2010 CarswellNat 838, 2010 SCC 14, J.E. 2010-716, 67 M.P.L.R. (4th) 1, 90 R.P.R. (4th) 1, 99 Admin. L.R. (4th) 167, 317 D.L.R. (4th) 193, 400 N.R. 279, [2010] 1 S.C.R. 427

Montréal (Ville) c. Administration portuaire de Montréal

City of Montréal, Appellant and Montreal Port Authority, Respondent and Attorney General of Canada, Federation of Canadian Municipalities and City of Toronto, Interveners

City of Montréal, Appellant / Respondent on cross-appeal and Canadian Broadcasting Corporation, Respondent / Appellant on cross-appeal and Attorney General of Canada, Federation of Canadian Municipalities and City of Toronto, Interveners

Supreme Court of Canada

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: December 16, 2009
Judgment: April 15, 2010
Docket: 32881, 32882

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Proceedings: reversing in part Montréal (Ville) c. Administration portuaire de Montréal (2008), 49 M.P.L.R. (4th) 1, (sub nom. Montréal Port Authority v. Montréal (City)) 301 D.L.R. (4th) 202, 2008 CAF 278, 2008 FCA 278, 2008 CarswellNat 4330, 51 M.P.L.R. (4th) 1, 73 R.P.R. (4th) 159, (sub nom. Montreal (City) v. Canadian Broadcasting Corp. & Montreal Port Authority) 389 N.R. 305, 2008 CarswellNat 3440 (F.C.A.); reversing in part Montréal (Ville) c. Société Radio-Canada (2007), 2007 CF 700, (sub nom. Montreal (City) v. Canadian Broadcasting Corp.) 315 F.T.R. 226 (Eng.), 2007 CarswellNat 1912, 2007 FC 700, 2007 CarswellNat 3598, 37 M.P.L.R. (4th) 53 (F.C.); and reversing Montréal (Ville) c. Administration portuaire de Montréal (2007), 2007 CF 701, 36 M.P.L.R. (4th) 205, (sub nom. Montreal (City) v. Montreal Port Authority) 315 F.T.R. 250 (Eng.), 2007 CarswellNat 1906, 2007 CarswellNat 3494, 2007 FC 701, 61 R.P.R. (4th) 168 (F.C.)

Counsel: Luc Lamarre, Vincent Jacob, for Appellant / Respondent on cross-appeal, City of Montréal

Gilles Fafard, Guy Régimbald, for Respondent, Montreal Port Authority

Sylvie Gadoury, Judith Harvie, for Respondent / Appellant on cross-appeal, Canadian Broadcasting Corporation

Nathalie Benoit, René LeBlanc, for Intervener, Attorney General of Canada

Stéphane Émard-Chabot, Marie-France Major, for Intervener, Federation of Canadian Municipalities

Diana Dimmer, Angus MacKay, for Intervener, City of Toronto

Subject: Public; Tax — Miscellaneous; Property

Administrative law --- Standard of review — Miscellaneous

Revised standard of review - reasonableness — Crown corporations MPA and CBC made payments in lieu of real property taxes (PILTs) under Payments in Lieu of Taxes Act — After municipal amalgamation, city repealed business taxes that some of former municipalities collected and created variable-rate property tax system to recover amounts otherwise lost by that repeal — City's requested PILTs significantly increased — CBC and MPA reduced requested PILTs by amount of increase due to repeal of business tax, MPA excluded value of silos and CBC used lesser tax rate for residual category of property — City's applications for judicial review were granted — Crown corporations' appeals were allowed, except on CBC's use of residual tax rate — City appealed; CBC cross-appealed — Appeals allowed; cross-appeal dismissed — Given legal nature of PILTs and powers conferred on Crown corporations to determine amounts to pay, standard of review was reasonableness — Act clearly reserved decision-making power for Crown corporation, but this could not be exercised arbitrarily — Crown corporations' exercise of their discretion led to unreasonable outcomes.

Municipal law --- Municipal tax assessment — Tax exemptions — Crown — Occupiers of Crown-owned land — Crown corporation

Crown corporations MPA and CBC made payments in lieu of real property taxes (PILTs) under Payments in Lieu of Taxes Act — After municipal amalgamation, city repealed business taxes that some of former municipalities collected and created variable-rate property tax system to recover amounts otherwise lost by that repeal — City's requested PILTs significantly increased — CBC and MPA reduced requested PILTs by amount of increase due to repeal of business tax, MPA excluded value of silos and CBC used lesser tax rate for residual category of property — City's applications for judicial review were granted — Crown corporations' appeals were allowed, except on CBC's use of residual tax rate — City appealed; CBC cross-appealed — Appeals allowed; cross-appeal dismissed — Given legal nature of PILTs and Crown corporations' power to determine PILTs, standard of review was reasonableness — Crown corporations' discretion to choose relevant tax rate could not be exercised arbitrarily — Crown corporations did not previously make PILTs in respect of business tax since it was not included in Act, and they claimed that requested PILTs included amounts in lieu of that business tax — City had right to impose variable-rate property taxes and Crown corporations had to calculate effective rates under current system in which business tax did not exist — This was in keeping with purpose of Act to fairly and equitably establish system of PILTs reflecting actual tax situation — Crown corporations' exercise of their discretion led to unreasonable outcomes — MPA's silos were not excluded from basis for calculating PILTs — Conclusion that CBC's decision was unreasonable disposed of cross-appeal.

Municipal law --- Municipal tax assessment — Tax exemptions — Crown — Buildings and equipment

Crown corporations MPA and CBC made payments in lieu of real property taxes (PILTs) under Payments in Lieu of Taxes Act — After municipal amalgamation, city repealed business taxes that some of former municipalities collected and created variable-rate property tax system to recover amounts otherwise lost by that repeal — City's requested PILTs significantly increased — CBC and MPA reduced requested PILTs by amount of increase due to repeal of business tax, MPA excluded value of silos and CBC used lesser tax rate for residual category of property — City's applications for judicial review were granted — Crown corporations' appeals were allowed, except on CBC's use of residual tax rate — City appealed; CBC cross-appealed — Appeals allowed; cross-appeal dismissed — Given legal nature of PILTs and Crown corporations' power to determine PILTs,

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standard of review was reasonableness — Crown corporations had to calculate effective rates under current system in which business tax did not exist, and their decision not to was unreasonable — MPA's silos were not excluded from basis for calculating PILTs — Although silos were containers, they could not be considered to be reservoirs — Silos were structures used to store dry plant products, not liquids — Parliament did not see fit to exclude them from basis for calculating PILTs — MPA's interpretation was not consistent with ordinary meanings of words in statute or Parliamentary intention, and so was unreasonable.

Municipal law --- Municipal tax assessment — Remedies — Judicial review — Certiorari

Crown corporations MPA and CBC made payments in lieu of real property taxes (PILTs) under Payments in Lieu of Taxes Act — After municipal amalgamation, city repealed business taxes that some of former municipalities collected and created variable-rate property tax system to recover amounts otherwise lost by that repeal — City's requested PILTs significantly increased — CBC and MPA reduced requested PILTs by amount of increase due to repeal of business tax, MPA excluded value of silos and CBC used lesser tax rate for residual category of property — City's applications for judicial review were granted — Crown corporations' appeals were allowed, except on CBC's use of residual tax rate — City appealed; CBC cross-appealed — Appeals allowed; cross-appeal dismissed — Given legal nature of PILTs and Crown corporations' power to determine PILTs, standard of review was reasonableness — Crown corporations' discretion to choose relevant tax rate could not be exercised arbitrarily — Crown corporations did not previously make PILTs in respect of business tax since it was not included in Act, and they claimed that requested PILTs included amounts in lieu of that business tax — City had right to impose variable-rate property taxes and Crown corporations had to calculate effective rates under current system in which business tax did not exist — This was in keeping with purpose of Act to fairly and equitably establish system of PILTs reflecting actual tax situation — Crown corporations' exercise of their discretion led to unreasonable outcomes — MPA's silos were not excluded from basis for calculating PILTs — Conclusion that CBC's decision was unreasonable disposed of cross-appeal.

