

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100721**

**Docket: A-348-09**

**Citation: 2010 FCA 196**

**CORAM: BLAIS C.J.  
EVANS J.A.  
SHARLOW J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN,  
IN RIGHT OF CANADA, as represented  
by the MINISTER OF PUBLIC WORKS  
AND GOVERNMENT SERVICES**

**Appellant**

**and**

**HALIFAX REGIONAL MUNICIPALITY**

**Respondent**

Heard at Halifax, Nova Scotia, on May 25, 2010.

Judgment delivered at Ottawa, Ontario on July 21, 2010.

**REASONS FOR JUDGMENT BY:**

**EVANS J.A.**

**CONCURRED IN BY:**

**BLAIS C.J.**

**REASONS DISSENTING IN PART BY:**

**SHARLOW J.A.**

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

**A. INTRODUCTION**

[1] Lands and property owned by the federal Crown are exempt from provincial and municipal taxation by virtue of section 125 of the *Constitution Act, 1867*. In order to compensate municipalities for the resulting loss of revenue, the *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13 (PILT Act or Act), authorizes the Minister of Public Works and Government Services Canada (Minister) to make payments in lieu of the taxes (PILT) that would have been paid to the municipality if the federal property in question had been taxable.

[2] The amount of PILT for a federal property is a function of two factors: the value of the federal property, and the effective rate of tax applicable to it. A taxing authority, generally a municipality, may make an application for judicial review to the Federal Court on the ground that the Minister's calculation of the amount of PILT is not in accordance with the Act. However, consistent with the constitutional immunity of federal property from tax, the Act does not create a legal right to PILT. Payments under the Act are thus *ex gratia*.

[3] This is an appeal by Her Majesty the Queen in Right of Canada, as represented by the Minister, from a decision of the Federal Court (2009 FC 670). In that decision, Justice Phelan (Applications Judge) granted an application for judicial review by Halifax Regional Municipality (Halifax), the taxing authority, and set aside the Minister's calculation of PILT in respect of the Halifax Citadel, a national historic site of Canada. He concluded that the Minister's decision was unreasonable because the reasons given for it were inadequate.

[4] Subject to a minor modification, the Minister had adopted the assessment of the value of the Citadel contained in the Report of a Dispute Advisory Panel appointed under section 11.1 of the Act when a taxing authority disagrees with the Minister's assessment of the value of federal property for the purpose of the Act.

[5] On the basis of the assessed total value of the Citadel, Halifax requested more than \$15.5 million in PILT for the years 1997-2007. In this period, the Minister paid just over \$2.2 million.

After considering the Panel's Report, the Minister concedes that there was a PILT shortfall in respect of the Citadel in these years, but only of \$324,441.

[6] I agree with the Applications Judge that unreasonableness is the standard of review applicable to the Minister's calculation of PILT in this case. In my respectful view, the Minister's reasons are sufficient to satisfy the requirements of transparency and cogency with respect to the Citadel land, and that the outcome of the valuation process is within the range of options rationally open to the Minister on the facts and the law. However, I agree that the Minister's reasons for the valuation of the structures on the Citadel site in dispute are inadequate, and I would set aside that aspect of his decision. Accordingly, I would allow the Minister's appeal with respect to the valuation of the land.

***B. FACTUAL BACKGROUND***

[7] The essential facts are not in dispute. The Halifax Citadel, Canada's most frequently visited national historic site, sits on a hill overlooking the city and occupies a total of 48.5 acres of land in the city centre. Approximately six acres of the site comprise the nineteenth century military fortification structures -- ramparts, casemates (bomb-proof structures built into the ramparts used originally for storage), a three storey house (the first two storeys of which comprise demi-casemates), and other smaller buildings.

[8] The elevated land sloping down from the ramparts to the roads below is covered with grass and comprises approximately 42 acres, or nearly 90% of all the Citadel land. The historical term for

this part of a fortification is a glacis. Its original purpose was to provide an open field of fire to enable troops in the Citadel to repel attackers. Nowadays, it is also a pleasant place for visitors to the Citadel, and others, to sit and admire the view, picnic, fly kites, and otherwise enjoy this peaceful, green oasis in the urban core of Halifax.

