Federal Court  Cour fédérale

Date: 20150129

Docket: T-1786-13

Citation: 2015 FC 106

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 29, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

CITY OF TROIS-RIVIÈRES

Applicant

and

TROIS-RIVIÈRES PORT AUTHORITY

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

JUDGMENT AND REASONS

I. Nature of the matter

[1] The City of Trois-Rivières (the applicant) is challenging the lawfulness of a decision dated October 4, 2013, rendered by the Trois-Rivières Port Authority (TPA), in which the TPA

held that the payment in lieu of property taxes (PILT) owed to the applicant under the *Payments in Lieu of Taxes Act*, RSC 1985, c M-13 (PILT Act), for the 2013 taxation year was $68,313, or $70,341 including water and sewer taxes. In communicating this decision, the TPA referred to an interim payment of $91,179 made on July 25, 2013, and informed the applicant that the amount in excess of $70,341 would be considered an advance payment against the 2014 PILT.

[2] This application for judicial review involves (i) the scope of the discretion of a Crown corporation, in this case the TPA, to determine the amount of the PILT it must pay to a municipality; (ii) the procedure to follow in case of a disagreement between a Crown corporation and a municipality about the amount of a PILT; and (iii) whether a Crown corporation is entitled to set off an overpayment to a municipality against a subsequent taxation year.

II. The federal Payments in Lieu of Taxes Program

[3] Although the legislative framework for this dispute has been explained in great detail by this Court, the Federal Court of Appeal and the Supreme Court of Canada, it would be useful to provide a brief overview for the purposes of this case.

[4] Under section 125 of the *Constitution Act, 1867*, Crown properties are not liable to taxation by another level of government and therefore benefit from immunity from taxation (see *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at para 12 [*Montreal Port Authority*]; *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29 at para 2 [*Halifax*]). To balance tax fairness for municipalities with the preservation of constitutional immunity from taxation, the federal government established the PILT Act, a regime of discretionary payments to compensate for the taxes that the municipalities would otherwise have levied (*Montreal Port Authority* at para 14; *Halifax* at para 2). Section 2.1 of the

PILT Act explicitly states that "[t]he purpose of this Act is to provide for the fair and equitable administration of payments in lieu of taxes." However, as noted by Justice LeBel at paragraph 20 of *Montreal Port Authority*, the municipality is not a creditor of the Crown, given that Parliament did not intend to diminish the Crown's immunity from taxation, as is evident from section 15 of the PILT Act, which states that "[n]o right to a payment is conferred by this Act." Therefore, although municipalities "expect" to receive payments in lieu, these payments are subject to a "structured administrative discretion" (*Montreal Port Authority* at para 20).

[5] Paragraph 3(1)(*a*) of the PILT Act sets out that the "Minister may . . . make a payment out of the Consolidated Revenue Fund [to a municipality] . . . in lieu of a real property tax for a taxation year". However, this payment must not exceed the product of "the effective rate in the taxation year applicable to the federal property in respect of which the payment may be made" and the "the property value in the taxation year of that federal property", pursuant to subsection 4(1) of the PILT Act. Subsection 7(1) of the *Crown Corporation Payment Regulations*, SOR/81-1030 (CCPR), adopted by the Governor in Council pursuant to paragraph 9(1)(*f*) of the PILT Act, indicates that a Crown corporation's payment must not be <u>less than</u> the product of these two amounts. Section 2 of the CCPR defines the terms "corporation effective rate" and "corporation property value" as follows:

> "corporation effective rate" means the rate of real property tax or of frontage or area tax that a corporation would consider applicable to its corporation property if that property were taxable property.
>
> "corporation property value" means the value that a corporation would consider to be attributable by an assessment authority to its corporation property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property.
>
> [Emphasis added.]

[6] While I recognize that the definitions relating to the calculation of payments in the PILT Act and the CCPR are not identical, I note that they are very similar.

[7] Where a Crown corporation "is unable to make a final determination of the amount of a payment" in lieu of taxes to a municipality, the corporation must, within 50 days after receipt of an application for the payment, "make . . . an interim payment that corresponds to the estimated total payment to be made" pursuant to section 12 of the CCPR.

[8] Finally, section 11.1 of the PILT Act states that in the event of disagreement between the Minister and a municipality, an advisory panel will give advice regarding "the property value, property dimension or effective rate applicable to any federal property, or claims that a payment should be supplemented under subsection 3(1.1)."

III. Facts

[9] On May 22, 2013, the applicant, through its Treasurer and Deputy Treasurer, sent the TPA a PILT application for an amount of $179,486. According to the applicant, the value of the TPA's lots was $4.18 per square foot, and it was on this basis that the amount requested in the PILT application was calculated. I note that the TPA argues in its memorandum that the City's assessment was $4.09 per square foot rather than $4.18 per square foot. I am of the view that this minor discrepancy is not determinative in this case.

[10] On June 25, 2013, the applicant sent the TPA a supplementary PILT application in the amount of $1,979 on the basis of the issuance of two certificates of amendment. The total PILT amount claimed by the applicant for 2013 is therefore $181,465.

[11] Noting that the applicant calculated this amount on the basis of a property value that was 60% higher than the value established for 2012, the TPA hired a chartered appraiser to obtain a second opinion. According to that appraiser, the value of the lots was $1.25 per square foot, a much lower amount than the one assessed by the applicant. However, the effective rate used by the applicant is not in dispute.

[12] On July 25, 2013, the TPA sent the applicant a cheque in the amount of $91,179 as an interim payment for the 2013 PILT.

[13] On September 10, 2013, representatives from the parties met to discuss their disagreement as to the value of the property. However, the parties failed to reach an agreement.