Droit administratif --- Norme de contrôle — Divers

Norme de contrôle révisée - décision raisonnable — Sociétés d'État APM et SRC ont fait des paiements en remplacement d'impôts fonciers (PRI), conformément à la Loi sur les paiements versés en remplacement d'impôts — À la suite d'une fusion municipale, la ville a aboli les taxes d'affaires que les anciennes municipalités avaient mises en place et a créé un régime d'impôt foncier à taux variable visant à récupérer des montants qui autrement auraient été perdus à la suite de l'abolition — Montant des PRI exigés par la ville a considérablement augmenté — SRC et l'APM ont réduit les PRI exigés d'un montant représentant la portion de l'augmentation résultant de l'abolition de la taxe d'affaires, l'APM a exclu la valeur de certains silos et la SRC a utilisé un niveau d'imposition inférieur pour les fins de la catégorie résiduelle des propriétés — Requêtes en contrôle judiciaire déposées par la ville ont été accueillies — Appels interjetés par les sociétés d'État ont été accueillis, sauf en ce qui a trait au recours par la SRC au taux d'imposition résiduel — Ville a formé un pourvoi et la SRC a formé un pourvoi incident — Pourvois accueillis et pourvoi incident rejeté — Compte tenu de la nature juridique des PRI et des pouvoirs conférés aux sociétés d'État quant à la détermination des montants à payer, la norme applicable était celle de la décision raisonnable — Loi réservait clairement un pouvoir décisionnel aux sociétés d'État fédérales, mais ce pouvoir ne pouvait être exercé de façon arbitraire — Exercice par les sociétés d'État de leur discrétion a entraîné des résultats qui n'étaient pas raisonnables.

Droit municipal --- Cotisation d'impôt municipal — Exemptions fiscales — État — Occupants de terrains appartenant à l'État — Société d'État

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Sociétés d'État APM et SRC ont fait des paiements en remplacement d'impôts fonciers (PRI), conformément à la Loi sur les paiements versés en remplacement d'impôts — À la suite d'une fusion municipale, la ville a aboli les taxes d'affaires que les anciennes municipalités avaient mises en place et a créé un régime d'impôt foncier à taux variable visant à récupérer des montants qui autrement auraient été perdus à la suite de l'abolition — Montant des PRI exigés par la ville a considérablement augmenté — SRC et l'APM ont réduit les PRI exigés d'un montant représentant la portion de l'augmentation résultant de l'abolition de la taxe d'affaires, l'APM a exclu la valeur de certains silos et la SRC a utilisé un niveau d'imposition inférieur pour les fins de la catégorie résiduelle des propriétés — Requêtes en contrôle judiciaire déposées par la ville ont été accueillies — Appels interjetés par les sociétés d'État ont été accueillis, sauf en ce qui a trait au recours par la SRC au taux d'imposition résiduel — Ville a formé un pourvoi et la SRC a formé un pourvoi incident — Pourvois accueillis et pourvoi incident rejeté — Compte tenu de la nature juridique des PRI et des pouvoirs conférés aux sociétés d'État quant à la détermination des montants à payer, la norme applicable était celle de la décision raisonnable — Discrétion des sociétés d'État de choisir le taux d'imposition applicable ne pouvait pas être exercée de façon arbitraire — Sociétés d'État n'ont pas versé de PRI à l'égard de taxes d'affaires auparavant puisque ce type de taxe n'était pas inclus dans la Loi et ont prétendu que les PRI exigés incluaient dans les faits des sommes remplaçant la taxe d'affaires — Ville avait le droit d'imposer des taxes foncières à taux variables et les sociétés d'État devaient calculer leurs taux effectifs d'imposition en vertu du régime alors en vigueur et dans lequel la taxe d'affaires n'existait pas — Cette situation reflétait l'objectif poursuivi par la Loi d'établir un régime de PRI qui soit équitable et juste et qui corresponde à la réalité fiscale en vigueur — Exercice par les sociétés d'État de leur discrétion a entraîné des résultats qui n'étaient pas raisonnables — Silos de l'APM n'étaient pas exclus du calcul des PRI — Conclusion à l'effet que la décision de la SRC n'était pas raisonnable suffisait à disposer du pourvoi incident.

Droit municipal --- Cotisation d'impôt municipal — Exemptions fiscales — État — Bâtiments et matériel

Sociétés d'État APM et SRC ont fait des paiements en remplacement d'impôts fonciers (PRI), conformément à la Loi sur les paiements versés en remplacement d'impôts — À la suite d'une fusion municipale, la ville a aboli les taxes d'affaires que les anciennes municipalités avaient mises en place et a créé un régime d'impôt foncier à taux variable visant à récupérer des montants qui autrement auraient été perdus à la suite de l'abolition — Montant des PRI exigés par la ville a considérablement augmenté — SRC et l'APM ont réduit les PRI exigés d'un montant représentant la portion de l'augmentation résultant de l'abolition de la taxe d'affaires, l'APM a exclu la valeur de certains silos et la SRC a utilisé un niveau d'imposition inférieur pour les fins de la catégorie résiduelle des propriétés — Requêtes en contrôle judiciaire déposées par la ville ont été accueillies — Appels interjetés par les sociétés d'État ont été accueillis, sauf en ce qui a trait au recours par la SRC au taux d'imposition résiduel — Ville a formé un pourvoi et la SRC a formé un pourvoi incident — Pourvois accueillis et pourvoi incident rejeté — Compte tenu de la nature juridique des PRI et des pouvoirs conférés aux sociétés d'État quant à la détermination des montants à payer, la norme applicable était celle de la décision raisonnable — Sociétés d'État devaient calculer les taux effectifs en vertu du système en vigueur dans lequel la taxe d'affaires n'existait pas, et leur décision de ne pas le faire n'était pas raisonnable — Silos de l'APM n'étaient pas exclus du calcul des PRI — Bien qu'ils soient des contenants, les silos ne sauraient être considérés comme des réservoirs — Silos étaient des installations destinées à l'entreposage de produits végétaux secs, non de liquides — Parlement n'a pas jugé à propos de les exclure de la base de calcul des PRI — Interprétation adoptée par l'APM ne respectait ni le sens ordinaire des mots utilisés dans la Loi ni la volonté du législateur et, partant, n'était pas raisonnable.