[9] Halifax has for some time complained that PILT in respect of the Citadel were inadequate because the Minister's valuation of it was too low. For example, for the taxation year 2005, the Assessment Services Division of Service Nova Scotia and Municipal Relations, the property assessment authority for the Province, assessed the value of the entire Citadel site at more than \$38 million. On the basis of this valuation, Halifax claimed that it should have received PILT in that year of more than \$1.3 million. The Minister, however, valued the site at only \$5.3 million and made PILT of almost \$191,000. As a result of negotiations, the parties agreed the value of some parts of the Citadel.

[10] Others, however, remain in dispute: the land under the glacis, and the casemates and demi-casemates, together with the land under them. At Halifax's request, the Minister appointed a Dispute Advisory Panel to advise him on the valuation of these components of the Citadel.

[11] The most important difference between the parties concerns the valuation of the approximately forty two acres of land under the glacis, which the Minister has assessed at the nominal amount of \$10. However, he assessed the value of a much smaller area of land (60,542 square feet) under the casemates and demi-casemates in the Citadel at \$1.55 million. On the other

hand, relying on a report by Kathy Barss, a property appraiser employed by the assessment authority, Halifax claims that the total value of the land occupied by the Citadel is \$19 million, a figure close to that at which it had been assessed previously by the provincial assessment authority.

[12] The valuation of the land was for the 2005 taxation year. The valuation “base date” was January 1, 2003, as prescribed by the Director of Assessment under the *Nova Scotia Assessment Act*, R.S.N.S. 1989, chap. 23. The date for the valuation of the casemates and demi-casemates was 1997; they (and the land under them) were excluded by the Minister in 2001 from the calculation of PILT by an amendment (SOR/2001-494, section 23) to Schedule II of the PILT Act.

[13] The parties agree that the highest and best use of the Citadel is as a national historic site since this its present and likely future use. It is maintained and operated by Parks Canada at an annual revenue loss that has ranged from less than \$1.5 million to nearly \$2 million. The Citadel is currently zoned by Halifax as a regional park.

[14] It is improbable, to say the least, that Parliament will revoke the Citadel’s national historic site designation under the *National Historic Sites of Canada Order*, C.R.C. c. 1112, Sched., section 1, and authorize its sale to the highest bidder for whatever development purposes Halifax’s zoning bylaws might allow. The Minister says that, unlike the assessed value on which Halifax relies, his assessment reflects the reality of the restricted use of the land resulting from both the Citadel’s status as a national historic site and existing municipal land use zoning.

[15] Halifax also disputes the Minister's valuation of the casemates and demi-casemates. While they no longer qualify as eligible improvements, and are thus now excluded from an assessment of the value of the Citadel, the parties do not agree on their value in the years 1997-2000 when they constituted eligible improvements to the land for PILT purposes.

[16] The Minister is of the opinion that the value attributed to the casemates and demi-casemates should be reduced by an amount that recognizes not only their physical depreciation, but also the functional obsolescence resulting from their underutilization: many are empty or used only for casual storage. Hence, the Minister has assessed their value at just over \$2.5 million, as opposed to Halifax's figure of just over \$7.3 million.

### ***C. THE ADVISORY PANEL'S REPORT***

[17] This application for judicial review has proceeded on the basis that the Advisory Panel's Report, which was not binding on the Minister, constitutes the reasons of the Minister when he accepted it, with a minor modification, as the basis for his assessment of the value of the Citadel for the purpose of the PILT Act.

[18] The Panel made its recommendations to the Minister on the basis of the parties' submissions, the oral evidence of witnesses, and the documents that they adduced. The principal witness called on behalf of Halifax was Ms Barss. In a lengthy valuation report prepared for the proceeding before the Panel, she explained that land takes its value from the surrounding land and

that she had therefore approached the valuation of the Citadel land by examining the sale price of comparable land in Halifax.

[19] On the basis of a review of other sites in Canada, and local properties with heritage designations, she was of the view that the value of the Citadel land should not be discounted because it is a national historic site. She also testified that her analysis did not recognize that differences in zoning might result in differences in land values. After making size adjustments, she assessed the value of the Citadel land at \$19 million. Her valuation of the land and buildings at the Citadel, a little more than \$39 million, was about one million dollars more than the value attributed to it by the assessment authority for the taxation year 2005. However, Ms Barss' valuation included \$11 million for components of the Citadel that are not eligible for PILT.

