

**BOARD ORDER: MGB 125/06**

**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 A COMPLAINT** filed by GT Group Telecom Services Corp. respecting Linear Property Assessments for the 2004 tax year

**BETWEEN:**

GT Group Telecom Services Corp., represented by Bennett Jones LLP – Complainant

- a n d -

The Crown in the Right of the Province of Alberta as represented by the Minister of Municipal Affairs (Assessment Services Branch), represented by Brownlee LLP– Respondent

- a n d -

The City of Calgary and the City of Edmonton – Intervenors

**BEFORE:**

Members:

D. Thomas, Presiding Officer

L. Patrick, Member

J. Gilmour, Member

Secretariat:

M. d'Alquen

Upon notice being given to the affected parties, a merit hearing was held in the City of Calgary, in the Province of Alberta commencing on February 27, 2006 regarding linear property assessment complaints for the 2004 tax year filed by the Complainant, GT Group Telecom Services Corp.

The properties under complaint are listed in Appendix C of this Order.

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**OVERVIEW**

The Complainant argues that the Minister of Alberta Municipal Affairs (Minister) failed to establish an effective valuation standard for its telecommunications property which is a form of linear property under the *Municipal Government Act* (Act). Furthermore, it says if the Minister did establish such a valuation standard, he failed to do so by regulation, as required under the Act. As a result, the Complainant says its linear property assessments were prepared at an inflated value without legal authority and should be reduced to market value. The Respondent takes the contrary position.

**BACKGROUND**

The issue of whether assessment standards for regulated property were constituted validly under the Act has been considered by the MGB at several hearings, including: Telus - 2004 tax year, MTS Allstream – 2005 tax year, and Calgary - 2004 Equalized (Board Orders MGB 124/04, MGB 094/06, and MGB 076/06). The matter has also been placed before the Court of Queen’s Bench by way of a judicial review application concerning Board Order MGB 076/06 and a separate Statement of Claim filed by the City of Calgary. However, since decisions from the Court of Queen’s Bench are not anticipated for some time, the MGB proceeded to render its decision.

**LEGISLATION**

In reaching its decision, the MGB considered the relevant legislation, including the following provisions.

***Municipal Government Act***

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*
- ...

The Act contains authority for the MGB to hear complaints about linear property.

*488(1) The Board has jurisdiction*

- (a) to hear complaints about assessments for linear property*
- ...

A written statement must be filed with the MGB in order to file a linear complaint.

*491(1) Any matter that is to be dealt with by a hearing before the Board must be in the form of a written statement and must be filed with the administrator within the following periods:*

- (a) for a complaint about an assessment for linear property, not later than the date shown on the assessment notice;*
- ...
- (2) The statement referred to in subsection (1) must include*
  - (a) the reason for the matter being referred to the Board,*
  - (b) a brief explanation of the issues to be decided by the Board, and*
  - (c) an address to which any notice or decision of the Board is to be sent.*

The Act lists matters concerning which a linear property complaint may be filed.

*492(1) A complaint about an assessment for linear property may be about any of the following matters, as shown on the assessment notice:*

- (a) the description of any linear property;*
- (b) the name and mailing address of an assessed person;*
- (c) an assessment;*
- (d) the type of improvement;*
- (e) school support;*
- (f) whether the linear property is assessable;*
- (g) whether the linear property is exempt from taxation under Part 10.*

Likewise, the Act lists decisions that the MGB may make on concluding a linear property assessment hearing.

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

...

(b) *make a change with respect to any matter referred to in section 492(1), if the hearing relates to a complaint about an assessment for linear property.*

...

***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*

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- (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.*

...

- 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.*

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### **PART A: PRELIMINARY ISSUES**

The parties raised the following preliminary issues

Preliminary Issue 1: Should the MGB permit the Complainant to introduce transcripts recording testimony from a prior hearing?

Preliminary Issue 2: Does the MGB have authority to consider whether the valuation standards for regulated property were established properly by regulation, as required under the Act?

Preliminary Issue 3: Is the complaint barred by section 491(2) of the Act?

#### **Preliminary Issue 1: Should the MGB permit the Complainant to introduce transcripts recording testimony from a prior hearing?**

##### Summary of Complainant's Position

The Complainant requested to supplement its submissions with portions of Mr. Dan Driscoll's testimony from the 2004/2005 tax year MTS Allstream hearing (Board Order MGB 094/06). This testimony concerns matters such as the creation and publication of the Minister's Guidelines regarding the Assessment of Farm Land, Linear Property, Machinery and Equipment, and Railway (Minister's Guidelines) which the Complainant argued relates directly to the issue of whether those Minister's Guidelines can be regarded as valuation standards established pursuant to the Act. The Complainant indicated it could not call similar evidence from other witnesses, since only current or former staff members from the Respondent's office - such as Mr. Driscoll - would have access to the relevant information.