Droit municipal --- Cotisation d'impôt municipal — Réparations — Contrôle judiciaire — Certiorari

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C0819-004

Sociétés d'État APM et SRC ont fait des paiements en remplacement d'impôts fonciers (PRI), conformément à la Loi sur les paiements versés en remplacement d'impôts — À la suite d'une fusion municipale, la ville a aboli les taxes d'affaires que les anciennes municipalités avaient mises en place et a créé un régime d'impôt foncier à taux variable visant à récupérer des montants qui autrement auraient été perdus à la suite de l'abolition — Montant des PRI exigés par la ville a considérablement augmenté — SRC et l'APM ont réduit les PRI exigés d'un montant représentant la portion de l'augmentation résultant de l'abolition de la taxe d'affaires, l'APM a exclu la valeur de certains silos et la SRC a utilisé un niveau d'imposition inférieur pour les fins de la catégorie résiduelle des propriétés — Requêtes en contrôle judiciaire déposées par la ville ont été accueillies — Appels interjetés par les sociétés d'État ont été accueillis, sauf en ce qui a trait au recours par la SRC au taux d'imposition résiduel — Ville a formé un pourvoi et la SRC a formé un pourvoi incident — Pourvois accueillis et pourvoi incident rejeté — Compte tenu de la nature juridique des PRI et des pouvoirs conférés aux sociétés d'État quant à la détermination des montants à payer, la norme applicable était celle de la décision raisonnable — Discrétion des sociétés d'État de choisir le taux d'imposition applicable ne pouvait pas être exercée de façon arbitraire — Sociétés d'État n'ont pas versé de PRI à l'égard de taxes d'affaires auparavant puisque ce type de taxe n'était pas inclus dans la Loi et ont prétendu que les PRI exigés incluaient dans les faits des sommes remplaçant la taxe d'affaires — Ville avait le droit d'imposer des taxes foncières à taux variables et les sociétés d'État devaient calculer leurs taux effectifs d'imposition en vertu du régime alors en vigueur et dans lequel la taxe d'affaires n'existait pas — Cette situation reflétait l'objectif poursuivi par la Loi d'établir un régime de PRI qui soit équitable et juste et qui corresponde à la réalité fiscale en vigueur — Exercice par les sociétés d'État de leur discrétion a entraîné des résultats qui n'étaient pas raisonnables — Silos de l'APM n'étaient pas exclus du calcul des PRI — Conclusion à l'effet que la décision de la SRC n'était pas raisonnable suffisait à disposer du pourvoi incident.

To harmonize the property tax structure after a municipal amalgamation, the city repealed business taxes that some of the former municipalities had collected. The city changed its property tax system to recover amounts otherwise lost by that repeal, creating a variable-rate system. Prior to the amalgamation, two Crown corporations, MPA and CBC, had made payments in lieu of real property taxes (PILTs) under the Payments in Lieu of Taxes Act for property taxes but not for business taxes. The city's changes significantly increased the amount of the PILTs requested by the city. The Crown corporations reduced their PILTs by an amount equivalent to the portion of the increase due to the abolition of business tax. MPA also excluded the value of certain silos from its PILT and CBC calculated its PILT based on a lesser tax rate for the residual category of property. The city's applications for judicial review of the Crown corporations' decisions were granted. The Crown corporations' appeals were allowed, except on CBC's use of the residual tax rate. The city appealed and CBC cross-appealed.

Held: The appeals were allowed and the cross-appeal was dismissed.

Per LeBel J. (McLachlin C.J.C., Binnie, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ. concurring): The Act was designed to reconcile different objectives of tax fairness for municipalities and the preservation of the federal Crown's immunity from municipal taxation. Only a structured administrative discretion to choose the relevant tax rate for their properties and set the amounts of PILTs could balance the Act's objectives. That discretion could not be exercised arbitrarily. Given the legal nature of PILTs and the powers conferred on Crown corporations to determine the amounts to pay, the standard of review was reasonableness.

The Crown corporations did not previously make PILTs in respect of business tax since that type of tax was not included in the Act, and so took the position that the city's new tax system would have them make PILTs that included amounts in lieu of that business tax. However, the Crown corporations could not base their calculations

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on a system that no longer existed. The city had the right to impose variable-rate property taxes and Crown corporations then had to calculate the effective rates under the current system in which business taxes did not exist. This result was in keeping with the purpose of the Act to fairly and equitably establish a system of PILTs reflecting the actual tax situation where federal property was located. The Crown corporations' exercise of discretion had led to an unreasonable outcome. Further, MPA's silos should have been included in calculating its PILT, as they were not reservoirs. It was not necessary to comment on CBC's cross-appeal, since the conclusion that its decision was unreasonable sufficed to dispose of the cross-appeal.

Dans le but d'harmoniser la structure de son impôt foncier à la suite d'une fusion municipale, la ville a aboli les taxes d'affaires que les anciennes municipalités avaient mises en place. La ville a changé son régime de taxe foncière pour récupérer des montants qui autrement auraient été perdus à la suite de l'abolition, créant un régime à taux variable. Avant la fusion, deux sociétés d'État, l'APM et la SRC, avaient fait des paiements en remplacement d'impôts fonciers (PRI), conformément à la Loi sur les paiements versés en remplacement d'impôts, à l'égard des taxes foncières mais non pas à l'égard des taxes d'affaires. Le montant des PRI exigés par la ville a considérablement augmenté à la suite des changements apportés par la ville. Les sociétés d'État ont réduit leur PRI d'un montant représentant la portion de l'augmentation résultant de l'abolition de la taxe d'affaires. L'APM a de plus exclu la valeur de certains silos de ses PRI et la SRC a calculé ses PRI sur la base d'un niveau d'imposition inférieur pour les fins de la catégorie résiduelle des propriétés. Les requêtes en contrôle judiciaire déposées par la ville à l'encontre des décisions des sociétés d'État ont été accueillies. Les appels interjetés par les sociétés d'État ont été accueillis, sauf en ce qui a trait au recours par la SRC au taux d'imposition résiduel. La ville a formé un pourvoi et la SRC a formé un pourvoi incident.

Arrêt: Les pourvois ont été accueillis et le pourvoi incident a été rejeté.

LeBel, J. (McLachlin, J.C.C., Binnie, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : La Loi a été conçue dans le but de concilier des objectifs différents eu égard à l'équité fiscale envers les municipalités et la préservation de l'immunité des sociétés d'État dans le domaine de la fiscalité municipale. L'équilibre entre les objectifs poursuivis par la Loi ne pouvait être atteint que si un pouvoir discrétionnaire administratif encadré de choisir le taux d'imposition applicable à ses propriétés et de fixer les montants relatifs aux PRI était exercé. Cette discrétion ne pouvait pas être exercée de façon arbitraire. Compte tenu de la nature juridique des PRI et des pouvoirs conférés aux sociétés d'État quant à la détermination des montants à payer, la norme applicable était celle de la décision raisonnable

Les sociétés d'État n'ont pas versé de PRI à l'égard de taxes d'affaires auparavant puisque ce type de taxe n'était pas inclus dans la Loi et ont ainsi pris pour position que la nouvelle fiscalité de la ville les amènerait à verser des PRI incluant dans les faits des sommes remplaçant la taxe d'affaires. Toutefois, les sociétés d'État ne pouvaient pas faire leur calcul à partir d'un régime qui n'existait plus. La ville avait le droit d'imposer des taxes foncières à taux variables et les sociétés d'État devaient en conséquence calculer leurs taux effectifs d'imposition en vertu du régime alors en vigueur et dans lequel la taxe d'affaires n'existait plus. Cette situation reflétait l'objectif poursuivi par la Loi d'établir un régime de PRI qui soit équitable et juste et qui corresponde à la réalité fiscale des territoires où étaient situées les propriétés fédérales. L'exercice par les sociétés d'État de leur discrétion avait entraîné un résultat déraisonnable. De plus, les silos de l'APM, n'étant pas des réservoirs, auraient dû être inclus dans le calcul de ses PRI. Il n'était pas nécessaire de commenter le pourvoi incident de la SRC, puisque la conclusion à l'effet que sa décision n'était pas raisonnable suffisait à disposer du pourvoi incident.