[14] In an email dated October 4, 2013, the TPA informed the applicant that it considered the PILT for the 2013 taxation year to be $68,313, or $70,341 including water and sewer taxes, in accordance with the assessment of the chartered appraiser. The TPA added that the amount paid on July 25, 2013, in excess of the amount of $70,341 was to be considered an advance payment against the 2014 PILT.

[15] On October 11, 2013, the chartered appraiser hired by the TPA sent the applicant the comparables he had used as a reference to estimate the value of the lots mentioned in the PILT application. In that letter, the chartered appraiser confirmed that he had received the technical sheets sent by the applicant to the TPA and asked for the comparables that had been used by the applicant to establish the value of the PILT claimed from the TPA. The applicant did not send the comparables requested by the TPA.

[16] On November 21, 2013, the applicant filed an application with the Advisory Panel contesting the assessed value of the lots. However, that file has been suspended pending the ruling in this case.

[17] On December 3, 2013, the applicant sent the TPA a third PILT application in the amount of $300.

IV. Issues

[18] There are two issues:

1. Did the TPA err in exercising its discretion to establish the value of its properties?
2. Can the TPA recover an overpayment by setting it off against a subsequent taxation year?

V. Relevant provisions

The Constitution Act, 1867, 30 & 31 Vict, c 3	***Loi constitutionnelle de 1867, 30 & 31 Victoria, c 3***
125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.	125. Nulle terre ou propriété appartenant au Canada ou à aucune province en particulier ne sera sujette à la taxation.
Payments in Lieu of Taxes Act, RSC 1985, c M-13	***Loi sur les paiements versés en remplacement d'impôts L.R.C. (1985), ch. M-13***
2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"property value" means the value that, in the opinion of the Minister, would be attributable by an assessment authority to federal property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property;	« valeur effective » Valeur que, selon le ministre, une autorité évaluatrice déterminerait, compte non tenu des droits miniers et des éléments décoratifs ou non fonctionnels, comme base du calcul de l'impôt foncier qui serait applicable à une propriété fédérale si celle-ci était une propriété imposable.
2.1 The purpose of this Act is to provide for the fair and equitable administration of payments in lieu of taxes.	2.1 La présente loi a pour objet l'administration juste et équitable des paiements versés en remplacement d'impôts.
3. (1) The Minister may, on receipt of an application in a form provided or approved by the Minister, make a payment out of the Consolidated Revenue Fund to a taxing authority applying for it	3. (1) Le ministre peut, pour toute propriété fédérale située sur le territoire où une autorité taxatrice est habilitée à lever et à percevoir l'un ou l'autre des impôts mentionnés aux alinéas a) et b), et sur réception d'une demande à cet effet établie en la forme qu'il a fixée ou approuvée, verser sur le Trésor un paiement à l'autorité taxatrice :
(*a*) in lieu of a real property tax for a taxation year, and	*a*) en remplacement de l'impôt foncier pour une année d'imposition donnée;

(*b*) in lieu of a frontage or area tax

b) en remplacement de l'impôt sur la façade ou sur la superficie.

4. (1) Subject to subsections (2) and (3) and 5(1) and (2), a payment referred to in paragraph 3(1)(*a*) shall not exceed the product of

4. (1) Sous réserve des paragraphes (2), (3) et 5(1) et (2), le paiement visé à l'alinéa 3(1)*a*) ne peut dépasser le produit des deux facteurs suivants :

(*a*) the effective rate in the taxation year applicable to the federal property in respect of which the payment may be made, and

a) le taux effectif applicable à la propriété fédérale en cause pour l'année d'imposition;

(*b*) the property value in the taxation year of that federal property.

b) la valeur effective de celle-ci pour l'année d'imposition.

11.1 (1) The Governor in Council shall appoint an advisory panel of at least two members from each province and territory with relevant knowledge or experience to hold office during good behaviour for a term not exceeding three years, which term may be renewed for one or more further terms. The Governor in Council shall name one of the members as Chairperson.

11.1 (1) Le gouverneur en conseil constitue un comité consultatif composé d'au moins deux membres de chaque province et territoire — dont un président — possédant une formation ou une expérience pertinentes. Les membres sont nommés à titre inamovible pour un mandat renouvelable d'au plus trois ans.

. . .

[…]

Mandate

(2) The advisory panel shall give advice to the Minister in the event that a taxing authority disagrees with the property value, property dimension or effective rate applicable to any federal property, or claims that a payment should be supplemented under subsection 3(1.1).

Mandat

(2) Le comité a pour mandat de donner des avis au ministre relativement à une propriété fédérale en cas de désaccord avec une autorité taxatrice sur la valeur effective, la dimension effective ou le taux effectif ou sur l'augmentation ou non d'un paiement au titre du paragraphe 3(1.1).