##### Summary of Respondent's Position

The Respondent argued that written transcripts make unreliable evidence, because the decision maker has no opportunity to ask for clarification or to observe the emphasis, tone and demeanour of the witness. The Respondent also suggested that the Complainant could have called other witnesses to provide similar evidence, but chose not to. In any event, it said Mr. Driscoll's transcript evidence has little bearing on the issue at hand, since he is not a legislative expert and therefore is not qualified to testify as to whether legislation has been established properly. In short, the Respondent submitted that the prejudicial effect of admitting the transcripts will outweigh any possible evidentiary value they might bring to the hearing, and that they may unfairly shift the onus of proof to the Respondent.

##### Decision - Preliminary Issue 1

The MGB decided to admit the transcript evidence of Mr. Driscoll.

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### Reasons - Preliminary Issue 1

The MGB acknowledges that admitting transcripts from other hearings is unusual. However, Mr. Driscoll's position and knowledge of procedures at the Department of Alberta Municipal Affairs (Department) gives potential relevance to his testimony. Furthermore, any risk of prejudice was limited by ensuring the Respondent had full opportunity to address the evidence in the course of its submissions and to refer to other portions of the transcript if necessary. The Respondent could also have requested to have Mr. Driscoll appear in person to clarify his prior testimony, but opted not to do so.

### **Preliminary Issue 2: Does the MGB have authority to consider whether the valuation standards for regulated property were established properly by regulation, as required under the Act?**

#### Summary of Respondent's Position

The MGB's enabling provisions include sections 488(1)(a), 492(1), and 499. Notably, section 492(1) defines the complainant's right to pursue a linear complaint before the MGB. This section makes no mention of issues concerning the validity of legislation or other general questions of law. Statutory bodies must respect the confines of their jurisdiction and cannot trespass in areas where the legislature has not assigned them authority (ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4). Since such issues are not listed in section 492(1) they cannot sustain a complaint.

Section 499 lists the decisions the MGB has authority to make. Just as section 492(1) does not allow complainants to raise issues concerning the validity of legislation, so section 499 does not grant the MGB authority to decide such matters. The Act contains no express residual power that would allow the MGB to answer general questions of law, including questions of validity.

Having argued that the Act contains no express authority to determine validity, the Respondent went on to counter any suggestion that such a power is implied. In this connection, it cited authorities such as CTV Television Network v. Canada (Copyright Board), ([1993] 99 D.L.R. (4th) 216 (F.C.A.) leave to appeal dismissed, [1993] S.C.C.A. No. 74) to establish the proposition that an implied power must be linked inexorably to the exercise of a tribunal's function.

The Respondent suggested there is no inexorable link between the MGB's mandate and decisions regarding the validity of the Minister's Guidelines. It said the MGB's function is merely to decide assessment complaints within the context of an existing legislative framework. Thus, the MGB must distinguish between questions of interpretation and questions of validity (A.U.P.E. v. Provincial Health Authorities of Alberta, Alta LRBR 439(QB)). The latter require legal expertise and consideration of statutes beyond the MGB's scope of jurisdiction – for example, the *Interpretation Act* and the *Regulations Act*. In short, the Respondent argued that

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although the MGB's implied powers include interpreting the Act and subordinate legislation, they do not include the power to decide upon the validity of the Minister's Guidelines.

The Respondent conceded that in Cuddy Chicks v. Ontario (Labour Relations Board), 1991 2 SCR 5, the Supreme Court of Canada found that the Ontario Labour Relations Board (OLRB) had the power to determine whether its enabling legislation is constitutionally valid. However, it distinguished this case by noting that the OLRB's enabling legislation grants express statutory power to determine all questions of fact and law that arise in any manner; in contrast, the Act includes no similar provision. The Respondent suggested that unless a tribunal has a general power to determine issues of law, it cannot determine whether legislation is constitutionally valid (A.U.P.E. v. Provincial Health Authorities of Alberta, 2003 ABCA 157, [2003] A.J. No. 614; A.U.P.E. v. Provincial Health Authorities of Alberta, [2001] A.J. No. 1073, Alta L.R.B.R. 439 (Q.B.); Sturgeon Lake Cree Nation v. Greenview (Municipal District No. 16), 2003 ABCA 146, [2003] A.J. No. 502.) Furthermore, the Respondent stressed that the Cuddy Chicks case dealt with the constitutional validity of an enabling statute and not the exercise of legislated authority granted under the enabling statute.

