

Federal Court



Cour fédérale

**Date: 20110727**

**Dockets: T-833-10  
T-936-10**

**Citation: 2011 FC 937**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Vancouver, British Columbia, July 27, 2011**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**Docket: T-833-10**

**CITY OF MONTRÉAL**

**Applicant**

**and**

**MONTREAL PORT AUTHORITY**

**Respondent**

**AND BETWEEN:**

**Docket: T-936-10**

**CITY OF MONTRÉAL**

**Applicant**

**and**

**CANADIAN BROADCASTING  
CORPORATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is a review of the validity of the decisions made by the respondents, the Canadian Broadcasting Corporation (CBC) and the Montreal Port Authority (MPA) following the decision of the Supreme Court of Canada, *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, dated April 15, 2010, in which the Supreme Court restored the previous decisions of the Federal Court (2007 FC 700 and 2007 FC 701) and ruled entirely in favour of the applicant, the City of Montréal (the City).

[2] According to the orders the Federal Court made, “[b]efore rendering a new decision, the Tribunal must allow the applicant to adduce any additional evidence and make any additional submissions concerning the exact amount of the payment to be made under section 6 of the CCPR [the *Crown Corporation Payments Regulations*], including the legal authority for and appropriateness of granting any supplements for delayed payments, where applicable” (paragraph 7 of the orders dated July 5, 2007).

[3] After recalculating the payments in lieu of a real property tax they pay the applicant under the *Payments in Lieu of Taxes Act*, RSC 1985, c M-13 (the Act) and its regulations, the respondents paid the full amount of the principal in April and May 2010.

[4] Under the Act and the *Crown Corporation Payments Regulations*, SOR/81-1030, as amended (the CCPR), in the event of unreasonable delay, interest can also be paid in the form of

a late payment supplement (LPS). The sole issue in this case is the respondents' refusal to pay late payment supplements to the applicant.

[5] It should be noted that the impugned decisions were made in the exercise of a discretionary power. The parties accept that the standard of reasonableness applies (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 47). The reasonableness of their refusal to pay interest will therefore turn primarily on the existence of justification, transparency and intelligibility within the decision-making process, but also on whether the decisions fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[6] For the following reasons, the impugned decisions are unreasonable and must therefore be quashed.

[7] On April 29, 2010, two weeks after the Supreme Court of Canada's decision, the MPA paid the balance of the principal, providing explanations for how the payments in lieu of taxes (PILT) for each taxation year were calculated. However, the MPA simply decided to ignore the City's claim for interest or not to pay an LPS, without explanation or justification. Given the absence of contemporary reasons, the Court can therefore not assess whether the decision making process was transparent and intelligible or whether the decision was reasonable. The Court has nonetheless considered the general arguments raised in the written memorandum and oral submissions of counsel for the MPA.

[8] In a letter dated May 27, 2010, the CBC explained its refusal to pay interest on various grounds that must be read in light of the evidence as a whole and the correspondence exchanged at the time. The Court notes that the CBC believed that it was well founded in law, having obtained an independent legal opinion. There were many discussions between counsel about the payment of the balance of the principal following the Federal Court decision (2007 FC 700); however, the parties were unable to reach an agreement on the allocation of the amounts to be paid. The City has always insisted that the amounts paid by the CBC first be allocated to the payment of accrued interest. In contrast, the CBC offered to pay the balance of the principal on condition that the City waive the interest it is claiming in lieu of an LPS. After the Federal Court of Appeal allowed its appeal (2008 FCA 278), the CBC returned to its original position that it did not have to pay any balance on the principal.

[9] The Court must examine the reasonableness of the impugned decisions in light of the statutory and regulatory scheme. On the one hand, the Act applies to the calculation and remittance of payments related to so-called department properties owned directly by the Crown. On the other hand, the same Act provides for the making of regulations concerning payments in lieu of taxes made by Crown corporations, in this case the CCPR, which is applicable in the present case.