15. No right to a payment is conferred by this Act.

15. La présente loi ne confère aucun droit à un paiement.

Crown Corporation Payments Regulations, SOR/81-1030	***Règlements sur les versements provisoires et les recouvrements, DORS/81-226***
2. In these Regulations,	2. Les définitions qui suivent s'appliquent au présent règlement.
"corporation effective rate" means the rate of real property tax or of frontage or area tax that a corporation would consider applicable to its corporation property if that property were taxable property.	« taux effectif applicable à une société » Le taux de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie qui, de l'avis de la société, serait applicable à sa propriété si celle-ci était une propriété imposable.
"corporation property value" means the value that a corporation would consider to be attributable by an assessment authority to its corporation property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property.	« valeur effective de la propriété d'une société » La valeur qui, de l'avis de la société, serait déterminée par une autorité évaluatrice, abstraction faite de tous droits miniers et de tous éléments décoratifs ou non-fonctionnels, comme base du calcul de l'impôt foncier applicable à sa propriété si celle-ci était une propriété imposable.
6. The payment made by a corporation in lieu of a real property tax or frontage or area tax in respect of any corporation property that would be federal property if it were under the management, charge and direction of a minister of the Crown is made without any condition, in an amount that is not less than the amount referred to in sections 7 to 11.	6. Le paiement effectué par une société en remplacement de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie à l'égard d'une propriété qui serait une propriété fédérale si un ministre fédéral en avait la gestion, la charge et la direction n'est assorti d'aucune condition et ne doit pas être inférieur aux sommes visées aux articles 7 et 11.
7. (1) Subject to subsection (2), a payment made by a corporation in lieu of a real property tax for a taxation year shall be not less than the	7. (1) Sous réserve du paragraphe (2), un paiement versé par une société en remplacement de l'impôt foncier pour une année

product of

(*a*) the corporation effective rate in the taxation year applicable to the corporation property in respect of which the payment may be made; and

(*b*) the corporation property value in the taxation year of that corporation property.

12. (1) Subject to subsection (2), where a corporation makes a payment in accordance with section 6, it shall be made

(*a*) only to the taxing authority for the area in which the corporation property is situated; and

(*b*) within 50 days after receipt of an application for the payment.

(2) Where a corporation is unable to make a final determination of the amount of a payment made in accordance with section 6 within the time referred to in paragraph (1)(*b*), the corporation shall make, within that time, an interim payment that corresponds to the estimated total payment to be made.

Interim Payments and Recovery of Overpayments Regulations, SOR/81-226

4. If any payment made to a taxing authority under the Act or these Regulations is greater than the amount that may be paid to the taxing authority under section 3 of the Act, the amount of the overpayment and interest on that amount

d'imposition ne doit pas être inférieur au produit des deux facteurs suivants :

a) le taux effectif applicable à la société dans l'année d'imposition en cause à l'égard de la propriété de celle-ci pour laquelle le paiement peut être versé;

b) la valeur effective de la propriété de la société pour cette année d'imposition.

12. (1) Sous réserve du paragraphe (2), le paiement effectué par une société en application de l'article 6 est versé :

a) uniquement à l'autorité taxatrice du lieu où la propriété est située;

b) dans les cinquante jours suivant la réception de la demande de paiement.

(2) Lorsqu'une société est incapable de déterminer de façon définitive le montant du paiement à verser aux termes de l'article 6 au cours du délai visé à l'alinéa (1)*b*), elle doit, au cours de ce délai, effectuer un versement provisoire qui correspond au montant estimatif total du paiement.

Règlements sur les versements provisoires et les recouvrements, DORS/81-226

4. Si le montant d'un paiement versé à une autorité taxatrice au titre de la Loi ou du présent règlement est plus élevé que ce qui aurait dû être versé en vertu l'article 3 de la Loi, le trop-perçu et les intérêts fixés en vertu de l'article 155.1 de la

prescribed for the purpose of section 155.1 of the *Financial Administration Act* may be (*a*) set off against other payments that may otherwise be paid to the taxing authority under section 3 of the Act or these Regulations; or (*b*) recovered as a debt due to Her Majesty in right of Canada by the taxing authority.	*Loi sur la gestion des finances publiques* peuvent être, selon le cas : *a*) portés en diminution de tout autre paiement pouvant être versé à l'autorité taxatrice en vertu de cet article ou du présent règlement; *b*) recouvrés à titre de créance de Sa Majesté du chef du Canada.

VI. Parties' submissions

A. *Applicant's submissions*

[19] The applicant notes that on October 11, 2013, the chartered appraiser hired by the TPA sent the comparables he used to reach his conclusions about the value of the property, but argues that these comparables are merely irrelevant allegations, as they were not before the Advisory Panel and are therefore not evidence of the reasonableness of the decision. Moreover, the applicant states that the comparables in question were sent 11 days after the date set by the parties in their work schedule. The applicant also argues that because it received the comparables used by the TPA's appraiser on October 11, 2013, following the receipt of the TPA's decision dated October 4, 2013, it appears that the TPA is attempting to justify its decision unlawfully and after the fact.

[20] The applicant is not contesting the fact that Crown corporations have the discretion to establish the value of their properties, but it does argue that this discretionary power is normative and highly fettered. It also argues that the power being claimed by the TPA would generate instability and chaos in municipal finances.

[21] The applicant argues that the TPA is acting as though it had the power to take the law into its own hands unilaterally. The applicant submits that the TPA's decision is unintelligible because the TPA lacks the power to act unilaterally without applying to the proper forum.

[22] The applicant argues that the TPA's decision of October 4, 2013, reflects an unreasonable interpretation and application of the PILT Act and the CCPR and therefore suffers from a "fundamental flaw", to borrow the expression used by Justice LeBel at paragraph 40 of *Montreal Port Authority*. The applicant is basing its reasoning on the principles of statutory interpretation reiterated in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26.

[23] According to the applicant, one of the fundamental principles of the PILT Act is that a federal body must go beyond the limit of its constitutional immunity from taxation and [TRANSLATION] "duplicate the municipal tax system in place in a given municipality."

