

Date: 20080919

**Dockets: A-413-07
A-427-07**

Citation: 2008 FCA 278

**CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

A-413-07

MONTRÉAL PORT AUTHORITY

Appellant

and

CITY OF MONTRÉAL

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

A-427-07

CANADIAN BROADCASTING CORPORATION

Appellant

and

CITY OF MONTRÉAL

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

Hearing held at Montréal, Quebec, on September 8, 2008.

Judgement delivered at Ottawa, Ontario, on September 19, 2008.

REASONS FOR JUDGEMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

NOËL J.A.
TRUDEL J.A.

Date: 20080919

**Dockets: A-413-07
A-427-07**

Citation: 2008 FCA 278

**CORAM : LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

A-413-07

MONTRÉAL PORT AUTHORITY

Appellant

and

CITY OF MONTRÉAL

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

A-427-07

CANADIAN BROADCASTING CORPORATION

Appellant

and

CITY OF MONTRÉAL

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] For reference purposes, I include a table of contents of the topics discussed:

Table of Contents

| | <u>Paragraph</u> |
|---|------------------|
| Issues | 2 |
| Background facts and relevant legislation | 8 |
| Federal Court decision | 17 |
| Standard of review applicable to decisions of MPA and CBC and to decision of Federal Court | 18 |
| Could MPA and CBC change effective rate applied by City to their non-residential immovables? | 18 |
| (a) Existence of discretion | 18 |
| (b) Legality of exercise of discretion by appellants | 25 |
| (c) Reasonableness of decisions made by appellants | 34 |
| (d) Conclusion on exercise of discretion and validity of decisions made by appellants | 38 |
| Refusal to exclude effective value of silos from amount of payment in lieu of real property tax | 40 |
| (a) Ordinary meaning of words | 40 |
| (b) Parliament's intent | 42 |
| (c) <i>Ejusdem generis</i> rule | 43 |
| Did Federal Court rule <i>ultra petita</i> ? | 45 |

| | |
|---|----|
| Could the CBC either recover the overpayment from the City or set off the amounts already paid for the 2003 and 2004 taxation years and those which after revision of the effective rate, it considered having to pay for the 2003, 2004 and 2005 taxation years? | 46 |
| (a) Recovery of overpayment | 47 |
| (b) Compensation | 48 |
| Conclusion | 52 |

Issues

[2] These are two appeals (A-413-07 and A-427-07) from decisions of a judge of the Federal Court which raise both common issues and issues specific to each of the two appellants. A joint hearing of the two appeals was held before us.

[3] The following common issues were submitted to us:

- (a) the standard of review applicable to decisions rendered by the Montréal Port Authority (MPA) and the Canadian Broadcasting Corporation (CBC), respectively, which were subject to judicial review in the Federal Court;
- (b) whether the MPA and CBC could exclude the amount of the former business tax, which used to exist as such and which is now included by the City of Montréal (City) in its real property tax rate, from the calculation of the effective rate applicable to their non-residential immovables.

[4] The City amended its tax structure for fiscal year 2003, following the municipal mergers that occurred on the island of Montréal. I hasten to add that those amendments to the tax structure are the crux of these cases.

[5] In addition to the common issues, the MPA submits that in its case, the Federal Court erred in ruling *ultra petita* on the City's application by granting the City more than it was seeking. I will deal with this issue in more detail below.

[6] The MPA also submits that the Federal Court erred in law when it refused to exclude the silos from the amount of the payment in lieu of real property tax. According to the MPA, the silos are excluded from the definition of "federal property" within the meaning of paragraph 2(3)(b) of the *Payments in Lieu of Taxes Act*, R.S.C., 1985, c. M-13 (PLTA).

[7] Finally, as an issue which is unique to it, the CBC asserts that it had the authority either to recover the overpayment from the City or to effect compensation between the amounts it had already paid for the 2003 and 2004 taxation years and the amounts it considered that it should have to pay for the 2003, 2004 and 2005 taxation years on the basis of the calculation it made after having revised the real property tax rate that the City had established in its by-law. The CBC sees this as an error by the Federal Court judge, who concluded that because it was bound by the tax rate established by the City, the CBC could neither retroactively revise the decisions that it had made previously on this issue nor legally effect compensation for the 2004 and 2005 taxation years.

Factual background and relevant legislation

[8] It is not necessary to repeat in minute detail the facts giving rise to these two cases. Suffice it to say that the issues between the parties are based on the following amendment made by the City to the structure and rate of its real property tax.

[9] Before the 2003 fiscal year, a special tax for non-residential immovables was added to the general real property tax. That special tax took the form of a surtax.

[10] In addition, the City's tax system provided for a business, water and utilities tax for occupants of non-residential immovables. This tax was levied on them for carrying out commercial or professional activities on the premises.

[11] Intent on harmonizing its taxation system following the municipal mergers, the City abolished its business tax, which at that time was levied by only 10 of the 28 former municipalities.

[12] However, after abolishing that tax, the City increased the real property tax applicable to this category of immovables where they were located within a sector corresponding to one of the 10 municipalities in which the business tax was levied.

[13] Before this change in tax structure, the business tax was a specific, separate tax that was clearly identifiable and could be easily distinguished from the real property tax. Afterward,

according to the City, this was no longer necessarily the case, because the business tax disappeared and was incorporated into the real property tax.

[14] This is the basis of the submissions of the appellants: they were exempted from paying the business tax under subsection 236(1) of the *Act respecting municipal taxation*, R.S.Q., c. F-2.1 (AMT).

[15] That subsection reads as follows:

| | |
|---|--|
| <p>236. No business tax may be imposed by reason of (1) an activity carried on by (a) the State or the Crown in right of Canada, a mandatory of the Crown in right of Canada, the Société immobilière du Québec, the Corporation d'hébergement du Québec, the Régie des installations olympiques, the Agence métropolitaine de transport, the Société de la Place des Arts de Montréal or the École nationale de police du Québec;</p> | <p>236. La taxe d'affaires ne peut être imposée en raison : 1. d'une activité exercée par : a) l'État ou la Couronne du chef du Canada, un mandataire de la Couronne du chef du Canada, la Société immobilière du Québec, la Corporation d'hébergement du Québec, la Régie des installations olympiques, l'Agence métropolitaine de transport, la Société de la Place des Arts de Montréal. ou l'École nationale de police du Québec;</p> |
|---|--|

[16] According to the figures provided by the Federal Court, the change made by the City to its tax structure resulted in an annual increase varying from \$750,000 to \$1,000,000 for the MPA, excluding the silos and jetties. For the CBC, this increase amounted to \$2,319,235.79, \$2,611,883.54 and \$2,582,69.40 for the years 2003, 2004 and 2005 respectively.

[17] To complete the picture, I should add, as the judge of the Federal Court did at paragraph 8 of his reasons for decision in the case involving the MPA, that the immovables belonging to the Crown or a Crown corporation are exempt from all municipal or school property taxes under subsections 204(1) and (1.1) of the AMT:

| | |
|---|--|
| <p>CHAPTER XVIII</p> <p>FISCAL PROVISIONS</p> <p>DIVISION I</p> <p>TAXABLE IMMOVABLES</p> <p>§ 1. — <i>Rule</i></p> <p>Taxable immovables.</p> <p>203. An immovable entered on the property assessment roll is taxable and its taxable value is that entered on the roll under sections 42 to 48, unless the law provides that only a part of that value is taxable.</p> <p>§ 2. — <i>Exceptions</i></p> <p>Immovables exempt from tax.</p> <p>204. The following are exempt from all municipal or school property taxes:</p> <p>1) an immovable included in a unit of assessment entered on the roll in the name of the State or of the Société immobilière du Québec;</p> <p>1.1) an immovable included in a unit of assessment entered on the roll in the name of the Crown in right of Canada or a mandatary thereof;</p> | <p>CHAPITRE XVIII</p> <p>DISPOSITIONS FISCALES</p> <p>SECTION I</p> <p>IMMEUBLES IMPOSABLES</p> <p>§ 1. — <i>Règle</i></p> <p>Immeuble imposable.</p> <p>203. Un immeuble porté au rôle d'évaluation foncière est imposable et sa valeur imposable est celle inscrite au rôle en vertu des articles 42 à 48, sauf si la loi prévoit que seule une partie de cette valeur est imposable.</p> <p>§ 2. — <i>Exceptions</i></p> <p>Immeubles exempts de taxes.</p> <p>204. Sont exempts de toute taxe foncière, municipale ou scolaire:</p> <p>1) un immeuble compris dans une unité d'évaluation inscrite au nom de l'État ou de la Société immobilière du Québec;</p> <p>1.1) un immeuble compris dans une unité d'évaluation inscrite au nom de la Couronne du chef du Canada ou d'un mandataire de celle-ci;</p> |
|---|--|

[18] However, because it benefits from municipal services, the federal government made a commitment under the PLTA to compensate municipalities and make “payments in lieu of taxes” to them. This obligation extends to Crown corporations listed in schedules III and IV to the PLTA. The *Crown Corporation Payments Regulations*, SOR/97-103 (Regulations) implement the PLTA. I will note at once that the appellants are among the corporations listed in Schedule III because, as we will see further on, the status and treatment of corporations will differ, depending on whether a corporation is listed in Schedule III or Schedule IV.