[10] The Act is largely based on the principles of the tax system for ordinary taxpayers, while taking into account the constitutional immunity from which the Crown and, by extension, Crown corporations benefit. In legal terms, the making of a PILT to a municipality is voluntary, but in practice, the taxing authority (in this case, the City) expects the government and Crown

corporations to exercise their discretion in a manner that reflects the actual tax situation in the place where the properties in question are located.

[11] First, under the existing regulatory scheme, the PILT must be paid to the taxing authority within 50 days upon receipt of the application for payment. However, when a final determination of the amount of the PILT to be paid cannot be made, an interim payment that corresponds to the estimated total payment to be made will be made to the taxing authority. See section 3 of the *Interim Payments and Recovery of Overpayments Regulations*, SOR/81-226 (IPROR) and section 12 of the CCPR.

[12] Second, interest may be paid to taxing authorities. Thus, the Minister and, as we shall see later, the Crown corporations also have the power to pay an LPS in cases where, in their opinion, the payment to be made to the taxing authority has been “unreasonably” delayed. Subsections 3(1.1) and (1.2) of the Act read as follows:

(1.1) If the Minister is of the opinion that a payment under subsection (1) or part of one has been unreasonably delayed, the Minister may supplement the payment.

(1.2) The supplement shall not exceed the product obtained by multiplying the amount not paid by the rate of interest prescribed for the purpose of section 155.1 of the Financial Administration Act, calculated over the period that, in the opinion of the Minister, the payment has been delayed.

(1.1) S’il est d’avis que le versement de tout ou partie du paiement visé au paragraphe (1) a été indûment retardé, le ministre peut augmenter le montant de celui-ci.

(1.2) L’augmentation ne peut dépasser le produit de la somme non versée par le taux d’intérêt fixé en vertu de l’article 155.1 de la Loi sur la gestion des finances publiques. Elle couvre la période pour laquelle, selon le ministre, il y a eu retard.

[Emphasis added]

[13] The statutory provisions above came into force on January 1, 2000, and are the result of the recommendations of the Joint Technical Committee on payments in lieu of taxes and the feedback from municipal stakeholders. Similarly, regulatory amendments were made by the government in 2001 so that subsections 3(1.1) and 3(1.2) of the Act also applied to Crown corporations in respect of a taxation year starting on or after January 1, 2000. See section 8.1 of the CCPR.

[14] The payment of interest is a compensatory mechanism that is universally recognized by debtors and creditors. It is based on objective factors (rate and duration). It is also very easy to apply and has the advantage of being predictable. In that context, the purpose of and reason for the new provisions, subsections 3(1.1) and (1.2) of the Act, are clear and, first and foremost, benefit the taxing authorities.

[15] Because of property assessment cycles and disputes over rates and values, some municipalities did not always receive payment in full by the due dates, which created an inequitable situation by depriving these municipalities of the portions for which payment was outstanding and, financially speaking, denying them equal footing with other municipalities for whom full payment was not delayed. The solution was therefore to grant late payment supplements. Late payment supplements are calculated objectively according to the interest rate applied on the unpaid amount over the period that it is late. See Public Works and Governments Services Canada (PWGSC), *Late Payment Supplements (LPS) Procedure - PILT*, at paragraph 3 (the PWGSC Policy).

[16] On the other hand, Parliament wanted to leave some flexibility when it came to the payment of interest. However, the Minister's discretion (and, where applicable, that of the Crown corporations) is not absolute, even though subsection 3(1.1) of the Act gives the decision maker some latitude in assessing whether a delay is unreasonable. Moreover, the supplement granted covers only the period for which the payment has been delayed and shall not exceed the maximum payable provided for at subsection 3(1.2) of the Act. In passing, the CBC contrasts the words "indûment" and "unreasonably" in the French and English versions of subsection 3(1.1) of the Act, submitting that the second word has a broader meaning than the first. The dispute is more theoretical than practical, since, ultimately, the issue is whether the refusal to grant LPSs was reasonable or not.

[17] Regarding department properties, the PWGSC Policy establishes a procedure and lists criteria for the application and administration of LPS applications to ensure that they are processed in a fair, equitable and predictable manner. An "unreasonably delay" is defined as a delay in making a PILT, either in part or in full, beyond the payment due date established under the PWGSC Policy for that payment, where the reason for the delay is a result of an action or inaction on the part of the federal government.

