Federal Court  Cour fédérale

Date: 20090626

Docket: T-215-08

Citation: 2009 FC 670

BETWEEN:

HALIFAX REGIONAL MUNICIPALITY

Applicant

and

HER MAJESTY THE QUEEN, as represented by Public Works and Government Services Canada

Respondent

and

Docket: T-1358-08

BETWEEN:

HALIFAX REGIONAL MUNICIPALITY

Applicant

and

HER MAJESTY THE QUEEN, in right of Canada, as represented by Public Works and Government Services Canada

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] To say that the Halifax Citadel is priceless is obvious; to say what its value for taxes may be is less clear. This judicial review concerns the value of the Halifax Citadel for purposes of federal payments in lieu of taxes.

[2] There are two court files involved, but they were heard together. File No. T-215-08 is the judicial review of the recommendation of the Payment in Lieu of Taxes Dispute Advisory Panel (Panel) to the Minister of Public Works and Government Services Canada (Minister) in respect of the assessment value of certain property at the Halifax Citadel.

File No. T-1358-08 is the judicial review of the decision made by the Minister accepting the recommendation of the Panel. For reasons to be discussed, this second judicial review is the operative one; the Panel's recommendations being essentially subsumed into the Minister's decision.

Both proceedings deal with the provisions of the *Payments in Lieu of Taxes Act*, R.C.S. 1985, c. M-13 ('PILT Act' or 'the Act').

II. BACKGROUND

[3] The Applicant has applied to this Court to have the Minister's decision set aside and for a declaration that the value of the property is that determined by the provincial assessment authority. In the alternative, the Applicant requests that the matter be referred back to the Panel so that it might

render a new recommendation for payment in lieu of real property taxes which is in conformity with the PILT Act and the Nova Scotia *Assessment Act*, R.S.N.S. 1989 c. 23.

[4] The legislation at issue, the PILT Act, arises from the fact that the federal government constitutionally is not subject to provincial or local taxation on its lands, buildings, and certain other assets. In recognition that the loss of this tax base can be a significant burden on local authorities, the federal government formerly made grants in lieu of taxes as a matter of policy. That policy is now enshrined in the PILT Act, which defines the "federal property" it applies to, sets up a process for determining payments, and provides a means for addressing disputes regarding what payments may be due.

[5] The Halifax Citadel consists of approximately 48.5 acres of land with the improvements (buildings and related structures), and is zoned as a "Regional Park" by the Halifax Regional Municipality (HRM). It is also designated as a National Historic Site according to the *National Parks Act*, S.C. 2000, c. 32.

[6] The parties agreed that the Citadel's "highest and best use" is as a national Historic Site.

[7] The parties agreed that the land under the eligible and ineligible improvements comprising the entire Halifax Citadel was federal property and subject to payments under the PILT Act. The parties even agreed on the valuation of the "federal property" consisting of the eligible improvements.

[8] The parties were not able to agree on the valuation of the land, whether it was land under the eligible improvements or land under the ineligible improvements, for the taxation years from 1997 to 2005 inclusive.

[9] The parties were also not able to agree on the valuation of the casemates and demi-casemates, which are the total or partial shellproof chamber in a fort or rampart with openings for cannon-fire and the usual place for storage of ammunition and supplies. However, the parties did agree that the casemates and demi-casemates were federal property and eligible improvements only for the years 1997-2000, and that after the year 2000 they were excluded and as a result of an amendment to Schedule II of the PILT.

[10] For situations where the taxing authority (in this case the provincial assessment authority) disagrees with the department's assessment (in this case, the property value), the Governor-in-Council may appoint an advisory panel – the Panel – to advise the Minister, as was done in this case.

[11] The mandate of the Panel is described in s. 11.1(2) of the Act:

11.1 (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).	**11.1** (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).

[12] The HRM disagreed with the property value which Public Works and Government Services Canada (the department) officials had determined. Therefore, in this case, the matter upon which the Panel was to advise the Minister was the value of the property at the Halifax Citadel.

[13] The Panel conducted itself as if it were a property assessment review tribunal determining the value of the property at issue. Both parties called witnesses, introduced exhibits, and made written submissions. The hearing was conducted June 25-29, 2007, and was preceded by a tour of the Halifax Citadel.