Cases considered by LeBel J.**:**

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Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — referred to

C.U.P.E., Local 882 v. Art Hauser Centre Board Inc. (2008), (sub nom. Art Hauser Centre Board Inc. v. Canadian Union of Public Employees, Local 882) 311 Sask. R. 272, (sub nom. Art Hauser Centre Board Inc. v. Canadian Union of Public Employees, Local 882) 428 W.A.C. 272, 2008 SKCA 121, 2008 CarswellSask 602, [2008] 10 W.W.R. 206, (sub nom. Art Hauser Centre Board Inc. v. C.U.P.E., Local 882) 299 D.L.R. (4th) 163 (Sask. C.A.) — referred to

Casino Nova Scotia/Casino Nouvelle Ecosse v. Nova Scotia (Labour Relations Board) (2009), 2009 NSCA 4, 2009 CarswellNS 27, (sub nom. Casino Nova Scotia v. Labour Relations Board (N.S.)) 273 N.S.R. (2d) 370, (sub nom. Casino Nova Scotia v. Labour Relations Board (N.S.)) 872 A.P.R. 370, (sub nom. Casino Nova Scotia v. Nova Scotia (Labour Relations Board)) 2009 C.L.L.C. 220-018, (sub nom. Casino Nova Scotia v. Nova Scotia (Labour Relations Board)) 307 D.L.R. (4th) 99 (N.S. C.A.) — referred to

Khosa v. Canada (Minister of Citizenship & Immigration) (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, [2009] 1 S.C.R. 339 (S.C.C.) — referred to

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. Dunsmuir v. New Brunswick) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. Dunsmuir v. New Brunswick) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. Dunsmuir v. New Brunswick) 170 L.A.C. (4th) 1, (sub nom. Dunsmuir v. New Brunswick) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. Dunsmuir v. New Brunswick) 95 L.C.R. 65 (S.C.C.) — referred to

Westbank First Nation v. British Columbia Hydro & Power Authority (1999), 246 N.R. 201, [1999] 3 S.C.R. 134, 176 D.L.R. (4th) 276, 1999 CarswellBC 1929, 1999 CarswellBC 2092, [1999] 9 W.W.R. 517, 67 B.C.L.R. (3d) 1 (S.C.C.) — referred to

Statutes considered:

Appropriation Act No. 7, 1949, S.C. 1949, c. 42

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 125 — considered

Federal Courts Act, R.S.C. 1985, c. F-7

s. 18 — referred to

s. 18.1 [en. 1990, c. 8, s. 5] — referred to

Fiscalité municipale, Loi sur la, L.R.Q., c. F-2.1

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art. 244.29 [ad. 2000, c. 54, art. 82] — considered

art. 244.30 [ad. 2000, c. 54, art. 82] — considered

Municipal Grants Act, S.C. 1950-51, c. 54

Generally — referred to

s. 2 — referred to

s. 4 — referred to

Municipal Grants Act, Act to amend the, S.C. 1956-57, c. 10

Generally — referred to

s. 1 — considered

Municipal Grants Act, Act to amend the, S.C. 2000, c. 8

Generally — referred to

Payments in Lieu of Taxes Act, R.S.C. 1985, c. M-13

Generally — referred to

s. 2 — considered

s. 2(1) "assessed value" — considered

s. 2(1) "assessment authority" — considered

s. 2(1) "authorité évaluatrice" — considered

s. 2(1) "effective rate" — considered

s. 2(1) "federal property" b) — considered

s. 2(1) "property value" — considered

s. 2(1) "propriété fédérale" — considered

s. 2(1) "real property tax" — referred to

s. 2(1) "taxing authority" a) — considered

s. 2(1) "taux effectif" — considered

s. 2(1) "valeur effective" — considered

s. 2(1) "valeur fiscale" — considered

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s. 2(3) — considered

s. 2.1 [en. 2000, c. 8, s. 4] — considered

s. 3(1) — considered

s. 4(1) — considered

s. 9(1)(f) — considered

s. 9(1)(g) — considered

s. 11(1) — considered

s. 11.1 [en. 2000, c. 8, s. 14] — considered

s. 15 — considered

Sched. II — considered

Sched. III — considered

Sched. IV — considered

Regulations considered:

Payments in Lieu of Taxes Act, R.S.C. 1985, c. M-13

Crown Corporation Payments Regulations, SOR/81-1030

Generally — referred to

s. 2 — considered

s. 5 "corporation" — considered

s. 6 — considered

s. 7(1) — considered

s. 14 — considered

s. 12.1 [en. SOR/2001-494] — referred to

s. 15 — considered

APPEALS by city and CROSS-APPEAL by Crown corporation CBC from judgment reported at Montréal (Ville) c. Administration portuaire de Montréal (2008), 49 M.P.L.R. (4th) 1 (Fr.), (sub nom. Montréal Port Authority v. Montréal (City)) 301 D.L.R. (4th) 202, 2008 CAF 278, 2008 FCA 278, 2008 CarswellNat 4330, 51 M.P.L.R. (4th) 1 (Eng.), 73 R.P.R. (4th) 159, (sub nom. Montreal (City) v. Canadian Broadcasting Corp. & Montreal Port Authority) 389 N.R. 305, 2008 CarswellNat 3440 (F.C.A.).

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POURVOIS formés par la ville et POURVOI INCIDENT formé par la société d'État SRC à l'encontre du jugement publié à Montréal (Ville) c. Administration portuaire de Montréal (2008), 49 M.P.L.R. (4th) 1 (Fr.), (sub nom. Montréal Port Authority v. Montréal (City)) 301 D.L.R. (4th) 202, 2008 CAF 278, 2008 FCA 278, 2008 CarswellNat 4330, 51 M.P.L.R. (4th) 1 (Eng.), 73 R.P.R. (4th) 159, (sub nom. Montreal (City) v. Canadian Broadcasting Corp. & Montreal Port Authority) 389 N.R. 305, 2008 CarswellNat 3440 (F.C.A.).

LeBel J.:

I. Introduction

1 These two appeals concern the validity of decisions made by two federal Crown corporations, the Montreal Port Authority ("MPA") and the Canadian Broadcasting Corporation ("CBC"), regarding the calculation of the payments in lieu of real property taxes ("PILTs") they make to the City of Montréal. For the reasons that follow, I find that those decisions were unreasonable. I would therefore allow the appeals, set aside the judgments of the Federal Court of Appeal dismissing the City's applications for judicial review, and restore the Federal Court's judgments quashing the respondents' decisions. I would also dismiss the CBC's cross-appeal concerning the basis adopted by the Federal Court of Appeal for calculating its PILTs.

II. Origins of the Cases

2 These appeals arise out of the municipal amalgamations that took place on the island of Montréal starting in 2000. Following a series of events that I will not discuss, those amalgamations combined most of the municipalities on the island into the City of Montréal. They also resulted in a major restructuring of Montréal's municipal taxation system.