[24] The applicant submits that *Montreal Port Authority*, at paragraphs 14, 24, 42 and 46, indicates that Crown corporations must [TRANSLATION] "act like an ordinary taxpayer and apply the tax system that exists in the province in question" and should therefore follow the *Act respecting municipal taxation*, RSQ, c F-2.1 (AMT). Following that logic, the applicant maintains that because section 252.1 of the AMT states that ordinary taxpayers in Quebec may not refuse to pay their taxes while applications for review or proceedings are pending, the TPA must follow a similar procedure by paying the PILT in full and then contacting the Advisory Panel constituted under section 11.1 of the PILT Act to seek redress, thereby maintaining the stability of municipal finances. The applicant also submits that there are several [TRANSLATION] "legislative hints" supporting its claims to this effect.

[25] One of these purported legislative hints is found at paragraph 12(1)(*b*) and subsection 12(2) of the CCPR, which provide for "an interim payment that corresponds to the estimated total payment to be made". According to the applicant, the use of the word "total" requires Crown corporations to pay the full amount of the PILTs claimed by a municipality.

[26] The applicant also submits that because subsection 3(1) of the CCPR prohibits a corporation from entering into a "special arrangement . . . to pay an amount that would be less than the amount that it would pay in accordance with these Regulations", it is certainly not open to a Crown corporation to decide unilaterally to pay a lesser amount.

[27] Moreover, according to the applicant, making a partial payment of the amount claimed as a PILT is tantamount to attaching a condition to the payment, which is prohibited by section 6 of the CCPR. Such a payment would also go against the established legislative framework, because section 6 of the CCPR, read together with sections 2 and 7 of the CCPR, compels Crown corporations to pay an amount not less than the product of the "corporation effective rate" and the "corporation property value" as established by a municipality. The role of the Minister or the Crown corporation is limited to the payment of the full amount claimed by an assessment authority and, in the case of a disagreement, they may seek a remedy from the Advisory Panel.

[28] The applicant also argues that the use of the words "that a corporation would consider applicable" in section 2 of the CCPR [TRANSLATION] "merely indicates that it is the corporation that determines the property value by referring to the property value prescribed by the assessment authority."

[29] Moreover, the applicant submits that the method of calculation used by the TPA is [TRANSLATION] "fictitious" and [TRANSLATION] "arbitrary", contravening Justice LeBel's teachings in *Montreal Port Authority*.

[30] The applicant also submits that the TPA owes the late payment supplement for failing to respect the 50-day time limit set out in subsection 12(1) of the CCPR.

[31] According to the applicant, this Court should order the TPA to pay the full amount of the PILT claimed for 2013, without allowing it to go before the Advisory Panel, as the TPA did not avail itself of the appropriate forums within the prescribed time limits. The applicant maintains that the TPA made its final decision without first addressing the Advisory Panel and that it is now therefore *functus officio*.

[32] Finally, the applicant argues that the TPA lacks the authority to subtract the amount it claims to have overpaid for the 2013 taxation year from its payment for the 2014 taxation year. The applicant also argues that even if this Court were to hold that this set-off is possible, only the Minister, not Crown corporations, may govern the recovery of overpayments under section 10 of the PILT Act, and that it was therefore not open to the TPA to set off the so-called overpayment against the following taxation year.

B. *Respondent's submissions*

[33] The TPA alleges, among other things, that it has been trying since 2011 to reach an agreement with the applicant about value of its property. The TPA also points out that the 2013 PILT was 60% higher than the 2012 PILT, the property value having been calculated by the applicant at $5 million in 2012 and $8 million in 2013.

[34] The TPA submits that the standard of review applicable to this case is reasonableness and that the only issue [TRANSLATION] "is whether the TPA's determination of the property value was reasonable".

[35] The TPA maintains that this application for judicial review must be dismissed because it does not comply with the *Constitution Act, 1867* or the PILT Act. The respondent argues that, pursuant to section 125 of the *Constitution Act, 1867*, the TPA has the discretionary power to determine the amount of the PILT. The TPA states that [TRANSLATION] "the Minister and Crown corporations, at either the federal level or the provincial level, must be able to manage their assets without interference from the other level of government", and that [TRANSLATION] "section 125 prohibits anti-democratic interference in the administration of [public] funds".

[36] The TPA also submits that the federal government's discretionary power is reflected in the operation of the Advisory Panel. The TPA points to section 4.1 of the *Dispute Advisory Panel – Rules of Practice*, which states that every application for review must be presented by a taxing authority in writing. The TPA argues that because the PILT Act and the CCPR grant the Minister and Crown corporations a discretionary power to establish the amount of the PILT, it does not make sense that they be required to consult the Advisory Panel in the event of a disagreement.

[37] The TPA argues that it is required to pay amounts comparable to those paid by taxable property owners and that it applied an intelligible method for establishing the property value. The TPA submits that it reasonably relied on the value of comparable lots in determining the property value and the amount of the PILT. The chartered appraiser whom it hired noted that the land next to the applicant's land was assessed at $1.15 per square foot, while the applicant's land

was assessed at $4.09 per square foot by the applicant. The appraiser concluded that the value of the TPA's property was $1.25 per square foot. The TPA also points out that because it had no access to the applicant's comparables (the applicant did not make them available), it made a decision based on the information it had.

[38] The TPA alleges that it has been transparent with the applicant because, during a meeting between them on September 10, 2013, it explained how it had reached its assessment of $1.25 per square foot, even though the applicant already had access to the information, as the appraiser hired by the TPA had based his conclusions on the triennial roll of the City of Trois-Rivières.

[39] The TPA states that it made an interim payment because it was impossible [TRANSLATION] "to reconcile the City's application with what it believed to be the fair value of its property". The TPA also states that the applicant failed to participate fully in the dialogue and that the applicant was the party that initiated the legal dispute by bringing an application for judicial review.