### Summary of Complainant's position

The Complainant stressed that it is not requesting the MGB to make a declaration of invalidity; rather, it is requesting the MGB to consider whether valuation standards have been established by regulation, as required under the Act. Furthermore, it said the MGB does have authority to decide this question, and cited Cuddy Chicks in support of that position. As previously indicated, the Supreme Court of Canada held in that case that the OLRB had jurisdiction to consider whether provisions of its governing statute were contrary to the *Charter of Rights and Freedoms*. The Court found that although the OLRB could not declare a legislative provision invalid or expect deference concerning its interpretation of constitutional provisions, the legal process would be better served by having the OLRB make the initial determination of a jurisdictional issue arising from a constitutional challenge. Thus, the OLRB had a duty to determine whether the provision in question was valid under the *Charter of Rights and Freedoms* and then to treat that provision accordingly for its own purposes.

The Complainant submitted that the MGB is similar to the OLRB in that it is an expert tribunal within its area of competence and has a thorough knowledge of its enabling Act and subordinate legislation. Furthermore, it stressed that while Cuddy Chicks establishes that tribunals such as the MGB have jurisdiction to consider the validity of their enabling statutes, the question at hand is less far reaching. The question before the MGB is simply a question of law as to whether the Minister's Guidelines are effective as valuation standards and accomplish what the Act requires. Consideration of constitutional issues is not required.

The Complainant did not agree that Cuddy Chicks can be distinguished on the grounds that the OLRB's enabling statute grants broader powers than the MGB's. On the contrary, it said the MGB has similar powers to the OLRB. Accordingly, the MGB must deal with matters brought



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before it and determine questions of law, mixed fact and law, and questions of fact. The question now before the MGB falls within this scope.

The Complainant also disagreed that the cases cited by the Respondent preclude the MGB from determining whether a law is constitutionally valid; on the contrary, it said these cases confirm that under the authority of Cuddy Chicks, an administrative tribunal has the duty when called upon to consider the validity of that tribunal's constituting statute and any subordinate provisions pursuant to that constituting statute.

Finally, the Complainant noted that the MGB has already heard and decided the issue of the validity of the Minister's Guidelines in prior hearings without any question as to its authority.

### Summary of the Position of the Intervenor, City of Calgary

The City of Calgary agreed with the Complainant's position, adding there is recent Supreme Court of Canada authority to establish that an administrative tribunal can determine a constitutional issue, unless there is specific legislation prohibiting it. It submitted that if an administrative tribunal has authority to decide a constitutional matter, then it certainly has the power to determine matters relating to its enabling statute.

### Decision - Preliminary Issue 2

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.

### Reasons - Preliminary Issue 2

The MGB notes that it considered its jurisdiction to determine questions of validity at length in The City of Calgary v. Minister of Municipal Affairs (Board Order MGB 076/06) at pages 53-56. Similar reasoning was adopted in MTS Allstream v. Designated Linear Assessor (Board Order MGB 094/06). Having reviewed the submissions and authorities presented in the context of the current complaint, the MGB believes that the reasoning expressed in those decisions is correct and should be applied here.

### **Preliminary Issue 3: Is the complaint barred by section 491(2) of the Act?**

#### Summary of Respondent's Position

The Respondent argued that the complaint should be dismissed, because it does not conform to the requirements of section 491 of the Act. This section requires linear property complaints to be filed in writing and to include the reasons for the matter being referred to the MGB. The validity

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of the Minister's Guidelines was not listed as a reason on the written complaint form filed with the MGB. In fact, the Complainant did not describe the remaining issue as such until well into the scheduling and preliminary hearing process. Therefore, the issue is not properly before the the MGB.

In further support of its position, the Respondent argued that there is no authority in the Act to amend complaints by adding issues. Furthermore, timely written grounds for complaint provide municipalities with a basis to decide whether or not to become intervenors within the parameters of an annual complaint process. To consider issues not listed on the written complaint form would make complaints open-ended and undermine the effectiveness of the preliminary hearing and scheduling process.

### Summary of Complainant's Position

The Complainant noted that the statement filed with the MGB indicated its property had been assessed far in excess of actual value. The Respondent claims the Minister's Guidelines give it authority to assess above market value. However, if the Minister's Guidelines are invalid, and of no force and effect, then the Minister's argument fails, and the Minister will be required to assess at proper values pursuant to the Act. Accordingly, the question of the validity of the Minister's Guidelines is properly before the MGB and must be decided in order to adjudicate the complaint.

