



## PROPERTY TAXES FOR PORTS OPERATING ON FEDERAL LAND

### ***The City of Montréal v. Montréal Port Authority, 2010 SCC 14***

#### INTRODUCTION

In Canada, regulatory jurisdiction over matters involving navigation and shipping rests with the federal government, while responsibility for matters involving property and civil rights rests with the provinces. As a result, there is often tension when maritime-based businesses and organizations conclude that they are negatively affected by what would otherwise be valid provincial legislation or regulation.

In *The City of Montréal v. Montréal Port Authority*, (2010 SCC 14), the Supreme Court of Canada considered the matter of payments in lieu of property taxes made by federal corporations (including major Canadian ports) to municipalities in which these corporations are located.

This is an important issue for Canadian ports as making payments in lieu of taxes can affect their economic viability. The payments can have a direct impact on fees charged and services provided to their users. The ports' service and fee structure is a key element to their competitiveness in comparison to other North American ports.

Canadian ports often point out<sup>1</sup> that in Canada, the ports make payments in lieu of taxes which are equivalent to property taxes, while in the United States, money flows in the opposite direction due to direct and indirect subsidies and grants from the local, state and federal governments, including the ability to issue tax-exempt revenue bonds to support capital

projects and the ability of some ports to levy their own property taxes.

#### WHAT ARE CANADIAN PORT AUTHORITIES

The Montréal Port Authority is a Canadian port authority whose current governance structure was created by the federal Canada Marine Act 1998. The Canada Marine Act created 17 ports, including all Canada's major ports, which act as hubs in key transportation corridors. These 17 ports handle more than half of all Canadian marine cargo.

The key elements of the structure of autonomous Canadian port authorities' include:

... (1) requiring these new Authorities to be fully 'commercial' and completely 'self-sufficient' with no further funding from the Government of Canada; (2) setting strict borrowing limits for Port Authorities with operations funded solely from the CPA's stream of revenues with no ability to pledge assets to borrow; and (3) requiring Port Authorities to provide a portion of their gross revenues to the Government of Canada's general revenue fund.<sup>2</sup>

In addition to the Canadian port authorities, there are pilotage authorities and other federal marine operations that are located on federally owned land and subject to the same issues with respect to property taxes.

#### WHAT ARE PAYMENTS IN LIEU OF TAXES?

Under the Canadian Constitution Act 1867, property of the government of Canada or the provincial government is not liable to taxation by the other level of government. No provincial legislation may impose tax liability on property belonging to the federal Crown.

Acknowledging that the federal government owns property in the provinces and relies on provincial and municipal services, the federal government has established in the Payments In Lieu of Taxes Act (the PILT Act) and its predecessor acts a system of grants to compensate Canadian municipalities for services supplied to federally owned property.

The regime established under the PILT Act is meant to preserve the immunity of federal crown property from

<sup>1</sup> See, for example, "Ports: A Component of Canada's Critical Infrastructure" by Michael C. Ircha, published in *Canadian Ports Magazine*, Association of Canadian Ports Authorities, spring 2003, pp. 14-21.

<sup>2</sup> <http://www.acpa-ports.net/industry/industry.html>



taxation and at the same time to provide fairness and predictability of payments to municipalities in matters of local taxation.

## ARE PAYMENTS IN LIEU OF TAXES VOLUNTARY?

The question that has been somewhat open since the inception of the payments in lieu of taxes regime in the 1950s is whether crown corporations must make payments in lieu of taxes when the municipality makes a request for such payments, or whether the payments are entirely voluntary.

Before changes were made to the Crown Corporations Grants Regulations under the PILT Act in 2001, the most reasonable interpretation of the regime was that such payments were entirely voluntary. This interpretation was and is supported by the language that the legislature used to describe the purpose of the PILT Act: "to provide for the fair and equitable administration of payments in lieu of taxes".

Section 15 of the PILT Act provides that "no right of payment is conferred by this Act".

Section 11 of the PILT Act further stipulates that corporations included in Schedule III (including the Canadian port authorities) shall, if they are exempt from real property tax, comply with any regulations respecting payment that they may make in lieu of a real property tax.