[18] In order to simplify the procedure, each type of PILT application form also includes a section on LPSs, in which taxing authorities are asked to indicate (if the amount exceeds \$25) whether they are requesting an LPS. In that regard, when a taxing authority asks the Minister to pay an LPS, it must also attach a copy of the taxation by-law, together with a description of its

practice for charging interest on overdue taxable real property tax accounts. It must also indicate the interest rate, the compounding frequency and the date from which interest on overdue tax accounts starts to accrue. See the PWGSC Policy, at section 5.1.

[19] According to the PWGSC Policy, the starting point for calculating the delay is the later of

- 50 days following the receipt of the complete application, or
- the day interest starts to accrue for that payment date on unpaid taxes of taxable property owners.

[20] Moreover, according to the PWGSC Policy, the LPS will be calculated as the lesser of

- the product obtained by multiplying the federal interest rate by the amount of the payment that has been delayed, for the term over which the delay has occurred; or
- the product obtained by multiplying the taxing authority's interest rate for outstanding balances by the amount of the payment that has been delayed, using the taxing authority's compounding frequency, for the term over which the delay has occurred.

[21] Relying on what PWGSC was doing, the CBC informed all the taxing authorities, in a letter dated November 27, 2002, signed by Tim Neal, Chief, Business Management and Administration, CBC/Radio-Canada Transmission (the CBC Policy), that a new PILT application form would be used from then on and that in the processing of applications for PILT and LPS payments, the terms set out in the CBC Policy would be considered. The letter also stated that the amendments in the Act and the Canadian government's new policies, including the PWGSC Policy, applied to the CBC.



[22] The CBC Policy describes the voluntary nature of PILT payments, but also clearly stipulates that payments will be made before the date prescribed in the application, as long as the taxing authority grants the CBC the same time for payment as it grants to business taxpayers before penalty interest applies. Moreover, if a payment is unreasonably delayed, the CBC will make a supplementary payment (interest) to the taxing authority. This is a type of general insurance that while respecting the principle of tax immunity, allows the taxing authority to forecast spending and to budget, or even to borrow, based on the expected PILT income as if it were dealing with another business taxpayer.

[23] The CBC Policy also states that, in the event of an unreasonable delay, the amount of the supplement paid to the taxing authority is calculated by multiplying the overdue PILT amount by the interest rate to be applied for the period in which the payment was late, as required by section 155.1 of the *Financial Administration Act* (the federal interest rate). Moreover, the Court also understands that if the taxing authority's policy allows more than 50 days to make payment, the CBC wants to take advantage of that time before making an LPS (characterized as a supplemental PILT in the CBC Policy). The same applies when the taxing authority's interest rate is lower than the federal interest rate.

[24] That said, the form used by the CBC since 2003 is for all intents and purposes a true copy of the form used by PWGSC. The CBC form requires the taxing authority to disclose its policy on charging interest on overdue real property tax accounts and to indicate, among other things, the interest rate and the compounding frequency. The CBC Policy also stipulates that

[TRANSLATION] “if a taxing authority does not complete all sections [of the form], does not provide all the information requested and does not append all supporting documents, the application will be returned to be completed and resubmitted, and the Corporation will find itself justified not to pay its PILT in time and consequently not to make the requested supplemental PILT as a penalty” (emphasis added).

[25] The MPA also has a general payment policy, which can be found in a document entitled *Procédure – Gestion et acquittement des paiements versés en remplacement d’impôts fonciers municipaux et scolaires*” (Procedure for Managing and Making Payments in Lieu of Municipal Property and School Taxes) and which was established in 2004 and updated in March 2010 (the MPA Policy). The purpose of the MPA Policy is to [TRANSLATION] “establish guidelines for the management of payments in lieu of municipal property and school taxes” (page 1). The Policy also states that the MPA is responsible for ensuring that PILT payments are made according to the principles described in the Act. The responsibilities of the director of the Real Property Department include [TRANSLATION] “recommending to the Financial Services Department, within fifty (50) days upon receipt of the statement from the taxing authority, the full (100%) payment in lieu of taxes” (page 2) (emphasis added).