[20] She stated that she had valued the Citadel land on the same basis that the assessment authority for Nova Scotia would value it pursuant to subsection 42(1) of the *Assessment Act*. This provides that all property must be assessed at market value, that is, the amount that, in the opinion of an appraiser, a willing buyer would pay for it to a willing seller.

[21] However, in forming that opinion, an appraiser must have regard to the assessment of other properties in the municipality, so as to ensure that taxation falls in a uniform manner on property in the three categories of property for tax purposes, namely, residential, resource, and commercial: subsection 2(1). It was agreed at the hearing that the "uniformity principle" requires that the ratio of assessed value to actual market value for all property in the different categories should be the same.



[22] The Citadel falls within the category of commercial property under the *Assessment Act* because it is neither a residential nor a resource property. In appraising the value of the Citadel, Ms Barss examined the price at which other Halifax land in the commercial category had been sold, even though: the use of that land was not subject to the kinds of restrictions imposed on the use of the Citadel because it is a national historic site; it had different highest and best uses; and was zoned differently.

[23] John Sparling, a quantity surveyor and certified building inspector employed by the assessment authority, testified on the valuation of the casemates and demi-casemates. His assessment of their value did not allow for any functional obsolescence, on the ground that, if they were underused, this was because they were part of a living museum and their original usage had to be retained.

[24] Charles Hardy, a property appraiser and Executive Vice-President of the Altus Group Limited, prepared a report for the Minister appraising the value of the Citadel. Unlike Ms Barss, he regarded the restrictions on the use of the Citadel inherent in its status as a national historic site and its zoning as fundamental to the appraisal of the value of the Citadel land.

[25] Mr Hardy testified that he was guided in his assessment by the most recent draft of “Best Practices” on the valuation of historic sites, a document that he had written. Public Works and Government Services Canada had also been involved in its development.

[26] This document is clearly controversial. It was still in draft and had not been adopted by the Appraisal Institute of Canada, nor by Canadian municipalities. Indeed, the Federation of Canadian Municipalities withdrew from the project in 2006, and Ms Barss stated that the approach outlined in “Best Practices” was not accepted by either Halifax or the assessment authority. Nonetheless, in my opinion, nothing turns on Mr Hardy’s use of “Best Practices” because he said that it did not affect his application of more traditional valuation methodology, and this evidence was not challenged.

[27] The Panel concluded that a determination of the market value of land must take into account factors that would influence the price that a prudent purchaser would be prepared to pay for it, including restrictions imposed by statute and zoning. Accordingly, it rejected all but one of Ms Barss’ sales as comparable because the highest and best uses of the land were different from the restricted use that can be made of the Citadel land by virtue of its designation as a national historic site and zoning.

[28] However, the Panel treated one parcel of land with a building on it (sale # 8) as comparable, and thus as a basis for arriving at a value for the Citadel land, because it had the same zoning as the Citadel. But the Panel declined to base its valuation of all the Citadel land on the price paid for the land in sale # 8 because of the presence of the glacis, which covers most of the land at the Citadel. The Panel noted that the glacis was essential to a fortification of the period represented by the Citadel. After making Ms Barss’ size adjustments, the Panel used sale # 8 for assessing the value of the 60,542 sq. ft. of the land under the casemates and demi-casemates at \$1.55 million.

[29] In its Report, the Panel recommended that the whole of the Citadel land should be valued at \$1.55 million. However, in a subsequent rectification, the Panel, among other things, added \$10 to the value of the land. Although the Panel did not say so, it must have made this addition to reflect the nominal value that Mr Hardy attributed to the land under the glacis.

[30] As for the valuation of the casemates for the years when they were eligible improvements, the Panel accepted Mr Sparling's cost assessment methodology, but preferred Mr Hardy's evidence on the calculation of their depreciation. Its resulting assessment of their value was \$2,556,200.00.

[31] The Panel thus valued the items in dispute (land, and the casemates and demi-casemates) at \$4,106, 210.00. The Minister's final valuation of the Citadel land and all eligible improvements, including items not in dispute, is \$9,330,583. The equivalent figure in Ms Barss' appraisal is approximately \$28 million, after \$11 million of ineligible improvements are excluded from her appraisal of the entire Citadel at more than \$39 million.