[40] The TPA also argues that, under section 4 of the *Interim Payments and Recovery of Overpayments Regulations*, SOR/81-226 (IPROR), it could reasonably set off the overpayment against any other payment owing to the applicant. In the TPA's view, it is possible to set off the overpayment in this case because, unlike in *Canadian Broadcasting Corporation v City of Montréal*, 2012 FCA 184 (*Canadian Broadcasting Corporation*), the TPA discovered the overpayment before informing the applicant of its final decision.

C. *Intervener's submissions*

[41] The intervener submits that the applicant's position is a [TRANSLATION] "direct attack" against the immunity from taxation set out in the *Constitution Act, 1867* and that recovering an overpayment by setting it off against a subsequent year flows from the very nature of the interim payment.

[42] According to the intervener, the issues involve whether or not the TPA has the discretion to establish the property value without reference to another body, as well as the TPA's right to effect compensation for an overpayment. In the intervener's view, these are general questions of law of great significance to the federal PILT regime and must be analyzed on a standard of correctness.

[43] According to the intervener, although the Supreme Court noted in *Montreal Port Authority* that the Crown may not use a method of calculating property tax that no longer exists and therefore is not based on the "actual tax situation in the places where federal property is located", this does not mean that the provincial regime for challenging taxation decisions should be incorporated into the federal PILT regime. The intervener therefore argues that the applicant has no basis for its claim [TRANSLATION] "that part of the provincial regime can be set up against the Crown by implied incorporation or otherwise."

[44] The intervener submits that the applicant's claims involving (i) the TPA's obligation to pay the property tax amounts indicated in the application for payment; (ii) the presumption that the values indicated in the assessment rolls are accurate; and (iii) the application of the AMT challenge procedure contravene the immunity from taxation set out in the *Constitution Act, 1867*.

[45] The intervener also submits that section 204 of the AMT, which states that the immovables of the Crown in right of Canada are exempt from all property taxes, defeats the applicant's claims.

[46] Furthermore, the intervener maintains that Crown corporations have the discretionary power to establish the value of the PILT, as reflected by section 2 of the CCPR and subsection 2(1) of the PILT Act. Subsection 12(2) of the CCPR also confers on the Crown the discretion to establish the value of a property for the purposes of an interim payment.

[47] The intervener argues that the applicant's claim that the words "estimated total payment" in subsection 12(2) of the CCPR refer to the amount indicated by a municipality in its application for payment is incoherent, since the amount claimed by the municipality in an application for payment is not estimated, but definitive. Moreover, states the intervener, requiring Crown corporations to institute proceedings to validate their own determination of their corporation property values would be tantamount to eliminating their discretion.

[48] The intervener also argues that because section 11.1 of the PILT Act states that the Advisory Panel gives advice in the event of a disagreement about the value of the PILT and because the property value is established by the Crown corporations in accordance with the definitions in section 2 of the CCPR, the Crown corporation has to exercise its power for there to be a disagreement, which implies that it has a discretionary power to establish the value of the PILT.

[49] The intervener argues that, according to paragraph 15 of *Montreal Port Authority*, it is the municipal authorities that must contest the amounts established by the Crown corporations.

Therefore, according to the intervener, the TPA has a discretionary power to establish the value of its properties without consulting the Advisory Panel.

[50] Moreover, contrary to the applicant's argument, the intervener submits that the TPA is not time barred from consulting the Advisory Panel to establish the value of its properties. Its reasoning is based on the fact that when the Federal Court allows an application for judicial review, it must remit the matter to the competent authority and cannot render a decision in the decision-maker's place. Therefore, because an invalid decision amounts to no decision, the principle of *functus officio* does not apply.

[51] Finally, with respect to the Crown corporation's right to recover an interim overpayment by setting it off against a subsequent taxation year, the intervener submits that this Court should apply the reasoning of the Federal Court of Appeal in *Montréal Port Authority v City of Montréal*, 2008 FCA 278 (*Montréal Port Authority 2008*), as that case was not overturned by the Supreme Court of Canada on that point. The intervener therefore submits that a Crown corporation may, at the time of the final payment, decide to set off an overpayment resulting from an interim payment against a subsequent taxation year.

VII. Analysis

A. *Standard of review*

[52] The issues must be analyzed on the standard of reasonableness. The intervener submits that the issues are general questions of law of central importance to the legal system as a whole that need to be analyzed on a standard of correctness because these issues are currently before this Court in several applications for judicial review. However, although these issues have

recently been raised by several municipalities, they actually involve the interpretation of provisions of the PILT Act, the IPROR and the CCPR and their application to a specific context (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 28) involving the exercise of a discretionary power (*Halifax* at para 43; *Montreal Port Authority* at paras 36-37).

[53] As mentioned in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47,

> [i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[54] That said, the intelligibility and transparency of the TPA's decision are not being challenged by the applicant, which is instead contesting the quality and substance of the decision.

B. *The discretion to establish property value*

[55] The parties are not questioning the existence of the Crown corporation's discretion, but they disagree on the scope of that power.

[56] In *Montreal Port Authority*, at paragraph 12, Justice LeBel points out that, according to section 125 of the *Constitution Act, 1867*, "[n]o provincial legislation may impose tax liability on property belonging to the federal Crown." In order to promote the values of federalism and democracy, each level of government must have sufficient operational space to govern without interference from another level of government, in the words of Justice Gonthier in *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at paras 16-17. Justice Martineau notes in *Montréal (City of) v Canadian Broadcasting Corporation*, 2007 FC 700 at para 21 (restored by the Supreme Court of Canada), that "the Canadian government is the

biggest land owner in the country." The PILT Act therefore plays a crucial role in the balancing of immunity from taxation with the stability of municipal finances by allowing Crown corporations to make payments in lieu of taxes (*Montreal Port Authority* at paras 13-14).