[26] The Court agrees that the adoption or disclosure of policies to taxing authorities does not limit the exercise of the administrative discretion that exists under the Act and its regulations. However, subsection 3(1.1) requires the delay to be undue (or unreasonable). Each case must therefore be decided on its merits. The Court can nonetheless consider the policies when it comes to examining the reasonableness of a refusal to make an LPS. The rationale for the policies is to

fill any statutory or regulatory vacuum, by establishing criteria to guide managers in similar cases. The Court's task is to ensure that the administrative decisions were reasonable and foreseeable. It is therefore not a matter of granting absolute discretion.

[27] Indeed, the very concept of “undue” or “unreasonable” delay calls for an assessment of the delay and the reasons why the payment is late. There must be a payment due date before one can speak of a delay. In the context of the present matter, this can only be the 50th day following the receipt of the complete PILT application or the day on which interest starts accruing on real property tax accounts (if the taxing authority gives ordinary taxpayers more than 50 days to pay). The delay becomes undue when, in objective terms, it becomes unreasonable for the taxing authority, who was counting on receiving the PILT on time, has to bear the financial burden of a loss of income, through no fault of its own, when the reason for the delay is an action or an inaction of the part of the Minister or the Crown corporation.

[28] In the present matter, it not disputed that the City sent the CBC PILT applications, together with LPS applications, for each of the impugned taxation years, and that the City provided the CBC with all the forms and documents it required in a timely manner. Even though the MPA does not use a form, the payment and interest applications were submitted by the City in accordance with MPA policies, together with all relevant documents. In both cases, the City conducted itself in the manner of a taxing authority, by regularly sending the respondents summary tables of the amounts claimed and reminders (capital and interest).

[29] For proof of this, and to illustrate, in a letter dated January 28, 2004, to which was appended a detailed claim for 2004, the City informed the MPA that the tax payments had to be made in a single instalment on March 1, or in two equal instalments on March 1 and June 1, 2004, and that a supplemental amount (interest) would be requested for late payments. Moreover, in a letter dated March 2, 2004, the City informed the CBC that the second instalment of the PILT for 2003 was late and did not include the supplemental amount in interest provided for by the Act. In addition, the City relied on the CBC Policy dated November 27, 2002, to claim a supplement in interest (supplemental PILT in the City's letter), given that the second instalment was not paid on June 2, 2003.

[30] It is also clear that the respondents are solely responsible for the delay in making the full PILT payments for each of the impugned years, since they refused to make a final or interim payment including all the amounts claimed by the City in lieu of taxes upon expiry of the standard 50-day payment period. In fact, the MPA and the CBC compelled the City to institute legal proceedings and delayed for several years, until a final judgment of the Supreme Court of Canada, the full payment of the payments in lieu of property taxes.

[31] The respondents' broad ground is not that it was impossible at the time to calculate the total amount of the PILT, but rather that they could legally deduct from the sums claimed by the City the equivalent of the municipal tax increase, which resulted from the City's abolition of the business tax in 2003, and, in the MPA's case, that it could also lawfully exclude from the calculation the value of the silos and piers located in the Port of Montréal (the impugned deductions).

[32] By choosing to act unilaterally and over the City's objections, the respondents opened the door to the possibility of having to pay the City a late payment supplement at a later date.

[33] The MPA did not really attempt to explain its refusal to pay a late LPS in the letter dated April 29, 2010. The foundation for the CBC's decision to refuse to pay an LPS is not objective, but capricious and arbitrary. The reasons in the letter dated May 27, 2010, do not withstand an exhaustive analysis. The refusal is somewhat subjective. The CBC's obtaining a legal opinion is merely it thinking that it had a good case. The City certainly thought the same. Indeed, if the question being asked is in the least complicated, it is easy to obtain contradictory legal opinions. A legal opinion is therefore no more a guarantee of lawfulness than is a favourable judgment that has been appealed. In fact, the respondents' actions were all found to be unlawful in the Supreme Court of Canada's final judgment, which restored all of the Federal Court's findings.