#### ***D. DECISION OF THE FEDERAL COURT***

[32] The Applications Judge applied the reasonableness standard of review to the Minister's valuation and concluded that the supporting reasons fell short in a number of respects. First, the Panel did not explain why a market value approach would distinguish Citadel land with eligible improvements on it from the land under the glacis, which was not an eligible improvement. Second, the Panel rejected sale # 8 as comparable for the purpose of valuing the land under the glacis but, without explanation, used it for valuing land under the eligible improvements. Third, it valued the

land comprising the glacia at \$10, but did not adequately explain why the land under the eligible improvements had a much higher value. These issues are closely related.

[33] Fourth, the Panel did not justify discounting the value of the casemates and demi-casemates for functional obsolescence when, as parts of a national historic site and living museum, they must be maintained as they were when they were built. Further, there was no evidential support for the Panel's assessment of the amount of the discount as 50%.

[34] Accordingly, the Applications Judge quashed the Minister's decision and remitted the matter for a new determination, with a direction that, if the Minister sought the advice of an Advisory Panel, it must be differently constituted.

#### ***E. LEGISLATIVE FRAMEWORK***

[35] The immunity from taxation of federal property is established by section 125 of the *Constitution Act, 1867*.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

125. Nulle terre ou propriété appartenant au Canada ou à aucune province en particulier ne sera sujette à la taxation.

[36] The decision of the Minister under review in this application was made pursuant to the *Payments in Lieu of Taxes Act*, the purpose of which is set out in section 2.1

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

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

[37] When a dispute arises between the Minister and a municipality, the Minister may appoint a Dispute Advisory Panel to advise on its resolution. Subsection 11.1(2) specifies the role played in this process by an advisory panel appointed by the Governor in Council under subsection 11.1(1) when a dispute arises.

11.1 (2) The advisory panel shall give advice to the Minister in the event that a taxing authority disagrees with the property value, property dimension or effective rate applicable to any federal property, or claims that a payment should be supplemented under subsection 3(1.1).

11.1 (2) Le comité a pour mandat de donner des avis au ministre relativement à une propriété fédérale en cas de désaccord avec une autorité taxatrice sur la valeur effective, la dimension effective ou le taux effectif ou sur l'augmentation ou non d'un paiement au titre du paragraphe 3(1.1).

[38] “Property value” is defined in subsection 2(1).

“property value” means the value that, in the opinion of the Minister, would be attributable by an assessment authority to federal property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property;

« valeur effective » Valeur que, selon le ministre, une autorité évaluatrice déterminerait, compte non tenu des droits miniers et des éléments décoratifs ou non fonctionnels, comme base du calcul de l'impôt foncier qui serait applicable à une propriété fédérale si celle-ci était une propriété imposable.

[39] The definition of “federal property” includes national historic sites of Canada.

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

...

(c) any real property or immovable developed and used as a park and situated within an area defined as “urban” by Statistics Canada, as of the

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

[...]

c) les immeubles et les biens réels aménagés en parc et utilisés comme tels dans une zone classée comme « urbaine » par Statistique Canada lors

<p>most recent census of the population of Canada taken by Statistics Canada, other than ... national historic sites of Canada, ...;</p>	<p>de son dernier recensement de la population canadienne, sauf ... les lieux historiques nationaux, ...;</p>
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[40] Subsection 3(1) authorizes the Minister to make payments in lieu of real property taxes to the taxing authorities where federal property is located. However, because of the constitutional exemption of federal property from provincial and municipal taxes, section 15 provides that the Act does not create a legal right to PILT.

<p>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</p> <p>(a) in lieu of a real property tax for a taxation year,</p> <p style="text-align: center;">...</p> <p>15. No right to a payment is conferred by this Act.</p>	<p>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 <i>a</i>) et <i>b</i>), 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 :</p> <p><i>a</i>) en remplacement de l'impôt foncier pour une année d'imposition donnée;</p> <p style="text-align: center;">[...]</p> <p>15. La présente loi ne confère aucun droit à un paiement.</p>
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[41] Since the definition of “property value” in subsection 2(1) refers to the value that an assessment authority would attribute to the federal property if it were taxable, provisions of the *Nova Scotia Assessment Act* are relevant for determining the value of the Citadel. For present purposes, it suffices to set out subsection 42(1).