### Decision - Preliminary Issue 3

The matter of the validity of the Minister's Guidelines is properly before the MGB.

### Reasons - Preliminary Issue 3

The MGB considered an identical argument concerning whether the issue of the validity of the Minister's Guidelines was properly before the MGB in *MTS Allstream v. Designated Linear Assessor* (Board Order MGB 094/06) at page 11. Having reviewed the submissions and authorities presented in the context of the current complaint, the MGB still agrees with the reasoning expressed there.

**PART B – MAIN ISSUE**

**Main Issue: Are the valuation standards for regulated property established by regulation, as required under the Act?**

Summary of Complainant’s Position

The Complainant submitted several arguments in support of its position that the Minister has not set out any valuation standards for linear property in the regulations, as required under section 292 of the Act.

First, the Complainant argued that the legislation distinguishes between valuation standards and procedures. Notably, section 293(1) of the Act says the assessor must apply the “valuation standards” and follow the “procedures” set out in the regulations. Having emphasized this distinction, the Complainant stressed the valuation standards are substantive and carry important financial consequences for taxpayers. Therefore, they are not procedural in nature and cannot be established through procedures in the Minister’s Guidelines. In this connection, the Complainant argued that a true valuation standard is not a “manner” or sequence of steps in which property is to be assessed; rather, it is a rule, measure or test by which valuation may be established. Definitions from *Sanagan’s Encyclopedia of Words and Phrases*, and the *Canadian Dictionary of Law* were cited to support this interpretation.

Second, the Complainant noted that section 322 only authorizes the Minister to make regulations establishing valuation standards. Although the Minister purports to exercise this power through *Alberta Regulation 289/99*, that regulation does not do what the Act intends. Instead of establishing substantive valuation standards for regulated property, it simply refers to “procedures” in the Minister’s Guidelines as established by the Department from time to time. This deferral represents an illegitimate attempt to delegate the power to make valuation standards to the Department. Pursuant to section 578(2) and section 21 of the *Interpretation Act*, the Minister has no power to delegate its regulation-making authority. Thus, its attempt to delegate the power to set valuation standards to the Department by way of the Minister’s Guidelines is contrary to the Act.

Third, the Complainant argued that even if valuation standards are established by the Minister’s Guidelines, those Guidelines are not effective regulations as required by section 292 of the Act. In support of this position, it noted that the Minister’s Guidelines do not conform to the formal requirements imposed under the *Regulations Act*, such as filing with the Registrar and publication in the Gazette. Pursuant to the authority of the Supreme Court of Canada in *re: Manitoba Language Rights*, such requirements must be fulfilled by all instruments that affect substantive rights or are otherwise of a legislative nature.

Fourth, the Complainant referred to the transcript of Mr. Driscoll, which confirms that the relevant Ministerial Orders and associated Guidelines are not published in the same fashion as

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regulations; instead, copies of the Ministerial Orders must be requested from the Minister. Once received, there is no assurance that an authoritative version of the Minister's Guidelines is attached. Finally, the Complainant noted that the Construction Cost Reporting Guide is not attached to *Ministerial Order MO L153/03* for the year under complaint. This circumstance presents a "moving target" that cannot be recognized as a regulation in a society of laws.

Finally, the Complainant noted that the Minister's Guidelines are adopted by reference both in *Alberta Regulation 289/99* and the Ministerial Orders to which they are attached. Section 1(1)(f) of the *Regulations Act* together with section 2 of the *Interpretation Act* state clearly that a regulation does not include a document incorporated by reference. Since a regulation does not include a document incorporated by reference, the Minister's Guidelines are not regulations. Moreover, the Ministerial Orders to which they are appended are not regulations under section 1(a) of the *Interpretation Act*, because they are not made in the execution of a power conferred under the Act.

### Summary of Respondent's Position

The Respondent rejected the notion that property valuation standards for linear property are contained in the Minister's Guidelines, as opposed to MRAT. In support of its position, The Respondent submitted that the term "valuation standard" means the manner in which a given type of property is assessed. MRAT clearly identifies the manner in which various property types are to be assessed. In particular, section 6 establishes that linear property is to be assessed by:

- using a standard other than market value
- using a calculation process, and
- using the procedures set out in the Alberta Linear Property Minister's Guidelines.