[14] As will be discussed further, "property value" is defined in the PILT Act as:

> "the value that, in the opinion of the Minister, would be attributable by an assessment authority to federal property … ."

[15] The Panel issued a report (Report) providing its own view of the valuations, the details of which are also discussed later. The net result is that, while the HRM viewed the amount to be paid

as approximately $15.5 million over the past 10 years and the department concluded that the amount should be $2.2 million, the Panel determined the amount to be $2.5 million.

[16] A striking feature of this case is that, while the Minister accepted the conclusions of the Panel's Report, it was not the Report which was before the Minister but a four-page Memorandum from the Deputy Minister which recommended that the Minister accept the conclusions of the Panel. The Report itself did not form part of the certified Tribunal Record submitted in the judicial review of the Minister's decision.

[17] The Memorandum to the Minister outlined that there was roughly an $11 million difference between what the department had accepted as payable and what the HRM viewed as its entitlement. There was a brief explanation of the impact of changes in the legislation on the valuation, and there was a spreadsheet showing annually the wide variation between the property valuations.

[18] The bulk of the Memorandum to the Minister consisted of a discussion of the first judicial review against the Panel's Report, redacted solicitor-client advice, a discussion of the risk of costly repercussions on other properties if the HRM were successful, as well as a notation that a communications strategy had to be prepared before the decision was announced. The Minister signed the Memorandum indicating that he accepted the Panel's advice.

[19] On July 29, 2008, the Minister, having accepted the recommendation, advised officials of HRM of this fact, stating that he had given the matter careful consideration. The letter informing

HRM of the decision contained no information concerning the factors considered or analysis undertaken by either the Minister or his staff in deciding to accept the Panel's recommendation.

[20] Subsequent to the commencement of the second judicial review, the Applicant demanded the Tribunal Record, the contents of which are described above. There was no evidence that either the Minister or his staff conducted any review or analysis of the basis for the Panel's advice.

[21] The Applicant does not take issue with the sufficiency or paucity of the Tribunal Record supporting the Minister's decision, and agreed with the Respondent that the Panel's Report formed part of the Minister's reasons.

[22] Therefore, for purposes of this judicial review, the Panel's Report must be taken (and indeed was taken) as the reasons for the Minister's decision.

A. *Panel Report*

[23] The Panel began by noting the matters the parties had and had not agreed to and that, as a result of amendments to Schedule II of the PILT Act, the casemates and demi-casemates were expressly exempted as "federal property" after the year 2000 and became ineligible improvements.

[24] The Panel set out the issues before it as being: the value of the land of the Citadel (whether the improvements on the land were eligible or ineligible), and the value of the casemates and demi-casemates. The values were to be arrived at for purposes of calculation of the payments in lieu of

taxes. By way of amendment to the Report, the Panel also considered the Cavalier Building Remainder.

[25] The valuation of land was for the 2005 taxation year and the valuation date for assessment purposes was January 1, 2003, in accordance with the "base date" prescribed by the Director of Assessment under the Nova Scotia *Assessment Act*. With regard to the casemates and demi-casemates, the valuation was for the 1997 taxation year.

[26] As part of the Panel hearing, the Applicant prepared a full appraisal of the disputed components of the Citadel sites. The Citadel lands were valued at $19,000,000 and the improvements were valued at $20,606,000 (including $7,315,900 for the casemates and demi-casemates), for a total of $39,606,000.

[27] The Respondent addressed specifically the federal property that was both eligible and in dispute and, through its expert, opined that land under the eligible improvements should be valued at $286,000, the remainder of the lands at a notional value of $10 and the improvements in dispute at $2,233,550, for a total value of approximately $2.5 million.

[28] In this hearing the Respondent submitted that the Applicant's figure included approximately $18.3 million of ineligible federal property, property that is not subject to the PILT Act, and approximately 2.7 million of already agreed upon valuations. Thus, the Respondent submitted that the Applicant's valuation could be represented as totalling approximately 18.6 million.

[29] The Panel developed its own methodology to arrive at values of $1,550,010 for the land and $4,761,200 for the improvements in dispute, for a total value for PILT purposes of approximately $6.3 million (approximately 2.6 million without the Cavalier Building Remainder).