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

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

## **F. ISSUES AND ANALYSIS**

### **(i) Standards of review**

[42] The question to be decided in this appeal is whether the Minister's valuation of the Citadel land and certain buildings at the site for PILT purposes was authorized by the Act. In *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 (*Montreal Port Authority*), a decision released after the Applications Judge's decision presently under appeal, the Supreme Court of Canada held (at para. 22) that determining the value of a federal property for the purposes of the PILT Act involves the exercise of discretion because "property value" is defined by subsection 2(1) of the Act as

... 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 real property tax that would be applicable to that property if it were taxable. (Emphasis added)

[43] The question in that case was whether two federal Crown corporations to which the PILT Act applied had, for the purpose of calculating the amount of PILT, selected the appropriate effective rate of tax applicable to properties that they owned in Montréal. The Court (at para. 36) applied the standard of reasonableness to the Crown corporations' decision because the effective rate of tax is a matter of their opinion, and thus involves the exercise of discretion.

[44] Since the definition of property value in subsection 2(1) of the Act also involves the opinion of the Minister, the determination of the value of the Citadel is a discretionary decision and is subject to the reasonableness standard of review. Justice Phelan reached the same conclusion in a very recent decision: *Toronto (City) v. Toronto Port Authority*, 2010 FC 687 at paras. 42-45 (*Toronto Port Authority*).

[45] The parties also made submissions on the standard of review applicable on judicial review to the scope of the Minister's statutory discretion to determine the "property value" of federal properties. Halifax says that it is correctness, while the Minister submits that his discretion also extends to this question of statutory interpretation, and that the unreasonableness standard is therefore applicable to his determination of its scope.

[46] The Supreme Court in *Montreal Port Authority* seems to have applied a standard of correctness to the scope of the corporations' discretion. For example, it stated (at para. 33):

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.

There are no indications in the Court's reasons that it gave any deference to the Crown corporations' interpretation of the scope of their statutory discretion.

[47] Despite the absence of any analysis, the Court's opinion is sufficiently clear as to be conclusive in the present case. Hence, the Minister's interpretation of the scope of discretion in the



valuation of federal property for the purposes of the Act must be correct if it is to be upheld on judicial review.

[48] Halifax also submitted that the Minister's discretion in valuing federal property is limited, in that he may only reject an appraisal by an assessment authority if it was unreasonable. I do not agree. The Minister is not reviewing the assessment authority's assessment of the value that it attributed to a federal property. The Minister's function under the PILT Act is to form an opinion with respect to the value that the assessment authority would attribute to federal property if it was taxable. In forming this opinion, the Minister is entitled to make an independent determination of the value of federal property in the light of the statutory scheme and the material before him.

**(ii) Scope of the Minister's discretion to determine "property value"**

[49] The statutory definition of "property value" in subsection 2(1) of the PILT Act limits the Minister's discretion by requiring him to form an opinion on "the value that would be attributable by an assessment authority to federal property" as a basis for computing the amount of property tax that would be applicable if the federal property were taxable.

[50] The reference to "an assessment authority" should be taken as recognition by Parliament that the "fiscal and legal environment ...varies from one province or municipality where federal property is located to another": *Montreal Port Authority* at para. 34. Hence, the relevant assessment authority in any given case is the authority that would assess the value of the particular federal

property if it were taxable. In this case, that was the Assessment Services Division, Service Nova Scotia and Municipal Relations.

[51] This conclusion follows by analogy from *Montreal Port Authority* where, writing for the Court, Justice LeBel stated (at para. 40) that, in determining the “effective rate” of tax, the Crown corporations could not

... base their calculations on a fictitious tax system they themselves have created arbitrarily. On the contrary, those calculations must be based on the tax system that actually exists at the place where the property in question is located. (Emphasis added)

Underlining the basic principle of the PILT Act, he said (at para. 42):

Parliament intended Crown corporations and managers of federal property to make payments in lieu of taxes 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 occupiers.