Even though the payments were largely considered voluntary, they were consistently paid in recognition of the critical infrastructure services provided by the municipalities and the importance of being a good neighbour.

Before it was amended in 2001, the language of Section 6 of the Crown Corporations Grants Regulations stated that:

*"Where a corporation makes a grant, it shall, in respect of any corporate property... make an unconditional grant in lieu of a real property tax."*

In 2001 the language of Section 6 was amended, making the voluntary nature of the payments questionable:

*"The payment made by a corporation in lieu of real property tax ...is made without any condition in the amount that is not less than the amount referred to in sections 7 to 11."*

In *Montréal Port Authority* the Supreme Court of Canada, in describing the PILT Act regime, clearly indicated (albeit without actually being asked to

decide on the issue) that payments in lieu of taxes are now mandatory.

In paragraph 4 of the decision Justice LeBel stated:

*"In 2003 and the following years, the City asked the [Montreal Port Authority] and the [Canadian Broadcasting Corporation] to make [payments in lieu of taxes] calculated using one of the rates applicable to non-residential immovables. The respondents refused to pay the amounts claimed by the City. The [PILT Act] required them to make PILTs because of their status as Crown corporations."* [emphasis added]

Further in paragraphs 23 to 24 of the decision, LeBel stated:

*"The PILT Act provides that regulations may be made respecting payments made by Crown corporations in lieu of real property taxes ..."*

*The Regulations provide that the corporations included in Schedule III of the PILT Act [including most major Canadian ports] must make payments in lieu of real property taxes ... . A payment in lieu of a real property tax must be not less than the product of the effective rate of tax and the property value of the property."* [emphasis added]

The language used by LeBel is perplexing considering that he also states in paragraph 20 of the decision that:

*"It is clear from the PILT Act that Parliament intended to uphold the immunity of federal Crown property from taxation. ... [I]t has, through the PILT Act and regulatory framework that Parliament established a system in which municipalities expect to receive payments but the payments are made within the statutory and regulatory framework that Parliament established without renouncing the principle of immunity from taxation."* [emphasis added]

The only way to reconcile the conflicting language in the decision with respect to whether immunity from taxation still exists when the payments are mandatory is to presume that although crown corporations cannot now refuse to make payments in lieu of taxes, Parliament retains the residual ability to repeal the PILT Act.

## HOW MUCH DISCRETION DO PORTS HAVE IN DETERMINING EFFECTIVE PROPERTY TAX RATE?

The dispute in *Montréal Port Authority* arose over whether Montréal Port Authority and another crown corporation, the Canadian Broadcasting Corporation, had properly exercised their discretion in calculating the amount of payments in lieu of taxes.

For practical purposes, the tax system in the city of Montréal went through a number of changes around 2003

as a result of an amalgamation of a number of municipalities into the city. The city abolished business tax collected by some of the municipalities which were part of the amalgamation and changed its property tax to recover the amounts that it would lose after abolishing the business tax. In calculating its payments in lieu of taxes, the Montréal Port Authority subtracted from the effective taxation rate the equivalent of the business tax that had been included in its real property tax on the basis that, but for the change in the property tax scheme, it would not be subject to the business tax.

Hearing the matter at first instance,<sup>3</sup> Justice Martineau for the Trial Division of the Federal Court of Canada quashed the Montréal Port Authority's decisions concerning calculation of its payments in lieu of taxes and held that the discretion given to crown corporations to set the appropriate tax rate did not authorize it to disregard the tax rate that is generally applicable to other owners within the municipality.

Justice Létourneau, for the unanimous Federal Court of Appeal set aside the Federal Court judgment and held that crown corporations had broad discretion to determine the effective tax rate, which the Montreal Port Authority had exercised reasonably<sup>4</sup> considering all surrounding circumstances.

At the Federal Court of Appeal level, Létourneau specifically pointed out that the competitiveness of Canada's network of ports is governed by the Canada Marine Act, and that the objective and scheme of the Canada Marine Act were consistent with, and in fact explained, the discretion with respect to payments in lieu of real property tax set out in the PILT Act - a point on which the Supreme Court of Canada made no comment.