[19] I will reproduce certain general provisions of the PLTA and the Regulations that are necessary to understand the submissions of the parties. I will complete the picture further on by adding other provisions that are relevant to the issue at hand.

PLTA

2. (1) In this Act,

“real property tax” means a tax of general application to real property or immovables or any class of them that is

(a) levied by a taxing authority on owners of real property or immovables or, if the owner is exempt from the tax, on lessees or occupiers of real property or immovables, other than those lessees or occupiers exempt by law, and

(b) computed by applying a rate to all or part of the assessed value of taxable property;

“effective rate” means the rate of real

2. (1) Les définitions qui suivent s’appliquent à la présente loi.

«impôt foncier» Impôt général :

a) levé par une autorité taxatrice sur les immeubles ou biens réels ou les immeubles ou biens réels d’une catégorie donnée et auquel sont assujettis les propriétaires et, dans les cas où les propriétaires bénéficient d’une exemption, les locataires ou occupants autres que ceux bénéficiant d’une exemption;

b) calculé par application d’un taux à tout ou partie de la valeur fiscale des propriétés imposables.

«taux effectif» Le taux de l’impôt

property tax or of frontage or area tax that, in the opinion of the Minister, would be applicable to any federal property if that property were taxable property;

“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;

(3) For the purposes of the definition “federal property” in subsection (1), federal property does not include

- (a) any structure or work, unless it is
 - (i) a building designed primarily for the shelter of people, living things, fixtures, personal property or movable property,
 - (ii) an outdoor swimming pool,
 - (iii) a golf course improvement,
 - (iv) a driveway for a single-family dwelling,
 - (v) paving or other improvements associated with employee parking, or
 - (vi) an outdoor theatre;

(b) any structure, work, machinery or equipment that is included in Schedule II;

9. (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and, without restricting the generality of the foregoing,

foncier ou de l’impôt sur la façade ou sur la superficie qui, selon le ministre, serait applicable à une propriété fédérale si celle-ci était une propriété imposable.

«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.

(3) Sont exclus de la définition de « propriété fédérale » au paragraphe (1) :

- a) les constructions ou ouvrages, sauf :
 - (i) les bâtiments dont la destination première est d’abriter des êtres humains, des animaux, des plantes, des installations, des biens meubles ou des biens personnels,
 - (ii) les piscines extérieures,
 - (iii) les améliorations apportées aux terrains de golf,
 - (iv) les entrées des maisons individuelles,
 - (v) l’asphaltage des stationnements pour employés et les autres améliorations s’y rattachant,
 - (vi) les amphithéâtres de plein air;

b) les constructions, les ouvrages, les machines ou le matériel mentionnés à l’annexe II;

9. (1) Le gouverneur en conseil peut, par règlement, prendre toutes mesures utiles à l’application de la présente loi et, notamment :

may make regulations

...

(f) respecting any payment that may be made in lieu of a real property tax or a frontage or area tax by any corporation included in Schedule III or IV and, without limiting the generality of the foregoing, providing that any payment that may be made shall be determined on a basis at least equivalent to that provided in this Act;

(g) respecting any payment that may be made in lieu of a business occupancy tax by every corporation included in Schedule IV;

10. The Minister may make regulations

(a) establishing a form of application for a payment under this Act;

(b) respecting the making of an interim payment in respect of a payment under this Act; and

(c) respecting the recovery of any overpayments made to a taxing authority, including recovery by way of set-off against other payments under this Act to the taxing authority.

PAYMENTS BY CROWN
CORPORATIONS

11. (1) Notwithstanding any other Act of Parliament or any regulations made thereunder,

(a) every corporation included in Schedule III or IV shall, if it is exempt from real property tax, comply with any regulations made under paragraph 9(1)(f) respecting any

[...]

f) régir les paiements à verser par les personnes morales mentionnées aux annexes III ou IV en remplacement de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie et prévoir, entre autres, que leur base de calcul sera au moins équivalente à celle prévue par la présente loi;

g) régir les paiements à verser par les personnes morales mentionnées à l'annexe IV en remplacement de la taxe d'occupation commerciale;

10. Le ministre peut, par règlement :

a) établir la formule de demande à employer pour les paiements visés par la présente loi;

b) régir tout versement provisoire relatif à un paiement visé par la présente loi;

c) régir le recouvrement des trop-payés à une autorité taxatrice, y compris par déduction sur les paiements à verser à celle-ci en vertu de la présente loi.

SOCIÉTÉS D'ÉTAT

11. (1) Par dérogation à toute autre loi fédérale ou à ses règlements :

a) les personnes morales mentionnées aux annexes III ou IV qui sont exemptées de l'impôt foncier sont tenues, pour tout paiement qu'elles versent en remplacement de l'impôt

payment that it may make in lieu of a real property tax or a frontage or area tax; and

(b) every corporation included in Schedule IV shall, if it is exempt from business occupancy tax, comply with any regulations made under paragraph 9(1)(g) respecting any payment that it may make in lieu of a business occupancy tax.

foncier ou de l'impôt sur la façade ou sur la superficie, de se conformer aux règlements pris en vertu de l'alinéa 9(1)f);

b) les personnes morales mentionnées à l'annexe IV qui sont exemptées de la taxe d'occupation commerciale sont tenues, pour tout paiement qu'elles versent en remplacement de celle-ci, de se conformer aux règlements pris en vertu de l'alinéa 9(1)g).

SCHEDULE II (Section 2)

10. Reservoirs, storage tanks, fish-rearing ponds, fishways
12. Snow sheds, tunnels, bridges, dams

ANNEXE II (article 2)

10. Réservoirs, réservoirs d'emmagasinage, viviers, passes à poissons
12. Abris contre la neige, tunnels, ponts, barrages

Regulations

INTERPRETATION

2. In these Regulations,

“corporation property” means

(a) except in Part II, any real property or immovable owned by Her Majesty in right of Canada that is under the management, charge and direction of a corporation included in Schedule III or IV to the Act, or that has been entrusted to such corporation; (a.1) except in Part II,

- (i) any real property or immovable that is owned by Her Majesty in right of Canada and that is managed by a port authority included in Schedule III to the Act, and
- (ii) any real property or immovable, other than any real property or immovable owned by Her Majesty in right of Canada, that is held by a port authority

DÉFINITIONS

2. Les définitions qui suivent s'appliquent au présent règlement.

«propriété d'une société»

a) Sauf à la partie II, l'immeuble ou le bien réel qui appartient à Sa Majesté du chef du Canada et dont une société mentionnée aux annexes III ou IV de la Loi a la gestion, la charge et la direction, ou l'immeuble ou le bien réel confié à une telle société;

a.1) sauf à la partie II,

- (i) l'immeuble ou le bien réel qui appartient à Sa Majesté du chef du Canada et dont une administration portuaire mentionnée à l'annexe III de la Loi a la gestion,
- (ii) l'immeuble ou le bien réel, autre qu'un immeuble ou un bien réel qui

included in Schedule III to the Act, on which the port authority engages in port activities referred to in paragraph 28(2)(a) of the Canada Marine Act and in respect of which the port authority is exempt from real property tax; and

(b) in Part II, any real property or immovable occupied or used by a corporation included in Schedule IV to the Act in respect of which occupancy or use the corporation is exempt from business occupancy tax; (propriété d'une société)

“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)

“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)

PART I

PAYMENTS IN LIEU OF A REAL PROPERTY TAX OR A FRONTAGE OR AREA TAX

General

5. In this Part, “corporation” means, in respect of any payment that may be made by it, every corporation included in

appartient à Sa Majesté du chef du Canada, qu'une administration portuaire mentionnée à l'annexe III de la Loi détient, sur lequel elle exerce des activités portuaires visées à l'alinéa 28(2)a) de la Loi maritime du Canada et à l'égard duquel elle est exemptée de l'impôt foncier;

b) dans la partie II, l'immeuble ou le bien réel occupé ou utilisé par une société mentionnée à l'annexe IV de la Loi bénéficiant, à l'égard de celui-ci, d'une exemption de la taxe d'occupation commerciale. (corporation 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 effective rate)

«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. (corporation property value)

PARTIE I

PAIEMENTS VERSÉS EN REMPLACEMENT DE L'IMPÔT FONCIER OU DE L'IMPÔT SUR LA FAÇADE OU SUR LA SUPERFICIE

Dispositions générales

5. Dans la présente partie, « société » s'entend, à l'égard de tout paiement qu'elle peut verser, de toute société mentionnée

Schedule III or IV to the Act.

Calculation of Payments

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 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.

Deductions

9. In determining the amount of a payment for a taxation year under section 7, there may be deducted

(a) if there is in effect a special arrangement for the provision or financing of an education service by the corporation, the amount established by that arrangement;

(b) if there is in effect a special arrangement for an alternative means of compensating a taxing authority, or a body on behalf of which the authority collects a real property tax, for providing a service, the amount established by that arrangement;

(c) if a taxing authority, or a body on behalf of which the authority collects a real property tax, is, in the opinion of the corporation, unable or unwilling to provide the corporation property with a service, and no special arrangement exists, an amount that, in the opinion of the corporation, does

aux annexes III ou IV de la Loi.