[52] In addition, the Court held that the scope of the discretion exercisable with respect to the calculation of PILT is limited by the purposes of the Act. Thus, Crown corporations and the managers of federal Crown property must ensure that

... the calculation of such payments would be consistent with the objective of equity and fairness in dealing with Canadian municipalities (at para. 43).

[53] Nonetheless, despite these limitations, the Minister has some discretion to exercise in forming an opinion under the PILT Act on the value that the relevant assessment authority would attribute to the federal property in question were it taxable: *Montreal Port Authority* at para. 22. The following example (at para. 35) is particularly relevant to the present appeal:

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 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.

Justice LeBel also said that the statutory discretion is necessary to enable property managers to

... react to protect federal government interests should municipalities use their taxing powers in bad faith to specifically target federal Crown property.

I hasten to add that no imputation of bad faith on the part of either Halifax or the assessment authority is being made in the present case.

[54] To echo the above observation by Justice LeBel, the Citadel is a unique property, for which there is no market. Assessing its value on the basis of what a notional willing purchaser would pay to a willing vendor for a national historic site is a hypothetical exercise that “raises significant technical problems” which have led to “legitimate disagreements” between the Minister and Halifax.

[55] Although the Nova Scotia *Assessment Act* states that all property vested in Her Majesty is exempt from taxation under the Act (paragraph 5(1)(a)), the definitions of “assessable property” in subparagraphs 2(1)(aa)(i) and (v) are broad enough to include the Citadel land and buildings. Pursuant to section 52 of the *Assessment Act*, the Director of Assessment entered the Citadel’s assessed value on the annual assessment roll as \$38,046,900. However, since this figure included the value of improvements that are not eligible for PILT calculations, Halifax agrees that this figure is not accurate for present purposes. The appraisal of the Citadel that Ms Barss prepared for the

Panel hearing put its value at \$39,606,000. However, this should be reduced to \$28 million because Ms Barss' valuation also included \$11 million of ineligible components.

[56] In these circumstances, in forming an opinion on the value that “would be attributable by an assessment authority to federal property” for computing the tax that would be applicable to it if it were taxable, the Minister is not bound by either an actual assessment made by the authority, or a valuation made for the purpose of the Panel hearing by an appraiser employed by the assessment authority. In my view, the Minister is entitled to reject Halifax's valuation in this case if satisfied that the assessment authority's approach was contrary to generally accepted principles of property valuation.

[57] Halifax argues that the Panel failed to confine itself to determining the value that the Nova Scotia assessment authority would attribute to the Halifax Citadel for property tax purposes if it were taxable. Instead, counsel for Halifax submitted, the Panel asked itself what value should be attributed to the Citadel land in the exercise of the Minister's statutory discretion. I do not agree.

[58] True, the Report does not get off to an auspicious start when the Panel frames the issues (Appeal Book, p. 67) in terms of the value that should be attributed to the federal property in dispute, without mentioning the value that would be attributable to it by the assessment authority for Nova Scotia. However, it is clear from other parts of the Report that the Panel correctly understood the scope of its statutory mandate.

[59] First, the Panel stated (Appeal Book, p. 68) that the Nova Scotia *Assessment Act* is relevant since the Citadel is situated in Nova Scotia, and set out the text of subsection 42(1) (Appeal Book, p. 73). Second, it noted (Appeal Book, p. 77) the existence of the principle of uniformity in subsection 42(1) of the *Assessment Act*, on which Ms Barrs relied, but stated that it was overridden by the statutory restrictions imposed on the use of the Citadel land. Third, the Panel relied (Appeal Book, pp. 77-78) on jurisprudence from Nova Scotia, and elsewhere in Canada, to support the proposition that, for assessment purposes, the value of property on the open market is the test of value, and that valuation must be based on conditions at the date of assessment, not at some undefined time in the future.

[60] In any event, counsel for Halifax stated at the hearing that Nova Scotia law governing the assessment of the value of property for tax purposes is not significantly different from that of other provinces

**(iii) Was the Minister's exercise of discretion unreasonable?**

**(a) Citadel land**

[61] In the present case, the Panel concluded on the basis of the authorities that it cited, as well as the evidence of Mr Hardy, that the assessment authority's approach was fatally flawed because it ignored the restrictions placed on the use of the Citadel by both its status as a national historic site (its highest and best use) and its zoning. The Panel also rejected all but one of the sales of land in Halifax relied on by Ms Barss as comparable, because these commercial properties were zoned

differently, had different highest and best uses, and were not subject to the same use restrictions as the Citadel.