III. ANALYSIS

A. *Decision to be Reviewed*

[30] In Court File No. T-215-08, filed on February 6, 2008, the Applicant sought judicial review of the Panel's recommendation. Given the uncertainty surrounding the PILT Act, it was a prudent step. However, the operation of the Act is much clearer as a result of the Court of Appeal's decision in *Montréal (City) v. Montréal Port Authority*, 2008 FCA 278, which was delivered on September 19, 2008 – after the filing of the applications but before the hearings in this matter.

[31] It is clear that a panel established under s. 11.1 of the PILT Act is truly advisory in nature, not determinative. The fact that the Minister may accept a panel's advice does not lessen the fact that the decision to accept the advice and the decision to pay or not, which the Minister is empowered to make pursuant to s.3(1) of the PILT Act, is the responsibility of the Minister.

[32] Therefore, there can be no judicial review of the Panel's Report *per se* as it is neither a "decision, order or … matter". The judicial review of the Panel's Report will be dismissed without costs.

[33] More problematic is the Minister's decision, and most particularly the reasons for that decision.

[34] If the reasons were those contained in the Deputy Minister's Memorandum, they are so devoid of analysis of the basis for a refusal that they could not stand judicial scrutiny. In many cases, the fact that the Minister never saw the Report would undermine the Minister's exercise of discretion even if one accepts that much of the real work on the file and the analysis would be performed by officials, as must occur in a modern democratic system.

[35] However, the parties have taken a different approach to this litigation and agreed that the real reasons for the Minister's decision were contained in the Panel's Report.

[36] Therefore, the Panel's Report, as forming the reasons for the Minister's decision, must be the basis for review, though not the Report standing on its own.

[37] As such, the principal issues in this judicial review are the scope of the Minister's discretion in determining the property value, and the reasonableness of the decision made in this instance.

B. *Standard of Review*

[38] With respect to the issue of the authority of the Minister to determine the property value differently from the value determined by an assessment authority, the standard of review is

correctness. The question of the Minister's jurisdiction in this regards stems from the interpretation of the phrase "in the opinion of the Minister" found in the definition of property value at s. 2(1) of the PILT Act. In the present case, the determination of the Minister's power hinges on the interpretation of a phrase of general use in conferring powers of discretion (see *Montreal (City),* above, at paragraph 38), and is of such legal importance that it reaches beyond the scope of this particular dispute and relates to other aspects of the operation of the Act (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 60). As such, it is a question of law which attracts a standard of review of correctness.

[39] However, with respect to the decision and reasons for coming to a different value determination than that of the Nova Scotia Director of Assessment, the Court of Appeal has in *Montréal (City)* pronounced on the standard, and concluded that it is reasonableness. While the element being varied in this case (property value) differs from the element being varied in *Montreal (City)*, above, (effective rate), the rationale for the standard of review is sufficiently similar. That rationale centres on the fact that an opinion is to be formed and therefore, in so far as the Panel's reasons are those of the Minister, the appropriate standard is reasonableness.

C. *Ministerial Discretion*

[40] The essential issue between the parties was the determination made by the Panel as to the "property value" to be used for the calculation of payments.

[41] “Property value” has a specific meaning and defined parameters which impact on the Minister’s discretion. It is defined, at subsection 2(1) of the PILT Act, as follows:

"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.

[42] The Applicant argues that the Minister’s discretion or opinion is so circumscribed by the statute that he/she is bound to accept the Director of Assessment’s conclusion on property value. HRM contends that such a limitation on the Minister’s discretion is consistent with the definition of “property value” and consistent with the purpose of the legislation and the recognition given to the “assessment authority” in the definition section and throughout the legislation. The Applicant argues that the Court of Appeal’s decision in *Montréal (City)*, above, which determined that the Minister is able to vary the assessment authorities’ determination, dealt with both different facts, a different provision relating to tax rates rather than property value, and that comments on the general scheme of the legislation were *obiter*.

[43] I cannot accept the Applicant’s argument. To accept such a position is to render the Minister’s “opinion”, referred to in the definition of “property value”, meaningless. Such a

conclusion has been rejected, albeit in different circumstances, by the Court of Appeal. While aspects of the *Montréal (City)* decision, above, are *obiter*, the comments or conclusions on the standard of review, the statutory scheme, and the exercise of Ministerial discretion are particularly germane to this judicial review and ought to be followed.