The Respondent submitted that – contrary to the Complainant's suggestion - the Minister's Guidelines are clear and easily identifiable. Thus, a fair and complete review of Mr. Driscoll's testimony establishes that the Minister's Guidelines are easily available through the Municipal Affairs Website and the Queen's Printer, and that the content of the versions from publically available sources is identical. Accordingly, the Respondent submitted that the valuation standards are established by regulation (i.e.: MRAT) in accordance with authority provided under the Act.

In the alternative, the Respondent argued that even if MRAT does not establish valuation standards, then the Minister's Guidelines do. Furthermore, it said the definition of "regulation" in the *Interpretation Act* is broad enough to capture the Minister's Guidelines. With respect to section 1(2)(d) of the *Regulations Act*, the Respondent submitted that the purpose of that provision is to allow documents to be incorporated into regulations without independently complying with the requirements of the *Regulations Act* - not to render referentially incorporated documents ineffective.

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Finally, the Respondent rejected the argument that the Minister's Guidelines represent an invalid subdelegation of Ministerial power. In support of its position, the Respondent noted the well established principle that delegation to staff is a practical necessity in a modern government. In accordance with this principle, it said the Minister delegated creation of the Minister's Guidelines to staff, but retained formal responsibility for their establishment by appending them to a signed Ministerial Order sanctioning the procedures they contain. The Respondent suggested that this interpretation should be preferred, since it accords with the principle that an interpretation promoting validity is to be preferred over one that does not.

### Decision - Main Issue

MRAT sets effective valuation standards for regulated property.

### Reasons - Main Issue

Once again, the issue of whether the standards and procedures upon which the Respondent determined its assessments for regulated property have a proper foundation under the Act was considered at length in Board Order MGB 076/06 at pages 56 and following. In the MGB's view, the reasoning outlined there addresses all of the issues raised by the parties in current complaint. Further comments here would be superfluous.

With respect to the testimony of Mr. Driscoll, the MGB reviewed the transcripts submitted by the Respondent. This testimony suggests that the Minister's Guidelines are not produced and published in the same fashion as is generally expected of regulations. Nevertheless, the MGB is satisfied that the Minister's Guidelines and the procedures they contain are clearly ascertainable by potential users - either via the Minister's Website or via the Queen's Printer. Thus, Mr. Driscoll's testimony is consistent with the view that the Minister has established a valuation standard for linear property by regulation in MRAT through reference to readily ascertainable procedures – in this case, procedures contained in the Minister's Guidelines.

**PART C – ORDER IN COUNCIL OC 498/2006**

**Introduction**

After oral presentations for this hearing were complete, the Lieutenant Governor in Council issued *OC 498/2006* which contains the *Minister's Guidelines Regulation* as an Appendix. That regulation indicates that it applies in respect of taxation years 1994 to 2008. It also indicates the Minister may establish valuation standards by Order and that the Minister's Guidelines are regulations pursuant to sections 289, 292, and 293 of the Act. Since these matters touch the issues argued before it, the MGB requested the parties to make further written submissions as to the effect of the *Minister's Guidelines Regulation*.

**Summary of Complainant's Position**

The Complainant argued that *OC 498/2006* should not be followed for two reasons. First, it is not authorized under the section 603 of the Act as claimed. Second, it is retroactive legislation that should be presumed invalid.

With respect to the scope of authority, the Complainant observed that section 603 authorizes the Lieutenant Governor in Council to provide for matters that are not sufficiently provided for under the Act. However, the Act already requires valuation standards to be established by regulation. Thus, *OC 498/2006* does not deal with a matter insufficiently provided for under the Act; rather, it attempts to remedy a failure to comply with the Act. Accordingly, it is not authorized under section 603.

With respect to retroactivity, the Complainant submitted that unless it is merely declarative or has enabling provisions that indicate otherwise, legislation claiming to have retroactive application must be presumed invalid. This presumption is reflected in texts such as R. Sullivan - Sullivan and Driedger on the Construction of Statutes, L-P Pigeon – Drafting and Interpreting Legislation, and P. Salembier – Regulatory Law and Practice in Canada. It is also established in the case law, including Bell Canada v. Canadian Telephone Employees Association, [2003] 1, SCR, Re Bedesky and Farm Products Marketing Board of Ontario (1975), 58 DLR (3d) 484 (Ont Div. Ct.); aff'd (1975), 62 DLR (3d) 265n (Ont. C.A.); leave to appeal refused (1975), 10 OR (2d) 106 SCC, JJC Holdings Ltd. and Wednesday Holding Ltd. v. Assessor of the City of Edmonton and Minister of Municipal Affairs (1983) 49 AR 91 QB ;rev'd on other grounds (1984) , 54 AR 378 (CA) leave to appeal refused (1984) 12 DLR 4 380n (SCC), Petersen v. Kupnicki [1996] AJ No 862 (CA), Skyline Roofing Ltd. v. Alberta (Worker's Compensation Board), 2001 ABQB 624, Alpha Laboratories Inc. v. Ontario, [1999] OJ No. 552 (ct. J. Gen Div) Leave to appeal refused, 1999 Ont CA, leave to appeal refused (199) 255 NR 398n SCC, Cencourse Project Inc. v. Ontario, [1995] OJ No. 3445 Ct. J. (Gen Div.)