[62] I see nothing unreasonable in these conclusions, which are adequately explained by the Panel: see also *Toronto Port Authority* at paras. 47-49. It is immaterial that the Minister may have accepted for PILT purposes the assessment authority's valuation of other national historic sites. The Minister may choose either to revisit those valuations or to let them stand, if, for example, much smaller amounts are at stake than in the present case.

[63] The Applications Judge was more concerned with the quality of the Minister's reasons respecting the differences in the valuation of the land under the glacis and the much smaller area of land under the casemates and demi-casemates. It will be recalled that the Panel used the sale price of one of Ms Barss' comparables (sale #8) as the basis for valuing the land under the casemates and demi-casemates, but rejected it when valuing the land under the glacis, to which it attributed only a nominal value.

[64] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 48, the Court approved the statement that a reasonableness standard of review requires a court to pay respectful attention to the reasons given by a specialized tribunal and to the reasons "which could be offered in support of a decision". In *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 63, however, the Court warned that these underlined words should not be taken by tribunals as a dilution of the importance of proper reasons.

[65] The Panel's reasons in this case on the differences in the value that they attributed to the land under the glacis and that under the casemates and the demi-casemates are not a model of clarity. Indeed, the Panel's conclusions do not mention the land under the glacis at all. However, in my opinion, the basis of the Panel's decision is sufficiently clear when its Report is read as a whole, together with Mr Hardy's explanation for valuing the land under the casemates and demi-casemates differently from the land under the glacis which, I infer, the Panel accepted.

[66] Mr Hardy's valuation of the land under the casemates and demi-casemates was based on the use being made of it. The buildings on this land were used primarily for offices and storage: Mr Hardy concluded that their predominant use was as offices. Since, consistently with the Citadel's status as a national historic site, a hypothetical purchaser would be able to use them for the same purposes, the land under them had value to a potential purchaser. However, a purchaser's inability to modify the existing buildings because they are part of a national historic site would decrease the value of the land.

[67] The Panel based the valuation of the land under the casemates and demi-casemates on the price paid in sale # 8, which also comprised land with a building on it and was zoned for park and institutional purposes. While the Panel describes this part of the Citadel land as supporting "eligible improvements", the more important consideration is that a purchaser could use the land for office and storage purposes, consistently with the fact that it is part of a national historic site. Indeed, the casemates and demi-casemates had ceased to be eligible improvements for PILT before January 1, 2003, the base date for valuing the Citadel land for the 2005 taxation year.

[68] Unlike the land under the buildings, Mr Hardy treated the land under the glacis as undeveloped land. He approached its valuation by considering its development value, which he concluded was nil. Any development would be inconsistent with the restrictions on the use of the land under the glacis emanating from the fact that it is a part of the fortification, a designated national historic site. In order for visitors to be able to see how the glacis functioned to protect the Citadel from attack, it must be retained in its present condition. On this basis, sale # 8 was not comparable; the land in question already had a building on it and, despite its zoning, had been purchased for development.

[69] Mr Hardy's evidence that the land under the glacis had no development value was not contradicted. Ms Barss' analysis proceeded on the basis that the statutory and zoning restrictions on the use of the Citadel were irrelevant to its valuation, an approach that the Panel rejected.

[70] Accordingly, on reading the Panel's reasons as a whole and the material before it, I have concluded that the basis of the Panel's valuation of the Citadel land is sufficiently clear to enable the parties to know why the Minister decided as he did and the court to perform its judicial review function.

[71] I must now consider whether the outcome (the Minister's valuation of all the Citadel land at \$2,038,833, as opposed to the \$19 million claimed by Halifax) falls outside the range of possible outcomes reasonably open to the Minister in view of the facts before him and the provisions of the PILT Act.