[57] The applicant suggests that the compensation regime contemplated by the PILT Act must [TRANSLATION] "duplicate" the municipal regime that exists in a given territory and the AMT. The case law does not support the applicant's position. Rather, the Supreme Court states that the PILT Act establishes "a system of payments to be made in lieu of the taxes Canadian municipalities generally collect". This system is distinct from the AMT, and it would therefore be an error to try to interpret it using the AMT as a model. Justice LeBel clarifies the nature of the system at paragraph 20 of *Montreal Port Authority*:

> It is clear from the *PILT Act* that Parliament intended to uphold the immunity of federal Crown property from taxation. Section 15 of the Act provides that "[n]o right to a payment is conferred by this Act." Parliament therefore did not intend to give municipalities the status of creditors of the Crown for payments in lieu of taxes. Instead, it has, through the *PILT Act*, established a system in which municipalities expect to receive payments but the payments are made within the statutory and regulatory framework that Parliament established without renouncing the principle of immunity from taxation. Thus, the *PILT Act* is designed to reconcile different objectives — tax fairness for municipalities and the preservation of constitutional immunity from taxation — that can be attained only by retaining a structured administrative discretion where the setting of the amounts of payments in lieu is concerned.
>
> [Emphasis added.]

[58] However, neither the case law nor the legislation indicates that Parliament intended to [TRANSLATION] "duplicate" the AMT in adopting the PILT Act, as the applicant argues. If Parliament had truly intended to use that system as a basis, it would not have created the PILT Act as a distinct and autonomous regime. As the intervener points out, the AMT expressly sets

out at section 204 that the immovables of the Crown in right of Canada "are exempt from all municipal or school property taxes". *Montreal Port Authority* does mention, as the applicant notes, that Crown corporations must make payments in lieu [TRANSLATION] "to the extent possible as if they were managers" and that the purpose of the PILT Act is to establish a system of payments "that reflects the actual tax situation in the places where federal property is located." However, the case law of the Supreme Court of Canada, combined with an analysis of the legislation, favours a more nuanced position than the one argued by the applicant. In adopting the AMT, Parliament engaged in a balancing act that seeks to retain the Crown's discretion in calculating payments in lieu of taxes while nonetheless structuring that discretion within a statutory and regulatory framework (*Montreal Port Authority* at para 20).

[59] On the one hand, this balancing exercise amounts to giving managers of federal property some "latitude" so that they are not limited to a "mechanical application" of municipal assessments (*Montreal Port Authority* at paras 34-35). Justice LeBel writes the following at paragraph 35 of *Montreal Port Authority*:

> There are also practical reasons why managers of Crown property must retain a decision-making power where the assessment of that property and the tax rates applicable to it are concerned. First, disagreements with taxing authorities about property assessments can occur. As we know, federal properties are very diverse, and can even be quite distinctive, if not unique or almost unique in Canada. The assessment exercise can accordingly give rise to significant technical problems related to the application of the principles of property assessment and can sometimes lead to inevitable, although legitimate, disagreements with municipalities.
>
> [Emphasis added.]

[60] A similar position was subsequently adopted by Justice Cromwell in *Halifax* at paragraph 41:

> Where disagreements about an assessment of federal property arise, the Minister cannot take advantage of the assessment appeals processes that would be available to taxpayers subject to particular municipal or provincial regimes. Finally, it makes sense that within this highly discretionary regime of PILTs — a regime that explicitly preserves the Federal Crown's constitutional immunity from provincial and municipal taxation (s. 15) — the Minister would be armed with ways to protect federal interests against over-zealous assessment authorities should the need arise.

[61] On the other hand, the calculation of a PILT must be based on the tax system normally imposed on a private owner in the place where the federal property is located (*Montreal Port Authority* at paras 40 and 46). Justice LeBel stated the following at paragraph 42 of *Montreal Port Authority*:

> The respondents' position is also contrary to the objective of the *PILT Act* and the *Regulations*. Parliament intended Crown corporations and managers of federal property to make payments in lieu on the basis of the existing tax system in each municipality, to the extent possible as if they were required to pay tax as owners or occupants.
>
> [Emphasis added.]

[62] Justice Cromwell explained the scope of the Minister's discretion in *Halifax*, at paragraph 40:

> The Minister's role under the Act is not to review the assessment authority's assessment; the Minister's function with respect to the value of the property is to reach an *opinion* about the value that *would be* attributed by an assessment authority. This is done in the context of exercising the discretion to make a PILT that must not exceed the product of the effective rate and the property value. While the view of an assessment authority is an important reference point for the Minister, I nonetheless agree with Evans J.A. that in reaching his or her opinion, the Minister is entitled to make an independent determination of the value that would be attributed to the federal property by an assessment authority.
>
> [Emphasis added.]

[63] Furthermore, subsection 2(1) of the PILT Act reflects Parliament's intention to reconcile the Minister's discretion with the taking into account of the value of federal property attributed by an assessment authority (*Halifax* at para 48). Under subsection 2(1) of the PILT Act, which defines the "property value" of such property, the Minister therefore has the discretionary power to establish the value to attribute to a property as long as the exercise is informed by the tax system that would apply to the federal property in issue if it were taxable (*Halifax* at para 42).