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The Complainant conceded that section 138 of the Act permits the Lieutenant Governor in Council to create retroactive orders; however, this provision does not rebut the presumption against retroactivity in the current circumstances, because it is limited to orders under Part 4 of the Act which does not cover the matters concerning *OC 498/06*.

Aside from the issues of retroactivity and lack of authority under section 603, the Complainant submitted that *OC 498/2006* is an attempt to use executive power to remedy a failure to comply with the Act. The Respondent has used a similar approach in the past – for example, it issued a “Ministerial Prescription” to avoid the implications of the Act concerning the assessability of feature software as interpreted by the MGB in Board Order MGB 099/99 (subsequently upheld by the Court of Appeal).

The Complainant submitted that the only logical reason to implement *OC 498/2006* “deeming” the Minister’s Guidelines to be regulations retroactively is that they were never regulations. Similarly, the only reason to exempt the Minister’s Guidelines from the requirements of the *Regulations Act* is the recognition that the *Regulations Act* rules out referentially incorporated documents as regulations. Accordingly, *OC 498/2006* is an admission that the Respondent has been assessing taxpayers without proper valuation standards for many years.

Finally, in reply to the Respondent’s reliance on Board Orders MGB 076/06 and MGB 094/06, the Complainant submitted that these were wrongly decided, because they found that a valuation standard is contained in MRAT. The Complainant submitted that a valuation standard cannot be contained in MRAT, because (1) it is not possible for an assessor to prepare an assessment by referring to information in that regulation, (2) the Minister’s Guidelines contain the substantive – as opposed to merely procedural – information necessary to prepare an assessment, and (3) section 2(d) of the *Regulations Act* prevents incorporation of the Minister’s Guidelines into MRAT by reference.

### Summary of Respondent’s Position

The Respondent argued that the MGB has already determined the matter now before it in two prior decisions: Board Orders MGB 076/06 and MGB 094/06. Those decisions found that MRAT contains the valuation standard for linear property; further, they held that the Minister has established a valuation standard for linear property by regulation. Since the Complainant has presented no new evidence or argument that might persuade the MGB to vary its previous decisions, the same conclusion should apply in the context of the current complaint.

In view of the above, the Respondent suggested that the MGB need consider no further arguments concerning the validity of the Minister’s Guidelines. However, if the MGB’s previous decisions were in doubt, the new *Minister’s Guidelines Regulation (Regulation)* established by *OC 498/2006* now provides full answer to the issues raised by the Complainant in the context of its current complaint. First, section 2(1)(b) of the *Regulation* provides the Minister with additional authority to establish guidelines respecting valuation standards. Second,

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section 2(2) provides that a guideline established pursuant to section 2(1) of the *Regulation* is a Regulation pursuant to sections 289, 292 and 293 of the Act. Finally, section 2(3) indicates that guidelines passed pursuant to the *Regulation* are not governed by the provisions of the *Regulations Act*. These provisions provide a full answer to every argument raised by the Complainant.

With respect to the Complainant's arguments concerning the scope of section 603 and the presumption against retroactivity, the Respondent submitted that the MGB has no authority to consider these questions, because they relate to the validity of legislation, as opposed to its interpretation. The Respondent again submitted that the MGB's jurisdiction to consider questions of law extends only to questions of interpretation, not to questions of validity.

The Respondent went on to argue that even if the MGB did have authority to consider questions of validity, the Regulation was established properly under section 603 of the Act. The Respondent clarified that in its view, section 603 allows the Lieutenant Governor in Council to amend the Act in a timely and responsive way. Accordingly, it said regulations made under this section carry the same weight as the Act. The Lieutenant Governor in Council's power under section 603(1) applies to "any matter that the Minister considers insufficiently provided for under the Act". Further, section 2 of the *Regulation* makes clear that the Minister considered an alternative statutory authority was required; accordingly, that section amends section 289, 292 and 293 of the Act. Section 3 then further amends the Act to provide for the balance of the matters insufficiently provided for in the Act.