Calcul des paiements

7. (1) Sous réserve du paragraphe (2), un paiement versé par une société en remplacement de l'impôt foncier pour une année 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.

Dédutions

9. Dans le calcul du paiement visé à l'article 7 pour une année d'imposition donnée, peut être déduit :

a) au titre d'un service d'enseignement que la société fournit ou finance, aux termes d'une entente spéciale en vigueur, la somme calculée conformément à celle-ci;

b) au titre d'un autre service pour lequel l'autorité taxatrice ou l'organisme pour le compte duquel elle perçoit un impôt foncier sont dédommagés en vertu d'une entente spéciale en vigueur, la somme calculée conformément à celle-ci;

c) au titre d'un service — non visé par une entente spéciale — que, selon la société, l'autorité taxatrice ou l'organisme pour le compte duquel elle perçoit un impôt foncier ne veulent ou ne peuvent pas fournir à une propriété de la société, une somme qui, selon la société, ne dépasse pas

not exceed reasonable expenditures incurred or expected to be incurred by the corporation to provide the service; and

(d) an amount that, in the opinion of the corporation, is equal to any cancellation, reduction or refund in respect of a real property tax that the corporation considers would be applicable to the taxation year in respect of its corporation property if it were taxable property.

10. Despite section 8, in determining the amount of a payment referred to in that section, a corporation may deduct an amount that does not exceed reasonable expenditures incurred or expected to be incurred by Her Majesty in right of Canada or that corporation or any other corporation to provide corporation property with the service or work to which the frontage or area tax is related.

PART II

PAYMENTS IN LIEU OF A BUSINESS OCCUPANCY TAX

General

14. In this Part, “corporation” means, in respect of any payment that may be made by it, every corporation included in Schedule IV to the Act.

15. The payment made by a corporation in lieu of a business occupancy tax in respect of any corporation property occupied by it 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 it would be required to pay if it were not exempt from the tax.

15.1 In respect of a taxation year starting

les frais raisonnables qu’elle a engagés ou estime devoir engager pour fournir le service;

(d) une somme égale, selon la société, à tout remboursement, suppression ou réduction de l’impôt foncier qui, pour l’année d’imposition, s’appliquerait, selon elle, à ses propriétés si celles-ci étaient des propriétés imposables.

10. Par dérogation à l’article 8, dans le calcul du paiement visé à cet article, une société peut déduire une somme qui ne dépasse pas les frais raisonnables que Sa Majesté du chef du Canada ou la société ou toute autre société a engagés ou estime devoir engager pour fournir à la propriété le service ou les installations correspondant à l’impôt sur la façade ou sur la superficie.

PARTIE II

PAIEMENTS EN REMPLACEMENT DE LA TAXE D’OCCUPATION COMMERCIALE

Dispositions générales

14. Dans la présente partie, « société » s’entend, à l’égard de tout paiement qu’elle peut verser, de toute société mentionnée à l’annexe IV de la Loi.

15. Le paiement effectué par une société en remplacement de la taxe d’occupation commerciale à l’égard d’une propriété occupée par elle 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 à la somme qu’elle serait tenue de payer si elle n’était pas exemptée de cette taxe.

15.1 Les paragraphes 3(1.1) et (1.2) et

on or after January 1, 2000, subsections 3(1.1) and (1.2) and paragraph 3.1(b) of the Act apply to a corporation with respect to business occupancy taxes as if any reference in those provisions to “the Minister” were a reference to “a corporation”, any reference to “federal property” were a reference to “corporation property” and the reference to “the real property tax or the frontage or area tax on the property” were a reference to “the business occupancy taxes payable with respect to the property”.

16. Despite section 15, in determining the amount of a payment referred to in that section for a taxation year, a corporation may deduct an amount that is equal to any cancellation, reduction or refund in respect of a business occupancy tax that would be applicable to the taxation year in respect of corporation property if it were taxable property.

Interim Payments and Recovery of Overpayments Regulations

1. [Repealed]

INTERPRETATION

2. In these Regulations, “Act” means the Payments in Lieu of Taxes Act.

INTERIM PAYMENTS

3. When, in respect of an application made by a taxing authority under section 3 of the Act, a final determination of the amount of the payment cannot be made within 50 days after receipt of the application, or within 90 days in the case of an application made for the first time, the Minister may

l’alinéa 3.1b) de la Loi s’appliquent à la société pour toute année d’imposition débutant le 1er janvier 2000 ou après cette date en ce qui touche la taxe d’occupation commerciale, les mentions de l’impôt foncier ou de l’impôt sur la façade ou la superficie, du ministre et des propriétés fédérales valant respectivement mention de la taxe d’occupation commerciale, de la société et des propriétés de la société.

16. Par dérogation à l’article 15, dans le calcul d’un paiement visé à cet article pour une année d’imposition, une société peut déduire une somme égale à tout remboursement, suppression ou réduction de la taxe d’occupation commerciale qui s’appliquerait pour cette année d’imposition à sa propriété si celle-ci était une propriété imposable.

Règlement sur les versements provisoires et les recouvrements

1. [Abrogé]

DÉFINITION

2. Dans le présent règlement, « Loi » s’entend de la Loi sur les paiements versés en remplacement d’impôts.

VERSEMENTS PROVISOIRES

3. S’il est impossible de déterminer de façon définitive le montant du paiement dans les cinquante jours suivant la réception de la demande présentée en vertu de l’article 3 de la Loi par l’autorité taxatrice ou, dans le cas de la demande présentée pour la première fois, dans les quatre-vingt-dix jours suivant sa réception, le ministre peut :

(a) estimate, on the basis of the information available to the Minister, the amount that may be paid to the taxing authority under section 3 of the Act; and

a) estimer, en se fondant sur les renseignements dont il dispose, la somme pouvant être versée à l'autorité taxatrice en vertu de cet article;

(b) make an interim payment to the taxing authority in an amount that does not exceed the amount referred to in paragraph (a).

b) faire, à l'égard du paiement, un versement provisoire ne dépassant pas la somme visée à l'alinéa a).

RECOVERY OF OVERPAYMENTS

RECOUVREMENT DE TROP-PERÇU

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 prescribed for the purpose of section 155.1 of the Financial Administration Act may be

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 Loi sur la gestion des finances publiques peuvent être, selon le cas :

(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

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) recovered as a debt due to Her Majesty in right of Canada by the taxing authority.

b) recouvrés à titre de créance de Sa Majesté du chef du Canada.

[Emphasis added.]

[20] The Attorney General of Canada intervened both here and in the Federal Court. He was of the opinion that in each of these cases, the decisions made by the MPA and the CBC to lower the effective tax rate claimed by the City are not those that the Minister of Public Works and Government Services Canada (Minister) would have made in the same circumstances because, in the Attorney General's view, they appear to be contrary to the PLTA and the Regulations. This position is surprising in terms of its relevancy, because it is the appellants, not the Minister, who are responsible for managing the properties at issue. It is the MPA and the CBC, which are Crown

corporations listed in Schedule III to the PLTA, that have the authority to deal with and actually do themselves deal with the applications for payments in lieu of taxes forwarded to them by municipalities. As we will see later on, this position is also surprising on the merits, given the PLTA and the Regulations.

[21] Basically, the Attorney General of Canada supports the final decision of the Federal Court. In that decision, he sees no error of law warranting our intervention.

Federal Court decision

[22] In both cases, the Federal Court allowed the applications for judicial review brought by the City. The Court quashed the decisions of the MPA and the CBC revising the effective tax rate used by the City to determine the amount “in lieu of taxes”. At the same time, the Court ruled that the MPA and the CBC could not make any adjustments for the taxation years after 2002. In addition, it refused the CBC the right to claim an amount of \$640,175.63 as an overpayment to the City or to effect compensation with the amounts still owed to it.

[23] Finally, the Federal Court referred the cases back to the MPA and the CBC respectively with an order to render a new decision in accordance with the PLTA and the Regulations and pay the resulting amounts owing. The Court stated the effective rates applicable to the value of the immovables of the MPA and the CBC entered on the property assessment role. However, it refused

to exclude the silos belonging to the MPA from the calculation of the amount of the payment in lieu of real property tax. The Court made no order as to costs.

Standard of review applicable to decisions of MPA and CBC and to decision of Federal Court

[24] Rather than deal with this issue in the abstract, I will conduct an analysis applied to each of the issues in these appeals. This approach will have the dual advantage of providing greater clarity and avoiding repetition.

Could MPA and CBC change effective rate applied by City to their non-residential immovables?

(a) Existence of discretion

[25] As is generally the case, the taxing authority, in this case, the City, determines the effective value of federal properties and sets the effective rate of taxation applicable to those properties. It then forwards an application for payment to the Minister or Crown corporation, as the case may be. In this case, this application was sent to the appellants.

[26] To facilitate consultation, I once again reproduce the definitions of “corporation effective rate” and “corporation property value” while underlining the words “that a corporation would consider”, which are found in these definitions of general application in section 2 of the Regulations:

“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)

«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 effective rate)

“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)

«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. (corporation property value)

[Emphasis added.]