[44] The Respondent, on the other hand, takes the position that the words "would be" in the phrase "would be attributable by an assessment authority to federal property" must be read as "should be". The purport is that the Minister would have complete discretion to impose his view of the applicable property value, without regard for the assessment authority's view.

[45] To accept the Respondent's position is to substitute words and to ignore Parliament's intention that the assessment authority have a role in the calculation of the property value. It bears mentioning that the determination of the property value is not determinative of whether or not the Minister makes payment in lieu of taxes. Pursuant to s. 3(1) of the PILT Act, the Minister has the discretion to not make payments in lieu of taxes. However, the Minister's discretion is narrower when it comes to determining the "property value" as defined in the PILT Act.

[46] The use of the phrase "would be attributable" in the definition of "property value" (s. 2(1) of the PILT Act) covers situations where no assessment may have been made as well as where an assessment has been made. Where an assessment authority has made a determination of value, the Minister need not speculate on that value but must, in reaching his own opinion, determine what is unreasonable or unsupportable about the assessment authority's determination. In that regard, the

Minister's discretion is circumscribed by the reasonableness of the assessment authority's determination. In this way there is a concordance of the discretion of the Minister with the respect or regard to be shown to assessment authorities.

[47] Had Parliament intended the interpretation advanced by the Respondent, there would have been no reason to refer to a valuation made by an assessment authority. Given the role accorded to assessment authorities, taxing authorities, and other provincial entities throughout the Act, the Respondent's interpretation is at variance with the recognition of these entities.

[48] Nothing in the Court's interpretation undermines the discretion of the Minister, on proper grounds and at the end of the process, from denying in whole or in part a request for a payment in lieu of taxes.

D. *Panel Advice/Reasons - Reasonableness*

[49] As noted earlier, the role of the advisory panel is truly advisory. It is to give advice on matters of property value, property dimension, and effective rate in the event of a disagreement as to the applicable determination. There is nothing that speaks to the procedures an advisory panel may follow and, given its nature, there is nothing which implicitly suggests that the panel is conducting a hearing or engaging in what is tantamount to a litigation or dispute arbitration process – as was done in this case.

[50] In this case, there is nothing in the Record which suggests that the Panel gave any particular regard to the assessment authority's value, other than as a party before it. The Panel embarked on an inquiry as to what it would do in respect of valuations, rather than truly engaging in an inquiry as to what was unreasonable about the Director of Assessment's assessment. Given the nature of the Minister's discretion, as discussed above, this is an error. As, given the particularities of this specific case, the Panel's Reasons are those of the Minister; the Minister's decision suffers from the same infirmity – whether one classifies it as a legal error or as an unreasonable conclusion.

[51] As for the reasonableness of the Panel's determination of value, the Applicant disputes the assignment of a nominal value of $10 for all the land under non-eligible improvements as an unreasonable rejection of accepted appraisal theory. The Applicant also challenges the Panel's determination that the Citadel's designation as a National Historic lessens the property value.

[52] However, on this second matter, the property is also zoned as Regional Park Zone under HRM's own land-use by-law and is therefore not comparable property to that of surrounding areas. A fact which cannot be ignored.

[53] Further, it is clear that the Nova Scotia *Assessment Act* must inform any PILT evaluation, and that Act would also take into account the National Historic Site restrictions. The relevant provision of the Nova Scotia *Assessment Act* is subsection 42(1), which reads as follows:

> 42 (1) All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the

> assessor shall have regard to the assessment of other properties in the municipality so as to ensure that, subject to Section 45A, taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the municipality.

[54] The provision establishes that the market value of a property shall be informed principally by the market comparison approach, which is "the value indicated by recent sales, listings or offerings to purchase comparable properties in the market" (see *Gander International Airport Authority v. Gander (Town)*, 2008 NLTD 120).

[55] While the Applicant relies on *T. Eaton Co. v. Alberta (Assessment Appeal Board)* (1995), 128 D.L.R. (4th) 469 (Alta. C.A.) to argue that the current owner can be considered as a possible purchaser and that the special value of the site to Canadians can be used to determine what might be paid for the property or the value thereof, that reliance is misplaced. The fact that a property is of significance does not automatically designate someone as a potential purchaser.