With respect to retroactivity, the Respondent submitted that the case law relied upon by the Complainant fully acknowledges that the presumption against retroactivity is rebuttable. As indicated by Sullivan in *Driedger on the Construction of Statutes*, the presumption is rebutted by (1) an express or inferred indication in the legislation that it was meant to apply to past events or (2) circumstances where the retroactive legislation merely seeks to confirm and declare the state of the law. The *Regulation* does not change any of the Complainant's assessments for previous years or the year under complaint, as prepared under the Minister's Guidelines. Accordingly, the *Regulation* is declarative and does not change the Complainant's rights under the law.

### **Decision - OC 498/2006**

The MGB has authority to consider whether the presumption against retroactivity applies to the *Minister's Guidelines Regulation* and whether that *Regulation* falls properly under the power granted to the Lieutenant Governor in Council by section 603 of the Act. However, in the current circumstances, the MGB declines to decide these issues, because it is satisfied that the matter of the effectiveness of the valuation standards set by the Respondent has already been dealt with under part B of this Order.



## BOARD ORDER: MGB 125/06

### Reasons - OC 498/2006

As articulated fully in Board Order MGB 076/06, the MGB has an obligation to consider questions of law that must be decided to determine matters that are properly before it. In the present circumstances, the MGB has a complaint concerning the assessment of linear property that is properly before it. The effectiveness of the valuation standard used to assess the subject property has been challenged by the Complainant. If it had not already found that the valuation standard for linear property was established correctly under MRAT, it would have been necessary to consider the issues raised by the Complainant concerning the effectiveness of the new *Minister's Guideline Regulation* as established by OC 498/2006. However, since the MGB has already found that the valuation standard for linear property was established properly by regulation under MRAT, and since the Respondent has raised no new considerations in this regard, no further decision is required.

No costs to either party.

Dated at the City of Edmonton, in the Province of Alberta, this 1st day of December 2006.

MUNICIPAL GOVERNMENT BOARD

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(SGD) D. Thomas, Presiding Officer

**APPENDIX "A"**

APPEARANCES

<b>NAME</b>	<b>CAPACITY</b>
A. Friend	Counsel for the Complainant
B. Sjolie	Counsel for the Respondent
C. Zukiwski	Counsel for the Respondent
S. Trylinski	Counsel for the Intervenor, City of Calgary

**BOARD ORDER: MGB 125/06**

**APPENDIX "B"**

DOCUMENTS RECEIVED AND CONSIDERED BY THE MGB:

<b>EXHIBIT NO.</b>	<b>ITEM</b>
PC - 1	Letter from Bennett Jones to MGB dated January 27, 2006
PC - 2	Respondent's Argument Regarding Proposed Use of Evidence Taken From the Merit Hearing of MTS Allstream Inc.
PC - 3	Respondent's Volume of Authorities
PC - 4	Reply Submission of London Connect Inc. Regarding Relevant Portions of Transcript of Dan Driscoll
PI - 5	Response Regarding GT Group's Proposed Use of Evidence Taken From the Merit Hearing of MTS Allstream Inc.
C- 6	Statement of Position of London Connect Inc. (GT Group Telecom Services Corp.) With Respect to its Linear Property Assessment
R - 7	Respondent's Argument
R - 8	Respondent's Authorities
R - 9	Respondent's Volume of Documents and Orders that Form the Record in this Complaint
C - 10	Reply submissions of London Connect Inc. (GT Group Telecom Services Corp.) with Respect to its Linear Property Assessment Complaint for Taxation Year 2004
I - 11	Submission of the City of Calgary
I - 12	Notice of Intervention of the City of Edmonton
R - 13	Atco Gas Pipelines Ltd. v. Alberta (Energy & Utilities Board); 2006 SCC 4
C - 14	Telus Communications Inc. v. The Crown in Right of the Province of Alberta
SC - 15	Supplemental Submissions of the GT Group Telecom Services Corp. Regarding <i>Order in Council OC 498/2006</i>
SR - 16	Respondent's Legal Argument Regarding the <i>Minister's Guideline Regulation</i>
SR - 17	Volume of Legislation Regarding the <i>Minister's Guideline Regulation</i>
SR - 18	Respondent's Reply Argument Regarding the <i>Minister's Guideline Regulation</i>
SC - 19	Reply Submissions of the GT Group Telecom Services Corp. regarding <i>Order in Council OC 498/2006</i>
SI - 20	Letter from the City of Edmonton to the MGB dated November 10, 2006