3 Before 2003, the City of Montréal collected property taxes on all taxable immovables within its territory. To the general property tax, it added a surtax on non-residential immovables. It also imposed an occupancy tax on commercial and professional premises. However, that business tax was imposed prior to the amalgamations in only 10 of the 28 municipalities that were to become part of the City. As authorized by provincial legislation, the City abolished the business tax effective at the start of the 2003 fiscal year. It changed its property tax to recover the amounts it would lose after abolishing the business tax. It created a property tax system under which rates varied depending on the purposes for which immovables were used. Immovables classified as non-residential were subject to a property tax rate that was calculated using variable rates based on the classification of property.

4 In 2003 and the following years, the City asked the MPA and the CBC to make PILTs calculated using one of the rates applicable to non-residential immovables. The respondents refused to pay the amounts claimed by the City. The *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13 ("*PILT Act*"), required them to make PILTs because of their status as Crown corporations. Until that time, they had made payments corresponding to the property tax on the taxable value of the immovables they owned in Montréal but had made no PILTs in respect of the business tax. The changes made to the property tax significantly increased the payments requested by the City (2008 FCA 278, 389 N.R. 305 (F.C.A.), at para. 16, *per* Létourneau J.A.). The MPA decided to reduce its payment in lieu by an amount equivalent to the portion of the property tax increase that resulted from the abolition of the business tax, and to exclude the value of silos and piers at the port of Montréal from the basis for calculating its PILTs. In its opinion, the silos and piers were not immovables in respect of which it had to make PILTs. The CBC excluded the amounts corresponding to the City's recovery of the proceeds of the abolished business tax and calculated a PILT based on Montréal's tax rate for the residual category of property, that

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is, 1.9522% in 2003 rather than the 4.1722% claimed by the City. It also maintained that it was entitled to effect compensation between its PILTs and amounts the City of Montréal owed it for overpayments. The City disagreed with those decisions and challenged them by applying to the Federal Court for judicial review under ss. 18 and 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7. It argued that the respondents' decisions were unlawful and unreasonable.

III. Judicial History

A. Federal Court

5 Martineau J. allowed the appellant's applications for judicial review and quashed the respondents' decisions concerning the calculation of their PILTs (Montréal (Ville) c. Société Radio-Canada, 2007 FC 700, 315 F.T.R. 226 (Eng.) (F.C.), and Montréal (Ville) c. Administration portuaire de Montréal, 2007 FC 701, 61 R.P.R. (4th) 168 (F.C.)). He did rule in the MPA's favour on excluding the piers from the basis for calculating its PILTs, but not on excluding the silos.

6 Martineau J. applied the case law on judicial review as it stood prior to New Brunswick (Board of Management) v. Dunsmuir and Khosa v. Canada (Minister of Citizenship & Immigration) (2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.); 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.)). In his opinion, the relevant standard of review was correctness. Applying that standard, he found that the respondents' decisions were arbitrary and capricious and had even been made without jurisdiction. He noted that the increase in the property tax rate did not change the nature of the tax. The discretion given to Crown corporations to set the appropriate rate when calculating PILTs did not authorize them to disregard the tax rate generally applicable to owners of non-residential immovables in the municipality. In the MPA's case, Martineau J. also found that the silos were not exempt federal property and that they had to be considered in calculating its PILTs, but he excluded the piers from this calculation.

7 Martineau J. referred the matters back to the respondents to have them set their PILTs for 2003 and 2004 on the basis of effective rates corresponding to the tax rates applicable to their property as classified. He added that the MPA and the CBC could not deduct the equivalent of the business tax abolished by the City of Montréal in making their calculations. The respondents appealed that judgment to the Federal Court of Appeal.

B. Federal Court of Appeal (Létourneau, Noël and Trudel JJ.A.)

8 Létourneau J.A., writing for a unanimous Court of Appeal, intervened, setting aside the Federal Court's decisions and dismissing the City's applications for judicial review (2008 FCA 278, 389 N.R. 305 (F.C.A.)). He applied the standard of correctness to determine whether the respondents had an administrative discretion in setting the amounts of their PILTs. He found that they did have such a discretion and that they had exercised it reasonably. In his opinion, the impugned decisions were consistent with the purpose and the general scheme of the PILT Act and with Parliament's intent. However, he corrected the tax rate used by the CBC, which was actually the rate for residential immovables consisting of fewer than six dwellings. He held that the use of that rate was unjustified and that the CBC's PILTs had to be calculated in the same manner as the MPA's. He ruled in the MPA's favour with regard to the silos and held that they were not to be included in the calculation of its PILTs.

IV. Analysis

A. Issues

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9 In these appeals, the appellant asks that the decisions of Martineau J. be restored. The CBC, in its cross-appeal, asks this Court to vary in part the judgment of the Federal Court of Appeal by authorizing the CBC to return to its original basis for calculating its PILTs, that is, using the tax rate for residential immovables consisting of fewer than six dwellings, which was the residual rate provided for in the City of Montréal's by-laws.

10 The appellant makes various arguments in support of its appeals. In particular, it submits that the regulations made under the *PILT Act* include an unlawful delegation of the regulatory powers conferred on the Governor in Council. There is no need to consider this argument, since the validity of the regulations has not been challenged and since the instant cases can be decided without considering it. The CBC submits that it may effect compensation between its PILTs and overpayments allegedly collected by the City. As will be seen, there is no need to consider this issue in the context of these appeals. I will limit my analysis to the issues that actually have a bearing on the outcome of these cases.

11 To begin with, the nature of the proceedings brought by the appellant must be borne in mind. As they are applications for judicial review, I must identify the standard of review to be applied in reviewing the impugned decisions to determine whether they are valid. For that purpose, I will consider the system for setting PILTs, the legal nature of PILTs, and the powers conferred on Crown corporations and administrators of federal property for determining what amounts should be paid. I will also summarize the development of municipal taxation in Quebec and discuss the reform by the City of Montréal of the taxation system applicable within its territory. However, this analysis must be prefaced by a brief review of the constitutional principles relating to the immunity from taxation of the federal and provincial governments in Canada.

B. Immunity of Government Property from Taxation

12 One basic principle must be borne in mind throughout this analysis. Section 125 of the *Constitution Act, 1867* provides that property of the Government of Canada or a 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. The proper functioning of the federal system requires that each level of government respect the other's immunity from taxation (*Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134 (S.C.C.), at paras. 4 and 17).

C. System of Payments in Lieu of Taxes

13 Despite the importance of this principle, however, the federal government was of course aware that its property forms part of the territorial fabric of the provinces and municipalities. As owners of real property, the federal government and its agents receive a range of municipal services that go well beyond the mere supply of goods like water or electricity.

14 For this reason, the federal government created a system to compensate Canadian municipalities. In short, it wanted its administrators and agents to act as good residents of the municipalities where federal property is located.

15 To ensure that this was done, the federal government gradually established a system of payments to be made in lieu of the taxes Canadian municipalities generally collect from their ratepayers. Under this system, municipalities cannot sue the federal Crown or its agents to collect municipal taxes or PILTs. However, they can contest decisions by the federal Crown or its agents regarding the amounts to be paid by bringing the appropriate proceeding in the proper forum, that is, by applying to the Federal Court for judicial review. The appeals now

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before this Court originated in such a proceeding, not in an action to recover taxes. Thus, the issue is whether the rules governing PILTs have been interpreted and applied in such a way as to create a basis for an application for judicial review. I will therefore turn now to the statutory and regulatory scheme that structures the system of payments in lieu in issue here.

