellant
30	Flip chart – Mr. Halkett – 1 page
31	Flip chart – Mr. Halkett – 1 page
32	Flip chart – Mr. Halkett – 1 page

Written summation and argument

S2	Brief and Written Submissions of the Respondent
S3	Book of Authorities of the Respondent
S7	Brief and Reply of the Respondent to the submissions filed by the City of Edmonton, Intervenors

INTERVENORS

Edm 1	Written Submission of the City of Edmonton Re: Statutory Argument
Edm 2	Written Submission of the City of Edmonton
Strath 1	Letter dated August 24, 2005 to the MGB Re: Calgary Equalized Appeal 2004

Written summation and argument

S5	Written Summary of the City of Edmonton
S6	Letter from Counsel for Strathcona County dated March 3, 2006