[34] It must be remembered that taxpayers who have challenged a notice of assessment and lost their case before the courts cannot refuse to pay the government interest because they thought they had a good case. If that really were the case, nobody would pay interest. It should be noted that taxpayers must pay the amount due, without the government having to specifically request them to do so. In cases where the amount is contested, taxpayers must pay the amount on an interim basis. If they do not pay the amount, interest accrues. The logic of the tax system is preserved for PILT payments, except that in the event of an unreasonable delay, the taxing authority expects to receive an LPS if it is ultimately successful.

[35] If one accepts the respondents' submissions, it would suffice for a Crown corporation to contest the PILT amount to be paid for the payment period of any balance on the principal to be indefinitely suspended until a final judgment in favour of the taxing authority, which could take years (as in the present instance). A delay would only be unreasonable if the Crown corporation did not pay the overdue balance within a reasonable period following the final judgment. In short, whether or not a supplement is paid would depend on events that are purely external and difficult to foresee, a little like the lottery, roulette or any other game of chance. Naturally, none of this makes any sense and is directly contrary to the general scheme of the Act and its regulations.

[36] This Court having determined that the decisions made by the respondents are unreasonable, the decisions must be quashed and the LPS applications returned to the respondents so that they can be re-examined in accordance with the Act, its regulations, the policies in effect, and the Court's reasons for judgment and directives. In that regard, questions were raised by the parties on how to calculate the supplement, which includes the rate and how to calculate the interest rate, hence the following direction.

[37] The Court notes that the Treasury Board adopted regulations under paragraph 155.1(6) of the *Financial Administration Act* that stipulate that in all cases where an amount is owing to Her Majesty, "interest calculated and compounded monthly at the average bank rate plus 3% is payable on that amount and accrues during the period beginning on the due date and ending on the day before the day on which payment is received by Her Majesty or an agent of Her

Majesty”. (*Interest and Administrative Charges Regulations*, SOR/96-188, subsection 5(1) (IACR)).

[38] The parties here agree on the rate to be used (prime + 3%), but apparently not the formula to be used. The applicant is of the opinion that the interest is compound, while the respondents are of the view that it is simple. The CBC submits in that regard that only the rate referred to at subsection 5(1) of the IACR applies in this instance, not the formula.

[39] In the present case, it suffices to prescribe that the interest for late payment will be calculated in accordance with subsections 3(1.1) and (1.2) of the Act, its regulations and the policies governing the rate for calculating interest for the period in which payment was delayed in similar cases, and, by analogy, with reference to the PWGSC Policy, the respondent’s policy on charging interest on overdue real property tax accounts and subsection 5(1) of the IACR, where applicable and if necessary.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that**

1. The applications for judicial review in dockets T-833-10 and T-936-10 are allowed;
2. The respondents’ decisions to refuse to pay the applicant late payment supplements are quashed and the payment applications are returned to the respondents for redetermination;
3. The payment applications will be re-examined in accordance with the Act, its regulations, the policies in effect, and the Court’s reasons for judgments and directions; and
4. The interest for late payment will be calculated in accordance with subsections 3(1.1) and (1.2) of the Act, its regulations and the policies governing the rate for calculating interest for the period in which payment was delayed in similar cases, and, by analogy, with reference to the PWGSC Policy (*Late Payment Supplements (LPS) Procedure - PILT*), the respondent’s policy on charging interest on overdue real property tax accounts and subsection 5(1) of the *Interest and Administrative Charges Regulations*, SOR/96-188, where applicable and if necessary.

“Luc Martineau”

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Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-833-10

**STYLE OF CAUSE:** CITY OF MONTRÉAL  
v MONTRÉAL PORT AUTHORITY

**DOCKET:** T-936-10

**STYLE OF CAUSE:** CITY OF MONTRÉAL  
v CANADIAN BROADCASTING CORPORATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** May 2 and 3, 2011

**REASONS FOR ORDER BY:** MARTINEAU J.

**DATED:** July 27, 2011

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