16 The development of the current system began in 1950. Regulations concerning municipal grants established an initial legal framework for voluntary payments by the federal government to municipalities (The Municipal Grants Regulations, SOR/50-54). Those regulations were made under the 1949 appropriation Act (The Appropriation Act, No. 7, 1949, S.C. 1949, c. 42). In 1951, Parliament passed legislation that included the provisions of the Municipal Grants Regulations of 1950 (The Municipal Grants Act, S.C. 1950-51, c. 54). Under this Act, the Minister of Finance of Canada was responsible for determining the "accepted" value of federal property and the amount of the grants to be paid (ss. 2 and 4). In 1957, the 1951 Act was amended to introduce methods for calculating the grants that would subsequently be included in the statute and regulations in force today. The amendments introduced, in particular, the concept of the "effective rate" of tax, which the Minister was to use in calculating the grants to be paid in lieu of taxes (An Act to amend the Municipal Grants Act, S.C. 1956-57, c. 10). Moreover, that the Minister would have a discretion in fixing the effective rate was recognized in the very definition of the term: "effective rate" was defined in the Act as "... the rate of tax that, in the opinion of the Minister, would be applicable to any federal property in a municipality if that property were taxable property" (s. 1).

17 In 1967, a federal Cabinet directive asked Crown corporations to pay municipal grants on a basis consistent with the principles established in the Municipal Grants Act (Record of Cabinet Decision, March 21, 1967, A.R. No. 32881, vol. 5, at p. 94). In the directive, it was acknowledged that Crown corporations should retain some discretion in calculating their payments.

18 The legal framework for payments in lieu has since been amended several times. The statute applicable to the instant cases was enacted and the applicable regulations made in the early 2000s. I will discuss them now.

D. Legal Framework for Payments Made in Lieu of Municipal Taxes

19 There are two aspects to the statutory and regulatory scheme established by the Government of Canada for payments in lieu. On the one hand, the PILT Act, as amended by the Act to amend the Municipal Grants Act, S.C. 2000, c. 8, applies to payments in respect of "departmental" property owned directly by the federal Crown and to the calculation of those payments. On the other hand, the same Act provides that regulations may be made respecting payments in lieu by Crown corporations and agents of the Crown. Such regulations have been made, and they apply in the instant cases (Crown Corporation Payments Regulations, SOR/81-1030 ("Regulations"), as amended by SOR/2001-494).

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

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in lieu is concerned. For the purpose of establishing those amounts, the PILT Act must define the relationship between the system for setting payments in lieu, on the one hand, and the provincial and municipal tax systems, which can vary from place to place in Canada, on the other.

21 The PILT Act establishes a system for compensation to be paid in lieu of municipal taxes, but those payments do not constitute debts to the provinces or municipalities. The system remains voluntary in the sense that it does not limit the Crown's immunity from taxation. The PILT Act applies to property of the Crown and of Crown corporations (s. 2). It confirms the principle that amounts are to be paid in lieu of real property taxes, frontage or area taxes, and business occupancy taxes. The term "real property tax" is defined as follows in s. 2 of the PILT Act:

> 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 ...

22 The reference point used in the PILT Act is the real property tax established by a "taxing authority", which is defined in s. 2 as "(a) any municipality, province, municipal or provincial board, commission, corporation or other authority that levies and collects a real property tax ... pursuant to an Act of the legislature of a province". According to the PILT Act, a payment in lieu corresponds to the product of the effective rate applicable to the federal property in the taxation year and the property value of the property (s. 4(1)). The two concepts applicable to that calculation — the effective rate and the property value — are defined in the PILT Act. Section 2 provides that "property value" means a value that, "in the opinion of the Minister, would be attributable by an assessment authority to federal property ... as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property". The PILT Act thus confers on the Minister a discretion to be exercised in determining the property value that will apply in calculating payments in lieu. The existence of this discretion is also clear from the definition of the second factor, the "effective rate": "the rate of real property tax ... that, in the opinion of the Minister, would be applicable to any federal property if that property were taxable property." Moreover, s. 2(3) excludes a long and varied list of federal properties from the basis for computing the payment amounts. In particular, item 10 of Schedule II to the PILT Act excludes reservoirs and certain other facilities. The MPA argues that the silos at the port of Montréal can be considered reservoirs for the purposes of that provision. The Minister is authorized to make payments that are consistent with this legal framework (s. 3(1)). The PILT Act establishes an advisory panel that is responsible for advising the Minister on the settlement of any dispute with a taxing authority over the property value or effective rate of tax applicable to any property (s. 11.1). Such disputes are not within the jurisdiction of the judicial or administrative authorities that would be responsible for settling them under the relevant provincial law.

23 The PILT Act provides that regulations may be made respecting payments made by Crown corporations in lieu of real property taxes and business occupancy taxes (s. 9(1)(f) and (g)). Finally, Schedules III and IV to the PILT Act list the federal Crown corporations and agents of the federal Crown to which the Regulations apply. The CBC and the MPA appear in Schedule III. Only the corporations listed in Schedule IV make payments in lieu of business occupancy taxes.

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24 The *Regulations* (as amended by SOR/2001-494) adapt the provisions of the *PILT Act* to the situation of the Crown corporation. The *Regulations* provide that the corporations included in Schedule III of the *PILT Act* must make payments in lieu of real property taxes (ss. 5 and 6) and that the ones included in Schedule IV must make payments in lieu of business occupancy taxes (ss. 14 and 15). 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 (s. 7(1)). The *Regulations* provide that the effective rate or property value is the rate or value that the corporation would consider applicable or attributable to its property if that property were taxable property in the municipality (s. 2). By virtue of s. 12.1 of the *Regulations*, the procedure for referring a dispute about the tax rate or property value applicable to a property to the advisory panel created under s. 11.1 of the *PILT Act* also applies to Crown corporations.

E. Development of the City of Montréal's Tax System

25 It is common ground that, prior to 2003, the CBC and the MPA — two corporations included in Schedule III to the *PILT Act*, but not in Schedule IV — made payments in lieu in respect only of the City's property taxes. In 2003, as I mentioned above, major changes were made to Montréal's municipal taxation structure.

26 Before 2003, as I have noted, the City imposed property taxes and a business occupancy tax. However, the new City as of that time included several municipalities that had not previously imposed a business occupancy tax. In fact, that tax was collected in only 10 of the City's 28 sectors. Where the tax was in effect, it was imposed on occupants of non-residential immovables who engaged in commercial or professional activities. Moreover, the property tax itself had certain distinctive features. The City first imposed a general property tax on all taxable immovables and then added a surtax on non-residential immovables.

27 In light of these disparities, the City concluded that it had to thoroughly review its taxation structure to harmonize the differing tax systems within its territory and improve efficiency. In 2000, the Quebec National Assembly had changed the legislative framework for municipal taxation by enacting legislation that authorized municipalities to adopt between two and five different property tax rates based on the categories to which immovables belonged (*Act respecting municipal taxation*, R.S.Q., c. F-2.1, s. 244.29 (added by S.Q. 2000, c. 54, s. 82)). The amendments did not change the legal nature of the tax, which remained a property tax on immovables located within municipalities. However, Quebec municipalities could from that time on adjust the tax rate by applying different rates to the various categories of immovables established by the legislation: non-residential immovables, immovables consisting of six or more dwellings, serviced vacant land, industrial immovables, and immovables that were unclassified and therefore part of the "residual" category (s. 244.30).

28 The City exercised those regulatory powers. For 2003 and the following fiscal years, it abolished its business occupancy tax and changed its property tax structure. It established a variable-rate property tax that would enable it, *inter alia*, to recover the income it would lose after abolishing the business occupancy tax.