[27] Likewise, for the same reasons, I once again reproduce section 7 of the Regulations. This section uses the two definitions mentioned above. It also determines the minimum amount of the payment in lieu of taxes by reference to the corporation effective rate and the corporation property value:

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 product of

(a) the corporation effective rate in the taxation year applicable to the corporation property in respect of which the payment

7. (1) Sous réserve du paragraphe (2), un paiement versé par une société en remplacement de l’impôt foncier pour une année 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

may be made; and

laquelle le paiement peut être versé;

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

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

[Emphasis added.]

[28] For the meaning of the words “de l’avis de la société”, sometimes rendered in English as “that a corporation would consider”, other times as “in the opinion of the corporation”, see section 9 of the Regulations. In its definitions, the PLTA has similar provisions in which the terminology refers to an effective rate or to an effective value which “in the opinion of the Minister” (in French, “selon le ministre”) would be applicable to a federal property.

[29] Do those expressions in the PLTA and the Regulations grant discretion to a Crown corporation or the Minister, as the case may be? If so, what is the scope of this discretion? If not, what meaning and utility must be ascribed to them?

[30] According to counsel for the City, those terms do not grant Crown corporations any jurisdiction or discretion to interfere with the amount of the effective rate and the effective value of federal property determined by the assessing authority. They are used in the PLTA and the Regulations to allow the Minister or a Crown corporation to verify whether the right rate was applied to them (for example, the rate for non-residential immovables, the one for residential immovables or the one for the residual category) and to correct any clerical errors or miscalculations.

[31] The Federal Court agreed with this submission by counsel for the City. Although this is the very foundation of both cases, the Federal Court dealt with the matter in only two paragraphs, which I reproduce:

112 I do not think that the use of the term “that a corporation would consider applicable” in the definition of “corporation effective rate” in section 2 of the CCPR confers the power to ignore the real property tax rate which usually applies to non-residential immovables. In my opinion, the use of the expression “that a corporation would consider applicable” simply reflects the fact that it is the corporation which determines the effective real property tax rate by referring to the real property tax rate prescribed by the taxing authority. If the Governor in Council had intended to grant the absolute discretion which the respondent claims with respect to determining the effective rate, he could have done so by using much broader terms, such as “the rate it considers to be reasonable”.

113 It goes without saying that the Tribunal must exercise its jurisdiction within the limits of the law. If the discretion granted to the respondent’s manager is to be discussed here, I would say that it is a “bound” discretion. Accordingly, the Tribunal cannot ignore the real property tax rate which would otherwise apply to the respondent’s property if it were taxable property. The definition of “corporation effective rate” in the CCPR must be read in its entirety. In short, what must be determined is the real property tax rate “that a corporation would consider applicable to its corporation property if that property were taxable property”.

[Emphasis added.]

[32] I do not think that the scope of these terms is restricted to simply verifying that the rate applied is in fact, for example, the real property tax rate and to correcting clerical errors and miscalculations. No enabling statutory provision is required to allow the Minister or a Crown corporation to report errors of this sort to a municipality that applies for a payment under the PLTA, which confers no right to a payment (see section 15 of the PLTA). In this respect, the legal situation of the Minister or a Crown corporation is no different from that of other taxpayers who note errors of this sort in their municipal tax statements.

[33] In fact, the position taken by counsel for the City and accepted by the Federal Court renders the words “in the opinion of the Minister” or “in the opinion of the corporation” meaningless. For all intents and purposes, it strikes them from the PLTA and the Regulations and leaves the Minister or corporation powerless, at the mercy of the taxing authority, in respect of the assessment of the value of Crown properties and of the applicable taxation rate.

[34] Moreover, the appellants did not in any way submit that these words entailed absolute discretion. They never claimed that they could do what they wanted concerning the effective rate, when they wanted and how they wanted, which would be the prerogative of an absolute discretion. Incidentally, I note that, contrary to what the Federal Court suggests, adding the words “the rate it considers to be reasonable” would not transform a limited discretion into an absolute one. On the contrary, with the introduction of an objective standard, that of reasonableness, rather than a subjective one pure and simple, the exercise of that discretion would further restricted and circumscribed.

[35] In any event, as the Supreme Court of Canada notes in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paragraph 107, discretionary power is not absolute and untrammelled. It is constrained by the scheme and object of the act that grants it.

[36] Concerning the question of whether the Minister and Crown corporations have discretion, the Attorney General of Canada disagrees with the negative conclusion of the Federal Court. I agree

with him that Parliament wished to give the executive branch of government the option of adjusting the effective rate and property value established by an assessment authority. After all, what is at stake here are the public funds that the executive is responsible for administering appropriately in the public interest.

[37] In addition, it is not unthinkable, much less unreasonable, to believe that with respect to certain federal properties, such as a penitentiary, citadel or historic site, there may be differing expert opinions or points of view regarding the effective value of those properties. Incidentally, that is why, in section 11.1 of the PLTA and section 12.1 of the Regulations, Parliament provided for the appointment of an advisory panel responsible for giving the Minister and Crown corporations advice on a federal property or Crown corporation in case of disagreement with the taxing authority concerning the effective value, property dimension or effective rate (emphasis added). What is the use of such a panel if there is no discretion to challenge the effective rate established by the taxing authority?

[38] In any event, the state of the law is unequivocal with respect to the meaning to be given to the terms “selon le ministre”, “de l’avis du ministre” or “in the opinion of the Minister”. These are acknowledged terms, the effect of which is to confer discretion: see for example *C.U.P.E v. Ontario (Minister of Labour)*, above, *Prassad v. Canada (M.E.I.)*, [1989] 1 S.C.R. 560, at page 580 *per* Justice L’Heureux-Dubé dissenting on another point, *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375, at pages 379, 380 and 381, *Mon-Oil Ltd. v. Canada*, [1993] F.C.J. No. 226 (F.C.A.) where the Court writes, “Where the Act intends to confer such discretion, as

for example in sections 5 and 22, it does so by appropriate words (“as he deems advisable”, in the opinion of the Minister etc.)”. The same holds true for the words “that a corporation would consider”.

[39] I note that sections 2 and 7 of the Regulations are not the only provisions that confer discretion upon a Crown corporation. Paragraphs 9(c) and (d) also confer such discretion for deductions if a taxing authority is, in the opinion of the corporation, unable or unwilling to provide the corporation property with a service, or for an amount that, in the opinion of the corporation, is equal to any cancellation, reduction or refund in respect of a real property tax applicable to its properties.

[40] With respect, I am of the opinion that the Federal Court erred in the legal interpretation of the words “that a corporation would consider”. This is an error in law that is reviewable on the correctness standard. If not for this misapprehension, the Court would have concluded, as I do, that the appellants had the authority to vary or correct the effective rate, that is, the real property tax rate applicable to their properties.

[41] That being said, it must now be determined whether the appellants legally exercised the discretion conferred upon them and, if so, whether the resulting decision is valid. I will do so on the basis of, to use the words of Justice Binnie in *C.U.P.E v. Ontario (Minister of Labour)*, above, the “scheme” and “object” of the PLTA and Regulations, and on the basis of the appellants’ enabling legislation.

(b) Legality of exercise of discretion by appellants

[42] It goes without saying that the legality of the appellants' exercise of their respective discretions is to be assessed according to the correctness standard. Simply put, discretion cannot be exercised contrary to law. In this case, there is no evidence to the effect that the MPA acted in a capricious manner, considered irrelevant factors or failed to consider relevant factors. As will be seen further on, this finding must be tempered for the CBC.

[43] As already mentioned, the appellants are Crown corporations listed in schedules III and IV to the PLTA. They are entrusted with the management, charge and direction of the properties at issue: see the definition of corporation property in section 2 of the Regulations. It is in this legitimate capacity that they exercised the discretion conferred upon them by sections 2 and 7 of the Regulations.

[44] Under section 2.1, the purpose of the PLTA "is to provide for the fair and equitable administration of payments in lieu of taxes". The concept of fairness must work both ways where, as in the present case, the respective rights and obligations of both parties, namely the City and the Crown corporation, must be reconciled. It is from this perspective that the discretion granted to the Minister under the PLTA (and to Crown corporations under the Regulations) must be regarded with respect to the determination of the effective tax rate and the property value of federal properties.

[45] In terms of its scheme, the PLTA authorizes the Minister to make a payment out of the Consolidated Revenue Fund to a taxing authority in lieu of a real property tax for a taxation year to compensate the cost of services provided by that taxing authority: see paragraph 3(1)(a).

[46] The Regulations applicable to Crown corporations have the same object and scheme. However, they make a distinction between, on the one hand, Schedule III and Schedule IV corporations and, on the other hand, payments in lieu of a real property tax and payments in lieu of a business occupancy or business tax.

[47] In effect, Part I of the Regulations, which concerns real property tax, and the definition of “corporation property” apply to Schedule III corporations and Schedule IV corporations alike: see sections 2 and 5.

[48] However, Part II of the Regulations, which specifically deals with payments in lieu of business tax, applies to Schedule IV corporations alone. The definition under section 14, which applies to Part II alone, is unequivocal in this regard. It reads as follows:

| PART II | PARTIE II |
|---|--|
| <p style="text-align: center;">PAYMENTS IN LIEU OF A BUSINESS OCCUPANCY TAX</p> | <p style="text-align: center;">PAIEMENTS EN REMPLACEMENT DE LA TAXE D'OCCUPATION COMMERCIALE</p> |
| <p style="text-align: center;">General</p> | <p style="text-align: center;">Dispositions générales</p> |
| <p>14. <u>In this Part, “corporation” means, in respect of any payment that may be made by it, every corporation included in Schedule IV to the Act.</u></p> | <p>14. <u>Dans la présente partie, « société » s’entend, à l’égard de tout paiement qu’elle peut verser, de toute société mentionnée à l’annexe IV de la Loi.</u></p> |

[Emphasis added.]