[56] Furthermore, the Alberta Court of Appeal, in *T. Eaton Co.*, above, made it clear that, while the special value to an owner may be taken into account in circumstances much like those in the current matter (where there is no existing market for the property), an assessor cannot directly equate market value to the subjective value of the property to the present owner. At paragraph 30 of *T. Eaton Co.*, above, the Alberta Court of Appeal wrote:

> In *Montreal v. Sun Life Assur. Co. of Canada*, [1952] 2 D.L.R. 81, the Privy Council held that in determining the market value of a building for municipal tax purposes the assessor may take into account the present owner as a possible purchaser of the property and

> consider what it would be willing to pay for the property if it were entering the market for property to meet its specific requirements, or the amount it would be willing to spend to replace the subject land. In his judgment, Lord Porter made it clear that this did not entitle the assessor to equate market value to the subjective value of the property to the present owner. He said at p. 90:
>
> > But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles, i.e., what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed.
> >
> > [Emphasis added]

[57] However, the Panel's own valuation of the land is also unreasonable. Firstly, there is no justification advanced, under the market value approach, for dividing the land under the eligible improvement from the land principally comprised of the glacis (the sloped land surrounding the fortification which provides an open line of fire). No sound explanation for this differentiation was advanced.

[58] Secondly, the Panel rejected as a comparator a sale relied upon by the Applicant's expert, citing the Citadel's presumably unchangeable National Historic Site status as limiting the value, but then used the sale price from the rejected comparator to calculate the value of the land under the eligible improvements. The Panel then added a 4.56/square foot demolition cost to that value; a notion completely inconsistent with the Panel's reliance on the site designation and its "highest and best use" as a citadel.

[59] Thirdly, the Panel ascribed a nominal value of $10, in toto, to the land under the glacis without explaining how the comparable land (land under the eligible improvements) could have a significantly higher value.

[60] The Panel's reasoning and conclusion is not justified, transparent, or intelligible. It does not fall "within a range of possible, acceptable outcomes" (*Dunsmuir*, above, at paragraph 47). The subject matter of this aspect of the Panel's reasons is not trivial, nor can it be disregarded in the context of the whole of the decision. The notion of dividing the land in this manner for market purposes, and the conclusions which flow therefrom, is unreasonable.

[61] In a somewhat similar manner, the Panel reached an unreasonable conclusion with respect to the value of the casemates and demi-casemates (the full or partial bomb proof chambers used for weapons and other storage in a fort or rampart). The assessment of whether the functional/economic depreciation calculated by the Panel is reasonable is inherently factual and is dependent on whether the panel adequately justified its conclusions, as required under *Dunsmuir*, above.

[62] The Panel concluded that the casemates and demi-casemates were not being used as shelter and storage (except for short-term). The Panel concluded that a discount for functional/economic depreciation should be applied, without having regard for the fact that the Citadel is a historic site and must be maintained as such.

[63] The Panel then applied a 50% discounted value without any precise evidence of non-use or other relevant evidence. There is no explanation or rationale for the quantum of discount applied.

[64] In view of the above, the Panel's conclusions cannot withstand a probing examination, nor is there a proper articulation of the Panel's rationale, much less a proper analysis of the unreasonableness of the assessment authority's valuation.

IV. CONCLUSION

[65] For all these reasons, the Applicant's judicial review will be granted and the Minister's decision is quashed. The matter is to be remitted to the Minister for a new determination. In the event that the advice of an advisory panel is sought, it must be a new panel. The Applicant shall have its costs.

"Michael L. Phelan"
Judge

Ottawa, Ontario
June 26, 2009

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-215-08
STYLE OF CAUSE:	HALIFAX REGIONAL MUNICIPALITY and HER MAJESTY THE QUEEN, as represented by Public Works and Government Services
AND	
DOCKET:	T-1358-08
STYLE OF CAUSE:	HALIFAX REGIONAL MUNICIPALITY and HER MAJESTY THE QUEEN, in right of Canada, as represented by the Minister of Public Works and Government Services
PLACE OF HEARING:	Halifax, Nova Scotia
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DATED:	June 26, 2009

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