F. Position of the CBC and the MPA

29 The respondents refused to take account of these reforms in calculating their PILTs. They submit that their effective rate has to be reduced by an amount equivalent to the portion of the property tax increase that corresponds to the amount of the former business occupancy tax. In their opinion, they were reasonable in exercising the discretionary decision-making power they have under the *PILT Act* and the *Regulations* where the calculation of their PILTs is concerned. The City disputes this position and submits that the PILTs were not calculated in accordance with the relevant statutory and regulatory provisions. This dispute is at the heart of these

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cases. To resolve it, I will begin by considering the legal nature of the respondents' decisions and the standard of review applicable to them in the context of an application for judicial review under ss. 18 and 18.1 of the *Federal Courts Act*.

G. Legal Nature of the Respondents' Decisions and Applicable Standard of Review

30 In this Court, the parties engaged in a lively discussion about the nature of the respondents' decisions regarding the determination of their effective rates of tax. The respondents' discretion was central to that discussion. The appellant argued that the discretion invoked by the two corporations is limited in scope, whereas the corporations argued that it is broad in scope and gives them great latitude in calculating their PILTs.

31 The respondents made their decisions pursuant to the *Regulations*. The administrative act they are required to perform involves determining what tax rate they will use in calculating their PILTs. As we have seen, that calculation depends on two factors: the effective rate and the property value of the corporations' property. The property value of the respondents' property is not in issue in either case. The respondents are not challenging the values established by the taxing authority, the City of Montréal. Aside from to the specific issue of the silos in the MPA's case, the only point in issue relates to the tax rate to be used in calculating the respondents' PILTs.

32 As in the *PILT Act* itself, the *Regulations* clearly reserve a decision-making power for Crown corporations. The definition of "effective rate" quoted above refers to the rate that a corporation would consider applicable to an immovable taxed in the municipality if it belonged to a private owner. This provision thus confirms that Crown corporations have the power to choose the relevant tax rate for each of their properties. In the language of Canadian administrative law, such a decision is considered discretionary (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 52; P. Issalys and D. Lemieux, *L'action gouvernementale — Précis de droit des institutions administratives* (3rd ed. 2009), at p. 63; G. Régimbald, *Canadian Administrative Law* (2008), at pp. 175-76).

33 However, in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework. Discretionary acts fall within a normative hierarchy. In the instant cases, an administrative authority applies regulations that have been made under an enabling statute. The statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.

34 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, as I have already mentioned, the *PILT Act* upholds the principle that the federal Crown is immune from taxation. The confirmation that the Crown has a decision-making power in respect of departmental property and that Crown corporations have such a power in respect of the property they manage gives effect to this principle. 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.

35 There are also practical reasons why managers of Crown property must retain a decision-making power where the assessment of that property and the tax rates applicable to it are concerned. First, disagreements with taxing authorities about property assessments can occur. As we know, federal properties are very diverse, and can even be quite distinctive, if not unique or almost unique in Canada. The assessment exercise can accordingly

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give rise to significant technical problems related to the application of the principles of property assessment and can sometimes lead to inevitable, although legitimate, disagreements with municipalities. Second, choosing the effective rate of tax may be difficult at times, particularly where the choice depends on how the property is classified and the provincial legislation provides for the possibility of applying different rates depending on the nature of the property involved. Finally, managers of federal property must retain some latitude so that they can react to protect federal government interests should municipalities use their taxing powers in bad faith to specifically target federal Crown property. The creation of the advisory panel provided for in the PILT Act to resolve this type of dispute confirms that such problems are plausible and that Parliament's intent was to safeguard the principle that the federal Crown is immune from taxation.

36 The conclusion that such a decision-making power exists resolves the question of the appropriate standard of review. In the instant cases, the appropriate standard is reasonableness, which is particularly suited to reviewing the exercise of a statutory discretion. Where such a discretion exists, exercising it can lead to the adoption of varying opinions and solutions depending on the application of the relevant legal principles to the facts of the case, and on reviewing a decision of this nature, the court must show deference to the administrative decision-maker (Khosa, at paras. 59-60, per Binnie J.).

37 The decisions challenged by the appellant relate to the management of federal Crown property. They involve acts of administration in respect of which the courts should, as a general rule, remain deferential. I readily acknowledge that it is not the role of judges to manage Crown property. In light of this principle, let us now return to the circumstances in which the discretion was exercised and how it was exercised in order to determine whether the respondents' decisions were reasonable or reviewable by the Federal Court.

38 The concept of "reasonableness" relates primarily to the transparency and intelligibility of the reasons given for a decision. But it also encompasses a quality requirement that applies to those reasons and to the outcome of the decision-making process (Dunsmuir, at para. 47); see also, for example, C.U.P.E., Local 882 v. Art Hauser Centre Board Inc., 2008 SKCA 121, 311 Sask. R. 272 (Sask. C.A.), at para. 33, per Jackson J.A.; Casino Nova Scotia/Casino Nouvelle Ecosse v. Nova Scotia (Labour Relations Board), 2009 NSCA 4, 273 N.S.R. (2d) 370 (N.S. C.A.), at para. 30, per Fichaud J.A.

39 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. And they reiterated those explanations in argument before this Court. In substance, they submit that they have a broad discretion under the PILT Act and the Regulations. They did not calculate their PILTs in the manner requested by the City for 2003 or subsequent years. They note that since they are not included in Schedule IV of the PILT Act, they never made PILTs in respect of the business occupancy tax. In their opinion, one result of the reform of Montréal's municipal taxation system was to have them make PILTs that actually included amounts in lieu of the business occupancy tax. In this situation, the corporations, in fixing the tax rates they considered appropriate, could, and even had to, deduct from their PILTs amounts equivalent to the portion of the property tax increase that resulted from the abolition of the business tax. As well, the MPA considered the silos at the port of Montréal to be reservoirs that were excluded from the basis for calculating its payments in lieu.

40 However, there is a fundamental flaw in this interpretation and application of the PILT Act and the Regulations. As I have indicated, the two corporations certainly have a discretion. It is clear from the definition of "effective rate" that Crown corporations have to decide on the appropriate tax rate. However, they cannot base their calculations on a fictitious tax system they themselves have created arbitrarily. On the contrary, those calcula-

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tions must be based on the tax system that actually exists at the place where the property in question is located. The PILT Act and the Regulations require that the tax rate be calculated as if the federal property were taxable property belonging to a private owner. In s. 2 of the Regulations and the corresponding provision of the PILT Act, it is assumed that the corporations begin by identifying the tax system that applies to taxable property in the municipality in order to establish the property value and effective rate of tax. They cannot do so on the basis of a system that no longer exists.

41 In these appeals, the relevant tax system is well established. The business occupancy tax had been abolished in 2003. Under Quebec municipal legislation, municipalities had the power to impose variable-rate property taxes. The City exercised that power. The respondents therefore had to calculate their effective rates having regard to the fact that the business occupancy tax no longer existed. They could not reintroduce that tax in their calculations for an indefinite period of time or indirectly force the municipality to maintain a tax system it had changed as it was authorized to do under provincial law. Indeed, the respondents' position would in practice mean that they would, in establishing the amounts of their PILTs, be entitled — not only now, but also 10 or 20 years from now — to make increasingly complex and illusory theoretical calculations based on taxes that had long since disappeared.