[49] It is useful to contrast it with the definition in section 5, which applies to Part I only:

| PART I | PARTIE I |
|---|---|
| <p style="text-align: center;">PAYMENTS IN LIEU OF A REAL PROPERTY TAX OR A FRONTAGE OR AREA TAX</p> | <p style="text-align: center;">PAIEMENTS VERSÉS EN REMPLACEMENT DE L'IMPÔT FONCIER OU DE L'IMPÔT SUR LA FAÇADE OU SUR LA SUPERFICIE</p> |
| <p style="text-align: center;">General</p> | <p style="text-align: center;">Dispositions générales</p> |
| <p>5. <u>In this Part, “corporation” means, in respect of any payment that may be made by it, every corporation included in Schedule III or IV to the Act.</u></p> | <p>5. <u>Dans la présente partie, « société » s’entend, à l’égard de tout paiement qu’elle peut verser, de toute société mentionnée aux annexes III ou IV de la Loi.</u></p> |

[Emphasis added.]

[50] On reading these two definitions which refer to payments that a corporation “may”, that is to say, is authorized to make, it seems obvious to me that in enacting provisions specific to each of the two groups, Parliament intended that those two groups should be treated differently and have different payment authorities.

[51] In other words, Parliament did not intend that Schedule III Crown corporations should be required and authorized to pay a business tax levied by a taxing authority. This led to the adoption of a Part II that is different from Part I, and to the distinct field of taxation in Part I covering a group of Crown corporations which is also distinct from those in Schedule III and clearly identifiable. This also explains paragraph 9(g) of the PLTA, which grants the Governor in Council the power to make regulations “respecting any payment that may be made in lieu of a business occupancy tax by every corporation included in Schedule IV” (emphasis added). It is obvious that the Crown corporations in Schedule III are not subject to that tax. However, it is also clear in the preceding paragraph 9(f) that as far as payment in lieu of real property tax is concerned, the regulatory power granted to the Governor in Council concerns Schedule III corporations as well as Schedule IV corporations (emphasis added).

[52] The definition of “corporation property” in section 2 of the Regulations confirms this legislative intent. Through this definition, by including or excluding Part II according to the objective sought (see paragraphs 2(a), 2(a.1) and 2(b)), Parliament enshrines the previously mentioned difference in treatment between payments in lieu of real property tax, authorized for Schedules III and IV corporations, and payments in lieu of business tax, authorized for Schedule IV corporations only.

[53] A brief review of the history of federal legislation in this field supports this conclusion.

[54] The current legislative framework came into existence in 1980 with the enactment of the *Municipal Grants Act, 1980*, S.C. 1980-81-82-83, c. 37. This Act and the *Crown Corporation Grants Regulations*, SOR/81-1030, dated December 10, 1981, create the distinction between Schedule III and Schedule IV corporations. Only Schedule IV corporations are empowered to pay business taxes.

[55] In 1994, the government set up a Joint Technical Committee on Payments in Lieu of Taxes (Committee). Its mandate was to study problems relating to payments made by the federal government and Crown corporations: see Appeal Record A-427-07, volume III, at page 530.

[56] After completing its work, the Committee drafted a report in 1995 in which there was a consensus to revise Schedules III and IV to ensure that corporations “involved in profit-oriented activities are empowered to make payments in lieu of business taxes”: *ibid.*, page 547.

[57] A supplementary report was tabled in 1997. The Committee noted “considerable variance among federal Crown corporations in terms of the degree to which their activities resemble those of private sector, profit-oriented entities”: *ibid.*, at page 574. The Committee recommended that the Royal Mint, which was mentioned in Schedule III, be transferred to Schedule IV, and this was done: *ibidem*. Canada Post was also included in Schedule IV.

[58] In 1998, a draft document entitled “Draft Discussion Paper”, from the Department of Public Works and Government Services Canada, made a distinction between the various Crown

corporations: see *Draft Discussion Paper 1998 Consultation on the Government of Canada's Municipal Grants Program and Related Legislation: ibid.*, at page 583. The following is stated at page 601:

Agent Crown corporations are listed in the Act under either Schedule III or Schedule IV. Those in Section III, like departments, are not empowered to make grants in lieu of business occupancy taxes. Those in Schedule IV more closely resemble private sector enterprises and are able (but not required) to make grants in lieu of occupancy taxes.

[Emphasis added.]

[59] This report mentions the fact that municipalities question the advisability of transferring Schedule III corporations to Schedule IV, such as in the case of the CBC. In their view, those corporations are commercial enterprises akin to private sector ones. However, the report concludes that the situation must be thoroughly examined on a case-by-case basis before recommending specific changes in status: *ibid.*, at page 625.

[60] Finally, in 2000, there was an in-depth review of the payment in lieu of taxes scheme, following which the appellants, namely the MPA and the CBC, remained in Schedule III of the PLTA, and only Crown corporations that are commercial enterprises are required and authorized to make payments in lieu of a business tax. The Royal Canadian Mint was once again included in Schedule III, as was the Canada Post Corporation: Appeal Record A-427-07, volume V, at pages 886 and 887.

[61] By including in its real property tax the former business tax mentioned in Part II of the Regulations, and by soliciting payment from the appellants, the City rendered the provisions of Part II of the Regulations applicable to Schedule III Crown corporations, although Parliament indubitably restricted the application to corporations listed in Schedule IV to the PLTA. In my opinion, the appellants are correct in stating that the City is trying to do indirectly what the Regulations do not allow to be done directly.

[62] Both appellants are governed by public policy legislation. They have either an economic or a cultural and social mission, or both. The MPA is proof of that.

[63] The competitiveness of Canada's network of ports is governed by the *Canada Marine Act*, S.C. 1998, c-10. The quest for competitiveness and efficiency to attain the desired social and economic goals is one of the objectives of this act, expressed in the context of a national marine policy in section 4 of this act, which reads as follows:

| | |
|---|--|
| <p>4. It is hereby declared that the objective of this Act is to</p> <p><i>(a)</i> <u>implement a National Marine Policy that provides Canada with the marine infrastructure that it needs and that offers effective support for the achievement of local, regional and national social and economic objectives and will promote and safeguard Canada's competitiveness and trade objectives;</u></p> <p><i>(b)</i> base the marine infrastructure and services on international practices and</p> | <p>4. Il est déclaré que l'objectif de la présente loi est de :</p> <p><i>a)</i> <u>mettre en œuvre une politique maritime nationale qui vise à assurer la mise en place de l'infrastructure maritime qui est nécessaire au Canada et qui constitue un outil de soutien efficace pour la réalisation des objectifs socioéconomiques locaux, régionaux et nationaux, et qui permettra de promouvoir et préserver la compétitivité du Canada et ses objectifs commerciaux;</u></p> <p><i>b)</i> fonder l'infrastructure maritime et les services sur des pratiques internationales et</p> |
|---|--|

| | |
|---|---|
| <p>approaches that are consistent with those of Canada's major trading partners in order to foster harmonization of standards among jurisdictions;</p> <p>(c) ensure that marine transportation services are organized to satisfy the needs of users and are available at a reasonable cost to the users;</p> <p>(d) provide for a high level of safety and environmental protection;</p> <p>(e) provide a high degree of autonomy for local or regional management of components of the system of services and facilities and be responsive to local needs and priorities;</p> <p>(f) manage the marine infrastructure and services in a commercial manner that encourages, and takes into account, input from users and the community in which a port or harbour is located;</p> <p>(g) provide for the disposition, by transfer or otherwise, of certain ports and port facilities; and</p> <p>(h) coordinate with other marine activities and surface and air transportation systems.</p> | <p>des approches compatibles avec celles de ses principaux partenaires commerciaux dans le but de promouvoir l'harmonisation des normes qu'appliquent les différentes autorités;</p> <p>c) veiller à ce que les services de transport maritime soient organisés de façon à satisfaire les besoins des utilisateurs et leur soient offerts à un coût raisonnable;</p> <p>d) fournir un niveau élevé de sécurité et de protection de l'environnement;</p> <p>e) offrir un niveau élevé d'autonomie aux administrations locales ou régionales des composantes du réseau des services et installations portuaires et prendre en compte les priorités et les besoins locaux;</p> <p>f) gérer l'infrastructure maritime et les services d'une façon commerciale qui favorise et prend en compte l'apport des utilisateurs et de la collectivité où un port ou havre est situé;</p> <p>g) prévoir la cession, notamment par voie de transfert, de certains ports et installations portuaires;</p> <p>h) favoriser la coordination des activités maritimes avec les réseaux de transport aérien et terrestre.</p> |
|---|---|

[Emphasis added.]