**BOARD ORDER: MGB 125/06**

**APPENDIX "C"**

**2004 (tax year) Linear Property Assessment Complaints  
GT Group Telecom Services Corp. – MA ID 21996**

**List of Properties under Complaint**

<b>Assessess Name</b>	<b>TJ MA ID</b>	<b>TJ Name</b>	<b>LPAU ID</b>
GT Group Telecom Services Corp.	3	City of Airdrie	2179391, 2179392
GT Group Telecom Services Corp.	12	County of Athabasca #12	2179395, 2179396
GT Group Telecom Services Corp.	46	City of Calgary	2179382, 2179383, 2179384, 2179385, 2179386, 2179387, 2179388, 2179389, 2179390, 2179401, 2179402
GT Group Telecom Services Corp.	50	Town of Canmore	2179403, 2179404
GT Group Telecom Services Corp.	356	Town of Chestermere	2179322, 2179323
GT Group Telecom Services Corp.	200	City of Leduc	2179352, 2179353
GT Group Telecom Services Corp.	206	City of Lloydminster	2179358, 2179359
GT Group Telecom Services Corp.	69	Town of Coaldale	2179407, 219408
GT Group Telecom Services Corp.	360	Town of Coalhurst	2179324, 2179325
GT Group Telecom Services Corp.	70	Town of Cochrane	2179409, 2179410
GT Group Telecom Services Corp.	79	Town of Crossfield	2179411, 2179412
GT Group Telecom Services Corp.	376	Cypress County	2179326, 2179327, 2179328, 2179329
GT Group Telecom Services Corp.	98	City of Edmonton	2179342, 2179343, 2179344, 2179345, 2179371, 2179372, 2179415, 2179416, 2179417
GT Group Telecom Services Corp.	117	City of Fort Saskatchewan	2179346, 2179347
GT Group Telecom Services Corp.	148	Town of High River	2179348, 2179349
GT Group Telecom Services Corp.	180	Town of Innisfail	2179350, 2179351
GT Group Telecom Services Corp.	201	Leduc County	2179354, 2179355
GT Group Telecom Services Corp.	203	City of Lethbridge	2179356, 2179357
GT Group Telecom Services Corp.	382	MD of Bighorn No.8	2179330, 2179331
GT Group Telecom Services Corp.	217	City of Medicine Hat	2179360, 2179361
GT Group Telecom Services Corp.	235	County of Newell No. 4	2179362, 2179363
GT Group Telecom Services Corp.	238	Town of Okotoks	2179364
GT Group Telecom Services Corp.	245	Parkland County	2179366, 2179367
GT Group Telecom Services Corp.	292	City of St. Albert	2179376, 2179377
GT Group Telecom Services Corp.	302	Strathcona County	2179378, 2179379
GT Group Telecom Services Corp.	303	Town of Strathmore	2179338
GT Group Telecom Services Corp.	262	City of Red Deer	2179370, 2179373
GT Group Telecom Services Corp.	254	Town of Ponoka	2179368, 2179369
GT Group Telecom Services Corp.	314	County of Thorhild No.7	2179315, 2179341
GT Group Telecom Services Corp.	387	Town of Banff	2179332, 2179333
GT Group Telecom Services Corp.	31	Town of Blackfalds	2179397, 2179398

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<b>Assessess Name</b>	<b>TJ MA ID</b>	<b>TJ Name</b>	<b>LPAU ID</b>
GT Group Telecom Services Corp.	43	Town of Brooks	2179380, 2179381
GT Group Telecom Services Corp.	65	Town of Claresholm	2179405, 2179406
GT Group Telecom Services Corp.	239	Town of Olds	2179365
GT Group Telecom Services Corp.	264	Town of Redcliff	2179374, 2179375
GT Group Telecom Services Corp.	311	Town of Taber	2179339, 2179340
GT Group Telecom Services Corp.	8	Village of Andrew	2179393, 2179394
GT Group Telecom Services Corp.	41	Village of Boyle	2179399, 2179400
GT Group Telecom Services Corp.	85	Village of Derwent	2179413, 2179414
GT Group Telecom Services Corp.	334	Vulcan County	2179318
GT Group Telecom Services Corp.	333	Town of Vulcan	2179316, 2179317
GT Group Telecom Services Corp.	335	Town of Wainwright	2179320, 2179321
GT Group Telecom Services Corp.	508	R.M. of Wood Buffalo	2179334, 2179335
GT Group Telecom Services Corp.	508	Fort McMurray	2179336, 2179337