[64] Therefore, when a Crown corporation receives an application for payment from a taxing authority, the assessment of the property value determined by the taxing authority will form the basis for the exercise of the Minister's discretion, but the Minister will still be called upon to come to "his own opinion on property value" (*Halifax* at para 42). As mentioned above, in principle, the property value established by the taxing authority is "the value that, in the opinion of the Minister, would be established by an assessment authority" (emphasis added). The Minister therefore has sufficient but not unfettered latitude to protect federal interests when necessary. However, this is not a fettered power that bears no resemblance to an arbitrary power. The exercise of this power must be reasonable in light of the circumstances of each case and the need to preserve the fiscal stability of municipalities. In many cases, the exercise of ministerial authority is limited to cross-checking whether the PILT, and therefore the "property value" established by the taxing authority, truly reflects the tax system that actually exists at the place where the property in question is located. When it comes to establishing "property value", the exercise of ministerial discretion may require taking into account in a judicious and reasonable manner an independent assessment of the value that would be attributed to the federal property by an assessment authority (*Halifax* at para 40 (*in fine*)).

[65] The issue in this case is therefore whether the TPA's decision to pay a PILT based on the opinion of the chartered appraiser it hired, without first consulting the Advisory Panel, is reasonable. I am of the view that this issue needs to be considered in two parts, namely: (1) the obligation of a Crown corporation to consult the Advisory Panel before making a PILT that does not correspond to an amount claimed by a taxing authority; and (2) the reasonableness of the TPA's decision to make a PILT based on the opinion of the chartered appraiser it had hired.

(1) The obligation to consult the Advisory Panel

[66] In *Montreal Port Authority*, Justice LeBel writes as follows at paragraph 22:

> The *PILT Act* establishes an advisory panel that is responsible for advising the Minister on the settlement of any dispute with a taxing authority over the property value or effective rate of tax applicable to any property (s. 11.1). Such disputes are not within the jurisdiction of the judicial or administrative authorities that would be responsible for settling them under the relevant provincial law.

[67] The Supreme Court has established that where disagreements with the taxing authority arise, the Minister "may refer the matter to an advisory panel, which will provide him or her with advice" (*Halifax* at para 13; emphasis added), pursuant to section 11.1 of the PILT Act. However, neither the case law nor the legislation seems to require Crown corporations to refer to the Advisory Panel where there is a disagreement with the taxing authority. I am of the view that nothing indicates that the Minister must refer to the Advisory Panel in order to exercise his or her discretionary power. As the intervener points out, what the applicant is proposing [TRANSLATION] "is tantamount to eliminating the discretionary power that Parliament has granted to Crown corporations through the [CCPR] and rendering meaningless the relevant regulatory provisions." For illustrative purposes only, as the TPA notes, section 4.1 of the *Dispute Advisory Panel – Rules of Practice* reflects this reality by providing that applications for

review be presented by the taxing authority. Although, as the applicant points out, the *Dispute Advisory Panel – Rules of Practice* are not legally binding, the fact remains that there is nothing in the legislation to indicate that the onus is on the Minister or a Crown corporation to bring a dispute to the Advisory Panel.

[68] In my view, the opinion of the Advisory Panel is a relevant factor that would limit the range of possible, reasonable outcomes, but it is not the role of the Minister or a Crown corporation to bring a dispute to the Advisory Panel. As a general rule, when a party disagrees with a governmental decision, the onus is on it to take the appropriate recourse to challenge that decision. In this case, the applicant decided of its own accord to seek judicial review of the Minister's decision in the absence of an opinion from the Advisory Panel. This approach deprives the parties of the Advisory Panel's opinion, which, while not binding, would certainly have been subsequently considered by the TPA and, if still necessary, in this application for judicial review. I am therefore of the view that the TPA may exercise its discretionary power with respect to establishing the "corporation property value" without being required to refer to the Advisory Panel to have its decision validated.

(2) The reasonableness of the exercise of the TPA's discretionary power

[69] In this case, the reasonableness of the TPA's decision is supported by the opinion of an independent expert. In support of its claim that its decision is reasonable, the TPA states that there is a significant gap between the conclusions of the applicant and those of the chartered appraiser that the TPA hired with respect to the value of its property per square foot.

[70] First, while the applicant submits that the TPA's property has a value of $4.18 per square foot, the TPA's chartered appraiser concluded that the property value was $1.25 per square foot.

[71] Second, an investigation by the chartered appraiser revealed that the triennial roll of the City of Trois-Rivières indicated that the industrial lands belonging to the Kruger company located near the TPA's property are valued at between $1.15 and $0.25 per square foot.

[72] Third, the chartered appraiser noted that property similar to the TPA's located in the City of Bécancour is valued at $0.72 per square foot. The applicant submits that these comparables, which the TPA sent to it on October 11, 2013, are nothing but irrelevant allegations that the TPA is using to justify its decision after the fact. However, the fact that they were sent to the applicant after the TPA sent its decision does not mean that they did not form the basis for that decision. Furthermore, having found that the onus was not on the TPA to refer the dispute to the Advisory Panel, I cannot accept the applicant's argument to the effect that these comparables are merely irrelevant allegations because they were not submitted to the Advisory Panel.

[73] Finally, the Director of Finances and Administration of the TPA explained on cross-examination that the value of the TPA's property was assessed at about $5 million by the applicant in 2012, but at about $8 million in 2013, which prompted the TPA to seek the opinion of a chartered appraiser. The applicant did not challenge these facts and provided no explanation justifying the discrepancy between its assessment of the value of the TPA's property and the chartered appraiser's assessment.

[74] In *Montreal Port Authority* and *Halifax*, the Supreme Court of Canada established that the Minister and Crown corporations cannot exercise their discretion by basing their calculations on a fictitious tax system (*Montreal Port Authority* at para 40) and that the Minister must adopt "the approach which the relevant assessment authority actually would apply to value the property" (*Halifax* at para 47). The guidelines established by the Supreme Court were respected

in this case. The TPA did not apply a separate method of calculation; it applied the method of calculation normally employed by the municipality, but reached a different conclusion. In fact, the chartered appraiser did not attempt to submit his own method of calculation, but relied on the triennial roll of the City of Trois-Rivières to draw conclusions about the value of the TPA's property.