[64] For these purposes, the MPA and the port authorities of Vancouver and Halifax, which were also incorporated as port authorities by letters patent in March 1999, were entrusted with port administration and the management of federal property to attain the objective sought under the *Canada Marine Act*. The objective and scheme of the *Canada Marine Act* are consistent with and in

fact explain the choices and distinctions made by Parliament concerning payments in lieu of real property tax and payments in lieu of business tax. It is not up to the courts to substitute their choices and preferences for those of Parliament. This conclusion also applies to how Parliament decided to treat the CBC: see the objects, powers and business, social and cultural objectives conferred upon it under section 46 of the *Broadcasting Act*, S.C. 1991, c. 1.

[65] Counsel for the City raised the spectre of confusion in respect of the effective taxation rate, a medium- and long-term confusion which, according to him, would result should this Court accept the appellants' submissions and reject those of his client. It would become impossible to distinguish between the amounts attributable to real property tax and those attributable to business tax. Perhaps this problem will arise in the long term, but such is not the case at present. In any event, if confusion were to arise, it would be caused by the City's actions, not those of the appellants. The City cannot take advantage of the confusion it creates to the detriment of the PLTA, the Regulations and the objectives of the enabling legislation of each of the appellants.

[66] Parliament may always amend the PLTA and the Regulations to redefine the scope of the discretion exercised by the Minister and to Crown corporations, restrict it or abolish it. Parliament, or the Government by regulation, may also make the provisions of Part II of the PLTA applicable to Schedule III corporations. The stakes involved in such amendments will have economic, social, cultural and political impacts. The choice to enact such amendments and impose them on the parties belongs to elected officials, not this Court.

[67] The way has now been paved to assess the “reasonableness” or “unreasonableness” of the decisions made by the appellants. This is the appropriate standard of review to apply to them.

(c) Reasonableness of decisions made by appellants

[68] For all practical purposes, both appellants subtracted from the effective taxation rate the equivalent of the business tax that had been included in their real property tax. However, they used two different methods to arrive at the same result.

[69] I note again, the business tax was a tax levied by the City on the rental value, on the basis of a professional or commercial activity. The City’s right to levy tax was based on section 236 of the *Act respecting municipal taxation*, but federal properties were exempted thereunder.

[70] To subtract that business tax from the amount claimed by the City as real property tax, the MPA based its calculation on the taxation rates in the municipal budget for the years 2003 and 2004, which included annual increases.

[71] More specifically, it used the 2002 combined rate for non-residential immovables, set at 3.9410. This rate was made up of:

- (a) the general real property tax for 2002, namely 1.9702;
- (b) the tax on non-residential immovables for 2002, namely 0.3348; and

(c) the real property equivalent of the business tax, namely 1.6360.

[72] It then determined the percentage that represented the amount of the business tax: 41.51% of the amount claimed by the City as real property tax. It applied this percentage to the 2003 and 2004 taxation years, taking into consideration the annual increases applied by the City. I reproduce below an analytical table of municipal tax rates for 2004, submitted by the MPA in Appeal Record A-413-07, volume III, at page 339:

[TRANSLATION]

Analysis of municipal tax rates for 2004

Summary - Tax rate for 2002 (Source: 2003 Budget, page 89)

| | Tax rate | Percentage |
|---|----------|------------|
| General real property tax for 2002 | 1.9702 | 49.99% |
| Tax on non-residential immovables for 2002 | 0.3348 | 8.50% |
| Total real property tax applicable to the MPA in 2002 | 2.30501 | 58.49% |
| Real property equivalent of the 2002 business tax | 1.6360 | 41.51% |
| Combined rate for non-residential buildings for 2002 | 3.9410 | 100.00% |

Summary – Tax rate for 2003 (Source: 2003 Budget, page 89)

| | Tax rate | Percentage |
|--|----------|------------|
| Combined rate for non-residential buildings for 2002 | 3.9410 | 100.00% |
| Annual increase by City of Montréal | 1.0587% | |
| Combined rate for non-residential buildings for 2003 | 4.1722 | 100.00% |

The increased percentage applied by the City of Montréal (5.87 %) exceeded the maximum increase of 5% stipulated in the 2003 budget of the City of Montréal. In 2003, the MPA used a rate of real property tax representing an increase of 5% of the real property rate for the 2002 taxation year.

| | Tax rate | Percentage |
|---|----------|------------|
| 2002 real property tax rate | 2.3050 | 100.00% |
| Maximum increase by the City of Montréal | 5.0000% | |
| Real property tax rate for 2003 used by the MPA | 2.42025 | 100.00% |

Scenario No. 1 for 2004 – 2004 tax rate without water tax
(Source: 2004 Budget, page 171 and 2002 base year)

| | Tax rate | Percentage |
|---|----------|------------|
| 2004 general real property tax | 4.0547 | 100.00% |
| Apportionment according to MPA (2002 base year) | | |
| Real property tax applicable to MPA in 2004 | 2.3715 | 58.49% |
| Real property equivalent of 2004 business tax | 1.6832 | 41.51% |

Scenario No. 2 for 2004 – 2004 tax rate with water tax
(source: 2004 Budget, page 171 and 2002 base year)

| | Tax rate | Percentage |
|---|----------|------------|
| 2004 general real property tax | 4.0547 | 99.02% |
| 2004 water tax | 0.0400 | 0.98% |
| 2004 combined general real property tax | 4.0947 | 100.00% |
| Apportionment according to MPA (2002 base year) | | |
| Real property tax applicable to MPA in 2004 | 2.3949 | 58.49% |
| Real property equivalent of 2004 business tax | 1.6998 | 41.51% |

Observations

Note that, according to the City of Montréal, the 2004 water tax of \$0.04 per \$100 of assessment will allow the refurbishment of the water network and would bring in approximately \$25 million for the City in 2004. (2004 Budget, page 35)

2004 Recommendation

Given that the 2004 water tax of \$0.04 is a tax for infrastructure renewal and not a water supply tax, tax scenario No. 2 is recommended for 2004.

[73] For its part, the CBC drew on excerpts from the City's 2003 budget plan to obtain information respecting the general real property tax rate applicable to non-residential immovables. As was the case with the MPA, that rate was 1.9702. To determine which category applied to it, the CBC studied the following four categories used by the City:

[TRANSLATION]

"City of Montréal":

- (a) non-residential immovables: 4.1722%;
- (b) immovables containing six or more dwelling units: 2.0992%;

(c) serviced vacant lots: 3.9044%;

(d) residual: 1.9522%.

[74] The CBC then settled on the real property tax rate for the non-residential immovables category, which was 4.1722. However, this rate of 4.1722 included the business tax for the 2003 fiscal year. Accordingly, the CBC did not use this rate, concluding that it did not fall within the non-residential immovables category, since it was not subject to the business tax.

[75] It then tried to fit into one of the three remaining categories of immovables. On the basis of this approach, it was obvious that it would not qualify for categories (b) and (c). In its opinion, only category (d) remained, namely the residual category. According to Exhibit P-6, found in Appeal Record A-427-07, volume I, at page 199, the residual category is mainly, although not exclusively, made up of buildings containing five or more dwellings. It adopted the taxation rate for this category, set at 1.9522, which in its opinion was similar to the rate of 1.9702 used for the general real property tax.

[76] I must say that the classification chosen by the CBC is intriguing, not to say unusual. Although it should be classified as a non-residential immovable, because of the choice it made, it ended up in a category that mainly included apartment buildings. The calculation method used by the MPA appears to me to be much more consistent than the one chosen by the CBC.

[77] However, the issue here is whether the CBC's method of calculating the amount of the business tax is the best or even the right one. What must be determined is whether the result obtained by applying the method is reasonable in the circumstances.

[78] The CBC based its calculation on the City's real property tax rate of 1.9522 for immovables in the residual category. This rate was just slightly lower (0.018 points) than the rate of 1.9702 applicable to non-residential immovables.

[79] In percentage terms, the method used by the CBC places the portion attributable to the business tax at 50.46% for 2002, compared with 41.51% for the MPA. The result is a significant difference of 8.95% in favour of the CBC.

[80] Even using the residual category rate of 1.9522, I do not see why the 0.3348 points applicable to non-residential immovables should not be added. After all, the CBC properties are non-residential immovables. If 0.3348 is added to the rate of 1.9522, the resulting real property tax for the year 2002 is 2.287, which represents a business tax equivalent to 1.654. Expressed as a percentage, this business tax equivalent is 41.96%. For all intents and purposes, this is the same as the MPA's rate of 41.51%.

(d) Conclusion on exercise of discretion and validity of decisions made by appellants

[81] In my opinion, the appellants exercised their discretion legally, in compliance with the objective and scheme of the PLTA and the Regulations, their enabling legislation and the intention

of Parliament. This intention is expressed in sections 2, 2.1, 4 and 7 of the PLTA, as well as in Parts I and II and sections 2, 5, 7, 9 and 14 of the Regulations.

[82] In my opinion, the decision made by the MPA in exercising this discretion has a reasonable basis in fact. According to the reasonableness standard, which is the applicable standard of review here, I conclude that the MPA's decision is both valid and legal.

[83] I cannot say the same of the decision of the CBC. In my opinion, the classification and the basis for calculation used by the CBC, as well as the result obtained for the amount of the business tax, are not reasonable. As was the case with the MPA, all the CBC had to do was take the general real property tax rate for 2002 and add to it the non-residential immovables tax rate for the 2002 taxation year. In doing so, it would have obtained the total real property tax rate applicable to it for 2002. From that, it could have determined the real property equivalent of the business tax.