[72] The valuation of land is a technical subject in which the Court has little, if any, expertise. In contrast, subsection 11.1(1) of the PILT Act provides that the Governor in Council shall appoint members to the PILT Dispute Advisory Panel who have “relevant knowledge or experience”. The non-statutory, knowledge prerequisites specify that appointees have knowledge of, among other things, property appraisal, the Canadian property taxation system, and provincial models of assessment and taxation: Appeal Book, p. 61. The statutory context in which the standard of review must be applied in this case also includes the fact that the Act neither confers legal rights on municipalities, nor abrogates their existing rights. Consequently, a reviewing court should be particularly cautious before concluding that, in adopting the Panel’s recommendations on the valuation of the Citadel, the Minister made an unreasonable decision.

[73] The most plausible basis for attacking the reasonableness of the Minister’s valuation of all the land at \$2,038,833 is that he attributed no substantial value to most of the Citadel land, namely that under the glacis. However, I am satisfied that the explanation provided by Mr Hardy, and accepted by the Panel, provides a reasonable explanation of this apparent anomaly. That is, consistently with its highest and best use, the land under the casemates and demi-casemates buildings can be used to support an office building and storage, while the land under the glacis can be used for nothing other than its use as part of the fortification. It is, of course, also a pleasant place to which members of the public have access for recreation. I turn now to the valuation of the casemates.

**(b) casemates and demi-casemates**

[74] The question here is whether it was unreasonable for the Minister to depreciate their value because not all were currently fully used. While the underutilization of a building may be a reason for reducing its valuation, Halifax argues that to do so in this case is unreasonable because the casemates and demi-casemates are part of a living museum, and their utilization must therefore be consistent with the purposes for which they were used in the historical period being represented at the Citadel. Further, Halifax argues, there was no basis in the evidence to support the Panel's choice of 50% as the amount of the reduction.

[75] The Panel's reasons are silent on why it rejected Mr Sparling's opinion that underutilization was irrelevant in view of the casemates' representational function in the Citadel. Nor does the Panel refer to the reasoning of Mr Hardy on this point; indeed the extract from his report in the record seems not to explain why he disagrees with Mr Sparling on the functional obsolescence issue.

[76] On the basis of the record, I am unable to determine whether the Minister's decision on the valuation of the casemates and demi-casemates satisfies the reasonableness standard of review.

[77] Accordingly, I agree with the Applications Judge that the Panel's reasons do not adequately explain the basis of the Minister's valuation of the casemates and demi-casemates. Therefore, like the Applications Judge, I would set aside this aspect of the decision under review, remit it to the Minister for re-determination, and direct that any Dispute Advisory Panel appointed by the Minister to make recommendations on this issue be differently constituted.

**G. CONCLUSIONS**

[78] For these reasons, I would allow the Minister's appeal with respect to the valuation of the land at the Citadel. To that extent I would set aside the Applications Judge's decision and dismiss Halifax's application for judicial review. I would dismiss the Minister's appeal with respect to the valuation of the casemates. I would also set aside the order of costs below and order that the parties bear their own costs below and in this Court.

“John M. Evans”

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J.A.

“I agree  
Pierre Blais C.J.”

**SHARLOW J.A. (Dissenting reasons)**

[79] I have read in draft the reasons of my colleague Justice Evans. I agree with his interpretation of the relevant provisions of the PILT Act. I also agree with his conclusions as to the scope of the Minister's discretion, the appropriate standard of review, and the inadequacy of the Panel's reasons in relation to the Minister's valuation of the casemates and demi-casemates.

[80] In my view, however, the Panel's report does not adequately explain why the land under the glaxis, comprising some 42 acres of land in downtown Halifax, is valued at \$10. Without that explanation, I am unable to conclude that the overall valuation of the land is reasonable.

[81] I would dismiss this appeal with costs, substantially for the reasons given by the Applications Judge.

“K. Sharlow”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-348-09

**STYLE OF CAUSE:** Her Majesty the Queen, in Right of Canada as represented by the Minister of Public Works and Government Services v. Halifax Regional Municipality

**PLACE OF HEARING:** Halifax, Nova Scotia

**DATE OF HEARING:** May 25, 2010

**REASONS FOR JUDGMENT BY:** EVANS J.A.

**CONCURRED IN BY:** BLAIS C.J.

**REASONS DISSENTING IN PART BY:** SHARLOW J.A.

**DATED:** July 21, 2010

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