[75] In *Halifax*, Justice Cromwell held that the Minister had evidence before him that other Canadian assessment authorities would not value the property the way he did and that it was therefore unreasonable for the assessment authority to attribute a value of $10 to the land in question. In this case, the TPA had no information indicating that the method of calculation used in the exercise of its discretionary power would not have been used by the applicant. Moreover, the applicant has submitted no evidence to this Court that the method of calculation employed by the TPA differs from the one it applied to conclude that the property in question had a value of $4.18 per square foot.

[76] Furthermore, I am of the view that sections 7 and 2 of the CCPR were respected in this case. The TPA merely exercised its discretion by determining that the assessment authority would not have made the assessment it made if it had adequately applied its usual methods of calculation. The TPA was not "bound by the valuation arrived at by the relevant assessment authority, [but] it must nonetheless be a reference point" (*Halifax* at para 48). The TPA in fact used the applicant's own calculation methods to conclude that there was a significant discrepancy between the assessment of its property performed by the applicant for 2013 and other similar assessments performed by the applicant.

[77] The applicant submits that if this Court does not find in its favour, municipal finances across Canada will be greatly destabilized. However, it should be recalled that, in this case, the applicant claimed a PILT based on an unexplained increase of 60% in the property value. The applicant provided no comparables to the TPA, and it is simply impossible for this Court to determine the basis for this increase from the information in the record.

[78] In my view, when, as in this case, (i) the assessment of a property value for a given fiscal year is significantly higher than the property value assessed in the previous fiscal years; (ii) no explanation is provided by the taxing authority for this significant difference; (iii) an independent assessment reveals that the assessment performed by the taxing authority is, in all likelihood, incorrect; and (iv) the independent assessment in question respects the criteria established by the case law and legislation, in particular because it is based on the calculation method that the taxing authority would normally use, it can be concluded that the Minister exercised his discretion reasonably. That said, the opinion of the Advisory Panel could have been persuasive in this case, but the applicant opted to bring an application for judicial review in the absence of such an opinion.

[79] To conclude with respect to the reasonableness of the amount of the TPA's PILT, I am of the view that the TPA is not required to pay a late payment supplement for making the interim payment outside the 50-day time limit. The supplement claimed by the applicant exists under the municipal taxation system but does not apply to the PILT system.

C. *The TPA's entitlement to set off a PILT overpayment against a subsequent year*

[80] As the intervener points out, the Federal Court of Appeal has already dealt with this issue in *Montréal Port Authority 2008*, reversed on other grounds by *Montreal Port Authority*.

Moreover, while the issue of setting off a PILT was later considered by the Federal Court of Appeal in *Canadian Broadcasting Corporation*, that case is distinguishable from this one because, in that case, the Canadian Broadcasting Corporation argued that the possible existence of a right to effect compensation with the overpayments justified the delay in payment of the interest (*Canadian Broadcasting Corporation* at para 4). This case involves a situation in which, following the reasonable use of the discretionary power governed by the PILT Act, the TPA decided simply to deduct the overpayment from the PILT of a subsequent year rather than claiming it from the applicant immediately. For the reasons that follow, I am of the view that it is reasonable for the TPA to proceed in this manner.

[81] On the one hand, if Crown corporations could not set off overpayments against a subsequent taxation year, they would have an incentive to make lower payments in the event of a disagreement with the taxing authority. It seems that the stability of municipal finances would be needlessly affected in such a situation.

[82] Section 12 of the CCPR expressly states that a Crown corporation may make an interim payment. As the Federal Court of Appeal states at paragraph 118 of *Montréal Port Authority 2008*, reversed on other grounds by *Montreal Port Authority*,

> a payment is not interim if, once the final amount has been determined, it is impossible to make the required adjustments, which in this case would entail the recovery of the overpayment or a reduction of future payments by an amount corresponding to the overpayment.

[83] Therefore, Crown corporations are entitled to legal compensation because, if they were not, interim payments would become needlessly complex (see *Montréal Port Authority 2008* at paras 113 and 119, reversed on other grounds by *Montreal Port Authority*). Indeed, if Crown

corporations could not recover an overpayment by setting it off against a PILT for a subsequent year, one of the reasonable alternatives open to them would be to request the immediate reimbursement of the overpayment.

[84] In this case, the TPA clearly indicated in its letter dated July 25, 2013, that the cheque for $91,179 sent under separate cover represented an [TRANSLATION] "interim payment for 2013". On September 10, 2013, representatives of the parties met to discuss the disagreement about the property value. However, they failed to reach an agreement. In an email dated October 4, 2013, the TPA informed the applicant that it considered the PILT for the 2013 taxation year to be $68,313, or $70,341 including water and sewer taxes, in accordance with the chartered appraiser's assessment that the TPA's lots had a value of $1.25 per square foot. The TPA specified that the amount paid on July 25, 2013, in excess of the amount of $70,341 was to be considered an advance payment against the 2014 PILT. In my view, aside from the fact that it was expressly mentioned in the letter of July 25, 2013, that the cheque for $91,179 constituted an interim payment, the context in which the payment was made leaves no doubt as to its interim nature.

[85] I am therefore of the view that the TPA may reasonably set off the overpayment against a subsequent taxation year.

VIII. Conclusion

[86] This application for judicial review must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

"George R. Locke"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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