[84] Basically, the CBC, like the MPA, manages non-residential immovables. Both organizations are in the same category for taxation purposes. They should be subject to identical treatment as far as the effective rate is concerned. Accordingly, I would apply the method used by the MPA and make the following amendment to the CBC's decision. I would set the real property equivalent of the 2002 business tax at 1.6360, representing a percentage of 41.51% of the amount of the application for payment in lieu of real property tax. I would apply this percentage of 41.51% to the 2003, 2004 and 2005 taxation years.

[85] This brings me to consider another request for the adjustment of the amount of the application for payment. This adjustment would correspond to the value of the MPA's silos if they had to be excluded from the claim made by City of Montréal.

Refusal to exclude effective value of silos from amount of payment in lieu of real property tax

[86] Paragraph 2(3)(b) of the PLTA excludes from the definition of federal property “any structure, work, machinery or equipment that is included in Schedule II”.

[87] This reference to Schedule II of the PLTA refers to paragraph 10 of this Schedule, where it is mentioned that the following items are excluded:

| | |
|---|--|
| 10. <u>Reservoirs, storage tanks, fish-rearing ponds, fishways</u> | 10. <u>Réservoir, réservoirs d'emménagement, viviers, passes à poissons</u> |
|---|--|

[Emphasis added.]

I am of the opinion that the Federal Court unduly restricted the meanings of the words “reservoir” and “storage tanks” by limiting them to receptacles for storing liquid or gaseous products. In my opinion, this restriction is not warranted by the rules of interpretation, the ordinary meaning of the words or Parliament's intention.

(a) Ordinary meaning of the words

[88] It is helpful to begin with an analysis of the ordinary meaning of the word “reservoir”.

[89] The 2006 *Petit Larousse illustré*, at page 926, and the 1991 edition, at page 841, give the word “réservoir” a first very general meaning and a second more specific meaning by referring to liquid or gaseous products:

[TRANSLATION]

1. Place set up for accumulating and storing certain things – e.g., place where various reserves are stockpiled. Reservoir of raw materials.
2. Receptacle containing liquid or gaseous products.

[Emphasis added.]

[90] The 1990 edition of the *Shorter Oxford English Dictionary* states that the meaning of “a receptacle or repository for things or articles” has been attributed to word “reservoir” since 1836. It does not restrict the meaning of the word to the storage of liquid products.

[91] Like the *Petit Larousse illustré*, the *Webster’s New World Dictionary*, Second College Edition, gives the English word “reservoir” a very broad first meaning and a more specific second meaning:

1. a place where anything is collected and stored, generally in large quantity.
2. a receptacle for holding a fluid, as oil, ink, etc.

(See also *Webster’s Third New International Dictionary of the English Language*, vol. II, at page 1931.)

[92] *Le Nouveau Petit Robert*, at page 2343, *Le Grand Robert de la langue française*, at page 776, the 1997 edition of *Le Petit Larousse illustré*, at page 939, and the *Office de la langue française – Grand Dictionnaire terminologique* define a silo as [TRANSLATION] “a reservoir (above or below ground) where agricultural products are stored for safekeeping” and as a [TRANSLATION] “reservoir erected for the storage and preservation of various bulk products: coal, cement, fodder, grain, etc.”. English language dictionaries give similar definitions.

(b) Parliament’s intent

[93] Unless Parliament indicates otherwise, the words it uses must be given their ordinary or natural meaning: see P.A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed., Carswell, Scarborough, Ont., 2000, at pages 261 to 266.

[94] Moreover, I do not believe that Parliament would have intended a result as absurd as that of excluding from a payment in lieu of real property tax only reservoirs for liquids and not those for solids. As noted by the MPA, the definition of “reservoir” would a reservoir of liquid sugar, but not a reservoir of granulated sugar. Similarly, the definition would apply to a reservoir of liquid cement, but not one of cement powder. Considering the Canada-wide tax and economic impacts that could result from such a difference in the treatment of the word “reservoir”, and given the generality of the word, I am of the opinion that restricting the meaning and application to tanks of liquids would be

contrary to the goal sought by Parliament. If that were the expected result, Parliament could have easily defined the word restrictively and limited it to reservoirs of liquids or gases.

(c) Ejusdem generis rule

[95] According to counsel for the City, if Parliament had intended to exclude silos, it would have done so expressly. I cannot agree with this submission because, on the one hand, the word “reservoir” is a generic term and, on the other hand, as I have already mentioned, a silo is a type of reservoir. The general term “reservoir” includes the specific, namely a silo.

[96] At the hearing, the discussion also addressed the fact that the terms “fish-rearing ponds” and “fishways” used in paragraph 10 of Schedule II have an aquatic connotation and, accordingly, qualify the term “reservoir” by restricting it to reservoirs for fluids.

[97] Applying this reasoning to the present case would mean that a specific term that completes an enumeration would restrict the generic terms that precede it. To do so would completely distort the *ejusdem generis* rule. Professor Côté wrote the following on the operation of the rule and the conditions for its application in his excellent book *The Interpretation of Legislation in Canada*, cited above, at page 315:

In fact, the latter [the *ejusdem generis* rule] is merely a particular application of *noctur a sociis* to cases where a general term follows a list of specific ones. . . . “The *ejusdem generis* rule means that a generic or collective term that completes an enumeration of terms should be restricted to the same genus as those words, even though the generic or collective term may ordinarily have a much broader meaning”.

[98] Moreover, it is far from obvious that the enumeration in paragraph 10 includes items of the same type or category. It is difficult to characterize a fishway, which is a narrow passage or corridor allowing fish to pass from one place to another, as a reservoir.

[99] Finally, even though some of the enumerations in Schedule II refer to objects or items of the same type, there is no uniformity or consistency in the enumerations in this Schedule such that it could be inferred that the terms in paragraph 10 have a common denominator that restricts the words “reservoir” and “storage tanks” to the storage of fluids alone.

[100] For example, paragraph 12 of Schedule II, cited above, includes exemptions for “snow sheds, tunnels, bridges [and] dams”. I tried in vain to find a common denominator for these terms in this enumeration, especially for snow sheds.

[101] In conclusion, I am of the opinion that the Federal Court erred in law in its interpretation of the term “reservoir” and that the correctness standard applies here. Silos are reservoirs and are included in the objects exempted under Schedule II to the PLTA. Therefore, they must be struck from the application for payment in lieu of real property tax.

Did Federal Court rule *ultra petita*?

[102] Given the conclusion I have reached on the merits of the appeals, which is to quash the decision of the Federal Court, it is not really necessary to decide this issue. I will simply state that it is obvious that the application for judicial review brought by the City concerns and is limited to the 2004 fiscal year, while paragraphs 2 and 3 of the order made by the Federal Court in respect of the MPA also covers the 2003 fiscal year.

[103] I contrast the first paragraph and the conclusion sought by the City in its application for judicial review with paragraphs 2 and 3 of the Federal Court order:

[TRANSLATION]

Judicial review

1. This is an application for judicial review concerning a payment in lieu of taxes made by the Montréal Port Authority (hereafter the MPA) to City of Montréal under the *Payments in Lieu of Taxes Act* and its regulations (R.S. (1985), c. M-13, hereafter “PLTA”, for its 2004 taxation year;

7. An order in the form of a declaratory judgment to the effect that the Defendant, the MPA must be subject to the law and accordingly pay to the City of Montréal amounts of \$737 889.67 and \$1 247 355.98, which it illegally subtracted from its payment in lieu of taxes for the 2004 taxation year of the City of Montréal, plus interest at the rate specified in the municipal regulations from March 22, 2004;
(Emphasis added.)

ORDER

THE COURT DECLARES AND ORDERS that:

1. This application for judicial review is allowed in part.
2. For every taxation year after 2002, the effective rate applicable to the respondent’s properties is the general real property tax rate applicable to non-residential immovables in the sector or sectors where the respondent’s properties are located, to which is added, where

appropriate, the special water tax rate applicable to immovables in that class.

3. For every taxation year after 2002, the respondent must not exclude from the calculation of the effective rate, or deduct from the payment in lieu of real property tax, the tax equivalent of the former business tax repealed by the applicant in 2002.

[Emphasis added.]

[104] If I had to decide the issue, it seems to me to be quite obvious that the conclusions of the order of the Court go beyond the City's application and the relief it sought.

Could the CBC either recover the overpayment from the City or effect compensation between the amounts already paid for the 2003 and 2004 taxation years and those which, after revision of the effective rate, it considered to be obliged to pay for the 2003, 2004 and 2005 taxation years?

[105] It should be noted that the Federal Court concluded that the CBC could neither retroactively amend its previous decisions nor effect compensation for the payments to be made for the years 2004 and 2005. The Court reached this conclusion because, in its opinion, the CBC could not modify the effective rate of taxation determined by the City. In short, the Court did not rule on the merits of the right to compensation invoked by the CBC: see paragraph 127 of the reasons for decision of the Federal Court. It also did not rule on the right to recover the overpayment under section 4 of the *Interim Payments and the Recovery of Overpayments Regulations*, SOR/81-226, January 2002 (IPROR).