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

43 This intention to deal with municipalities fairly and equitably can be seen in the statement of the PILT Act's purpose set out in the Act itself. Section 2.1 reads as follows:

> The purpose of this Act is to provide for the fair and equitable administration of payments in lieu of taxes.

Although the Act confirms both the principle that federal property is immune from taxation and the voluntary nature of payments in lieu, the intention was that the calculation of such payments would be consistent with the objective of equity and fairness in dealing with Canadian municipalities.

44 This interpretation is confirmed by the history of the creation of the current system of payments in lieu. In 1995, a joint technical committee made up of representatives of the Federation of Canadian Municipalities, the Treasury Board Secretariat and the Department of Public Works and Government Services Canada considered the question of municipal grants or payments in lieu of taxes. Its report recommended that the calculation of such payments be brought into line with current principles of property taxation:

> As required by the Municipal Grants Act, the values and rates used to calculate the payments should be those which would apply to federal properties if they were taxable, and should be determined in the context of the assessment and taxation legislation, policies and practices current in the province or territory in question ...
>
> (Report of the Joint Technical Committee on Payments in Lieu of Taxes, December 28, 1995, at p. 5)

45 A Parliamentary paper tabled by the Minister of Public Works and Government Services before the adoption of the current statutory and regulatory scheme expressed the same intention as regards the method for calculating PILTs:

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> The determination of a grant by multiplying the "effective rate" by the "property value" ensures that federal payments in lieu of taxes are comparable in amount to the local taxes paid by other property owners within the municipality.
>
> (*Draft Discussion Paper, 1998 Consultation on the Government of Canada's Municipal Grants Program and Related Legislation* (1998), at p. 5)

46 Thus, the purpose of the *PILT Act* is to establish a system of payments in lieu that reflects the actual tax situation in the places where federal property is located. The evidence shows that the Department of Public Works and Government Services calculated its PILTs for "departmental" property in Montréal as proposed by the City, as it did not reduce the amounts to take the abolition of the business occupancy tax into account.

47 The respondents' decisions were consistent neither with the principles governing the application of the *PILT Act* and the *Regulations* nor with Parliament's intention. The way they exercised their discretion led to an unreasonable outcome that justified the exercise of the Federal Court's power of judicial review.

48 The same conclusion applies with respect to the MPA's silos. Although silos are containers, they cannot be considered to be reservoirs. They are structures used to store dry plant products, not liquids. Parliament did not see fit to exclude them from the basis for calculating PILTs. The MPA's interpretation is not consistent with the words of the statute, with Parliament's intention or with any of the ordinary meanings of the words used in Schedule II to the *PILT Act*. It must therefore be concluded that the MPA's interpretation is unreasonable.

49 Moreover, I do not consider it necessary to comment on the CBC's cross-appeal. My conclusion that the CBC's decision was unreasonable suffices to dispose of its cross-appeal. The solution the CBC advocates — which, moreover, was rejected by the Federal Court of Appeal — is supported neither by the *Regulations* nor by the tax by-laws of the City of Montréal.

V. Conclusion

50 For these reasons, I would allow the appellant's appeals, with costs in the appeal concerning the CBC and without costs in the appeal concerning the MPA. I would restore all the conclusions of the judgments rendered by Martineau J. of the Federal Court, but in respect only of the 2004 taxation year in the case of the MPA. I would refer the matters back to the respondents to recalculate the payments they make in lieu of real property taxes. I would dismiss the CBC's cross-appeal with costs.

Appeals allowed; cross-appeal dismissed.

Pourvois accueillis et pourvoi incident rejeté.

Appendix

Payments in Lieu of Taxes Act, **R.S.C. 1985, c. M-13**

> **2.** (1) In this Act,

. . . . .

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"assessed value" means the value established for any real property or immovable by an assessment authority for the purpose of computing a real property tax;

"assessment authority" means an authority that has power by or under an Act of Parliament or the legislature of a province to establish the assessed dimension or assessed value of real property or immovables;

. . . . .

"effective rate" means the rate of real 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;

. . . . .

"federal property" means, subject to subsection (3),

. . . . .

(b) real property and immovables owned by Her Majesty in right of Canada that are, by virtue of a lease to a corporation included in Schedule III ... under the management, charge and direction of that corporation,

. . . . .

"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;

2.1 The purpose of this Act is to provide for the fair and equitable administration of payments in lieu of taxes.

3. (1) The Minister may, on receipt of an application in a form provided or approved by the Minister, make a payment out of the Consolidated Revenue Fund to a taxing authority applying for it

(a) in lieu of a real property tax for a taxation year, and

(b) in lieu of a frontage or area tax

in respect of federal property situated within the area in which the taxing authority has the power to levy and collect the real property tax or the frontage or area tax.

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

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

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

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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, 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;

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

(a) every corporation included in Schedule III ... shall, if it is exempt from real property tax, comply with any regulations made under paragraph 9(1)(f) respecting any payment that it may make in lieu of a real property tax or a frontage or area tax; and

. . . . .

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

Loi sur les paiements versés en remplacement d'impôts**, L.R.C. 1985, ch. M-13**

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

. . . . .

« autorité évaluatrice » Autorité habilitée en vertu d'une loi fédérale ou provinciale à déterminer les dimensions fiscales ou la valeur fiscale d'un immeuble ou d'un bien réel.

. . . . .

« propriété fédérale » Sous réserve du paragraphe (3):

. . . . .

b) immeuble ou bien réel appartenant à Sa Majesté du chef du Canada et relevant, en vertu d'un bail, d'une personne morale mentionnée aux annexes III [...];

. . . . .

« taux effectif » Le taux de l'impôt 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.

. . . . .

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« 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.

. . . . .

« valeur fiscale » Valeur attribuée à un immeuble ou à un bien réel par une autorité évaluatrice pour le calcul de l'impôt foncier.

2.1 La présente loi a pour objet l'administration juste et équitable des paiements versés en remplacement d'impôts.

3. (1) Le ministre peut, pour toute propriété fédérale située sur le territoire où une autorité taxatrice est habilitée à lever et à percevoir l'un ou l'autre des impôts mentionnés aux alinéas a) et b), et sur réception d'une demande à cet effet établie en la forme qu'il a fixée ou approuvée, verser sur le Trésor un paiement à l'autorité taxatrice:

a) en remplacement de l'impôt foncier pour une année d'imposition donnée;

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

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

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

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

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

. . . . .

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;

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

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

. . . . .

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

Crown Corporation Payments Regulations, **SOR/81-1030**

2. In these 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;

"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.

3. (1) On the coming into force of these Regulations, no corporation included in Schedule III or IV to the Act that is exempt from real property tax or a business occupancy tax shall enter into a special arrangement with a local government, province or other authority to pay an amount in lieu of such a tax that would be less than the amount that it would pay in accordance with these Regulations.

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.

Règlement sur les paiements versés par les sociétés d'état, **DORS/81-1030**

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

. . . . .

« 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.

« 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 [sic], comme base du calcul de l'impôt foncier applicable à sa propriété si celle-ci était une propriété imposable.

3. (1) À l'entrée en vigueur du présent règlement, aucune société mentionnée à l'annexe III [...] de la Loi et exempte de l'impôt foncier ou de la taxe d'occupation commerciale, ne doit prendre aucune disposition spéciale avec une autorité locale, une province ou une autre autorité en vue de verser en remplacement de tels impôts ou taxes un montant qui serait moindre que le montant qu'elle payerait en vertu du présent règlement.

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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.

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