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<sup>3</sup> At the trial level, the MPA and the CBC brought separate applications. In both instances, Justice Martineau held that the discretion was "bound" and set aside the calculation of the payments in lieu of taxes made by both the MPA and the CBC, albeit the methods of calculation employed by the two corporations were different. At the Court of Appeal and at the Supreme Court of Canada, the MPA and the CBC appeared together as appellants and respondents, respectively.

<sup>4</sup> Letourneau J.A. (Federal Court of Appeal) also found that the method used by the CBC to calculate the payment in lieu of taxes differed from the method used by the MPA and was not reasonable considering the surrounding circumstances. Therefore, Letourneau J.A. re-calculated the payments in lieu of taxes for the CBC relying on the method used by the MPA.

The City of Montréal appealed to the Supreme Court of Canada asking that the Federal Court Trial Division judgment be restored.

The Supreme Court of Canada (LeBel writing) unanimously allowed the appeal by the City of Montréal and restored Martineau's judgment, referring the matter back to the Montréal Port Authority to recalculate its payments in lieu of taxes.

With respect to calculation the Supreme Court stated:

*"Under the PILT Act and the Regulations, the calculation of PILTs is not limited to a mechanical application of municipal assessments and the tax rates adopted by municipalities. First of all, ... the PILT Act upholds the principle that the federal Crown is immune from taxation. ... Next, the system of payments in lieu must be adaptable to a fiscal and legal environment that varies from one province or municipality where federal property is located to another."*

LeBel acknowledged that there are practical reasons for discretion in determining property value and the effective tax rate, such as distinctiveness and uniqueness of federal property, classification of federal property for the purpose of assessment and potential misuse of taxation powers by municipalities.

LeBel stated that the determination of the effective tax rate must be reasonable. When reviewing decisions against the standard of 'reasonableness', courts look primarily to the transparency and intelligibility of the reasons given for a decision. To this effect, LeBel stated that:

*"Neither the transparency nor the intelligibility of the corporations' decisions is in issue. The respondents made management decisions and clearly explained the basis for those decisions to the City."*

[...]

*However, [the corporations] cannot base their calculations on a fictitious tax system they themselves have created arbitrarily. On the contrary, those calculations must be based on the tax system that actually exists at the place where the property in question is located. ... They cannot do so on the basis of a system that no longer exists. ... Indeed, the respondents' position would in practice mean that they would ... make increasingly complex and illusory theoretical calculations based on taxes that had long since disappeared."*

The question then becomes: to what extent the Canadian port authorities, and other Canadian ports operating on federal land must conform to the existing municipal tax rates. For example, it is not clear from the Supreme Court of Canada decision in *Montréal Port Authority*

whether it would be reasonable for Canadian ports to consider national and international competitiveness, corporate powers and objectives under letters patent or financial position from time to time when determining the effective tax rate.

That being said, municipalities cannot unilaterally dictate the amount of payments in lieu of taxes. An advisory panel is established under the PILT Act to consider any disagreements with respect to property value or effective rate and to advise the minister on the proper course of action.

## THE IMPLICATIONS OF THE DECISION IN MONTRÉAL PORT AUTHORITY

*Montréal Port Authority* is a declaration of the highest court in Canada on the interpretation of the PILT Act. Therefore, although the court's comments on voluntariness of payments are, arguably, extraneous to the decision on the actual issue in the case, (ie, the method used to calculate the payments in question), these comments are likely to be taken by many crown corporations as the leading authority on the interpretation of the regime set out under that act.

Thus, until further clarification is given by either the Supreme Court or Parliament, it would appear that Canadian ports subject to the PILT Act must make payments in lieu of taxes under the PILT Act, and that the only discretionary aspect of these payments is the ability of the port to determine the amount of the payments on the basis of 'effective rate' and 'property value', the determination of which must in any case be reasonable.

*The content of this Newsletter is intended to provide information on Bull, Housser & Tupper LLP, our lawyers and recent developments in the law. The information contained herein is summary in nature, and does not constitute legal advice. For additional details or advice concerning specific situations please contact Riley Burr at 604.641.4944, rrb@bht.com, Olga Rivkin at 604.641.4970, olr@bht.com or Shelley Chapelski at 604.641.4809, sac@bht.com or any member of our Tax Team.*



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