[106] The position of the CBC is based in part on section 4 of the IPROR, with respect to the recovery of an overpayment, and in part on the theory of deduction necessary to effect compensation. I will first deal with the argument concerning the overpayment.

(a) Recovery of overpayment

[107] The IPROR are regulations enacted pursuant to the PLTA for its implementation. These regulations cover only two situations and contain only two substantive sections: sections 3 and 4, cited above.

[108] Section 3 of the IPROR deals with the amount claimed from the Minister by a taxing authority under section 3 of the PLTA. It allows the Minister, where a final determination of the amount of a payment cannot be made within the allotted time, to estimate the amount that may be paid. It also authorizes the Minister to make an interim payment.

[109] Section 4 refers to a payment made by the Minister under section 3 of the PLTA or to an interim payment made by him under section 3 of the IPROR. Where those payments result in an overpayment to the taxing authority, section 4 of the IPROR allows the Minister may set off the overpayment and the accrued interest against any other payments that may otherwise be paid (i.e. effect compensation) or recover them as a debt due to Her Majesty in right of Canada.

[110] It is clear to me that the IPROR applies only to payments made by the Minister in respect of federal properties. Crown corporations are governed by their own Regulations, and while those Regulations are in many respects harmonized with the PLTA, they differ in other respects. When parallel pieces of legislation such as the ones at issue here are harmonized, there is always the possibility of omissions or of intentional or accidental differences in treatment.

[111] I am of the opinion that, by their content, the IPROR treat the Minister and Crown corporations differently with respect to the recovery of overpayments. I do not know whether this difference is intentional or accidental, but I cannot ignore it. In my opinion, the CBC cannot rely on the IPROR.

(b) Compensation

[112] As it did for the overpayment, the City denies that the CBC is entitled to effect compensation between future payments and the overpayments. Instead, the City suggests that the CBC must apply to a court of competent jurisdiction to assert its rights and obtain reimbursement: see paragraph 78 of the respondent's memorandum of fact and law.

[113] I suspect that the position taken by the City may cause much enmity and could be perceived by Crown corporations as an invitation to pay only lesser or symbolic amounts for fear of having to institute costly legal procedures to recover an overpayment. Happily, sections 6 and 12 of the Regulations offer a solution to the problem, in my opinion. I reproduce them below:

| | |
|--|--|
| <p><u>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.</u></p> | <p><u>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.</u></p> |
| <p style="text-align: center;">Time and Manner of Payments</p> | <p style="text-align: center;">Modalités de versement</p> |
| <p><u>12. (1) Subject to subsection (2), where a corporation makes a payment in accordance with section 6, it shall be made</u></p> | <p><u>12. (1) Sous réserve du paragraphe (2), le paiement effectué par une société en application de l'article 6 est versé :</u></p> |
| <p><u>(a) only to the taxing authority for the area in which the corporation property is situated; and</u></p> | <p><u>a) uniquement à l'autorité taxatrice du lieu où la propriété est située;</u></p> |
| <p><u>(b) within 50 days after receipt of an application for the payment.</u></p> | <p><u>b) dans les cinquante jours suivant la réception de la demande de paiement.</u></p> |
| <p><u>(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.</u></p> | <p><u>(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.</u></p> |

[Emphasis added.]

[114] It is clear from section 6 of the Regulations that a payment cannot be subject to conditions. It is also clear that the payment cannot be less than the amounts referred to in sections 7 and 11. I am of the view that this should read section 12, since section 11 has been repealed. In any event, section 12 specifically refers to section 6.

[115] Section 7 of the Regulation (cited above) sets out the amount of the minimum payment, which shall not be less than the product of the corporation effective rate and the corporation property value in the taxation year of that corporation property.

[116] Under subsection 12(2) of the Regulations, a Crown corporation may make an interim payment where, within 50 days after receipt of an application for the payment, it is unable to make a final determination of the amount of a payment it must make in accordance with section 6.

[117] However, undoubtedly to ensure that the taxing authority has interim financing pending a final determination of the amount of the payment, Parliament has provided that the interim amount must correspond to the estimated total payment.

[118] Interim means temporary, provisional, pending something else or destined to be replaced: see *Le Nouveau Petit Robert*, 1993 edition, at page 2033. As counsel for the CBC so rightly pointed out, 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.

[119] I am of the opinion that the Minister and the Crown corporations were granted the right to legal compensation. The Minister has that right under section 4 of the IPROR, while the Crown corporations obtain this right by a roundabout way, that is, through sections 6, 7 and 12 of the

Regulations that govern them. There is no reason in principle why public funds administered by the Minister and paid in lieu of real property tax may be deducted from future payments, but may not be similarly deducted where those same funds are paid by a Crown corporation.

[120] Lise Powers was the person at the CBC who was in charge of managing and following up on taxation matters arising within the City's territory. When questioned on her affidavit by counsel for the City, she stated that at the end of January 2003, she had received an application for payment in lieu of real property tax from the City. She stated that the amount requested was almost double that of previous years. She immediately requested a legal opinion on the legality of this payment: see Appeal Record A-427-07, volume IV, at pages 798, 816 and 817.

[121] On March 3, 2003, while the legality of the payment requested by the City was still being studied, she made a payment to supplement an initial payment in the amount of \$1 203 577.65 which had been credited to the City's account by bank transfer.

[122] In that letter, she clearly stated that the CBC was making no admission as to the validity of the tax account: *ibid.*, volume I at page 153. Another payment was made by the CBC on September 26, 2003. In the letter she sent with the payment, Ms. Powers contested the interest claimed by the City and reiterated her previous caveat as to the validity of the tax account.

[123] On that same occasion, Ms. Powers informed the City that she would shortly advise it of the final position of the CBC as to the validity of the tax account and that the CBC would make a

reduction equivalent to the overpayment of the 2004 tax account if, according to the legal opinion, it appeared that a greater amount had been paid than what should have been: *ibid.*, volume I at page 158; *ibid.*, volume IV, at pages 819 and 820.

[124] As confirmed by Ms. Powers in her testimony, it is clear that the above-mentioned payments were made on an interim or provisional basis so as not to penalize the City pending a final determination of the amount to be paid: *ibidem*. Contrary to what the Federal Court states at paragraph 123 of its reasons for decision, it appears that the payments were made in March and September 2003, while the CBC had not yet been able to make a final determination of the amounts to be paid.

[125] In conclusion, I am of the opinion that pursuant to the Regulations that govern it, the CBC is entitled to reduce future payments by the amounts it has overpaid in lieu of the real property tax requested by the City.

Conclusion

[126] For these reasons, I would allow the appeal of the MPA, quash the order of the Federal Court and dismiss the City's application for judicial review.

[127] I would declare that the silos of the MPA must be excluded from the application for payment in lieu of real property tax made by the City.

[128] The MPA was magnanimous in waiving costs on appeal even though the City claimed them against it. Accordingly, I would make no award as to costs.

[129] As regards the CBC, I would allow the appeal with costs, quash the order of the Federal Court and declare that the effective rates applicable to the immovables of the CBC entered on the assessment role are 4.1722%, 4.0947% and 3.9532% per \$100 of assessment for the years 2003, 2004 and 2005 respectively, reduced for each year by a rate of 1.7318% for the year 2003, 1.6997% for the year 2004 and 1.6409% for the year 2005, corresponding to a real property equivalent of a business tax of 41.51%.

[130] I would declare that the CBC is entitled to reduce future payments to the City by the amounts it has already overpaid in lieu of real property tax.

[131] I would dismiss the City's application for judicial review.

“Gilles Létourneau”

J.A.

“I concur
Marc Noël J.A.”

“I concur
Johanne Trudel J.A.”

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-413-07

STYLE OF CAUSE: MONTRÉAL PORT AUTHORITY v. CITY OF
MONTRÉAL and ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 8, 2008

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

DATED: September 19, 2008

APPEARANCES:

| | |
|-----------------|--------------------|
| Gilles Fafard | FOR THE APPELLANT |
| Luc Lamarre | FOR THE RESPONDENT |
| Nathalie Benoit | FOR THE INTERVENER |

SOLICITORS OF RECORD:

| | |
|---|--------------------|
| De Grandpré Chait, LLP Montréal, Quebec | FOR THE APPELLANT |
| Brunet, Lamarre, s.e.n.c. Montréal, Quebec | FOR THE RESPONDENT |
| John H. Sims, Q.C. Deputy Attorney General of Canada | FOR THE INTERVENER |

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-427-07

STYLE OF CAUSE: CANADIAN BROADCASTING
CORPORATION v. CITY OF MONTRÉAL and
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 8, 2008

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

DATED: September 19, 2008

APPEARANCES:

| | |
|-----------------|--------------------|
| Sylvie Gadoury | FOR THE APPELLANT |
| Luc Lamarre | FOR THE RESPONDENT |
| Nathalie Benoit | FOR THE INTERVENER |

SOLICITORS OF RECORD:

| | |
|---|--------------------|
| 1400 René-Lévesque Boulevard West Montréal, Quebec | FOR THE APPELLANT |
| Brunet, Lamarre, s.e.n.c. Montréal, Quebec | FOR THE RESPONDENT |
| John H. Sims, Q.C. Deputy Attorney General of Canada | FOR THE INTERVENER |