Federal Court of Appeal  Cour d'appel fédérale

Date: 20120615

Docket: A-360-11

Citation: 2012 FCA 184

CORAM: **BLAIS C.J.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

CANADIAN BROADCASTING CORPORATION

Appellant

and

CITY OF MONTRÉAL

Respondent

Hearing held at Montréal, Quebec, on June 5, 2012.

Judgment delivered at Ottawa, Ontario, on June 15, 2012.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] Did Justice Martineau (judge) of the Federal Court err in setting aside the decision of the appellant, the Canada Broadcasting Corporation, in which it refused to pay the respondent interest for the late payment of the principal owed?

[2] In support of its claim that the judge erred in reaching this conclusion, the appellant relies on the following reasons. First, the judge allegedly erred in his interpretation of the legislative framework applicable in the present matter by giving a simple letter from the appellant a normative value that it does not have and by accepting a directive from Public Works and Government Services Canada (PWGSC) even though it was inadmissible in evidence and unenforceable in law. The appellant submits that, in doing so, the judge unduly restricted the appellant's discretion as to the awarding of interest in cases where payments in principal are unreasonably late.

[3] Second, the judge allegedly erred in characterizing as unreasonable the appellant's decision to refuse to pay interest even though it was fully entitled to do so for each of the periods at issue. To quote the appellant, the judge ignored the reasons given by the appellant to explain its decision.

[4] Third, the judge allegedly erred by failing to consider that the respondent, the City of Montréal, was of the view that the appellant was not entitled to recover the overpayments or to effect compensation between the amounts owed and these overpayments. According to the appellant, since there is no right to compensation, the appellant was justified to delay the payment of the interest it claimed not to be required to pay.

[5] The appellant submits that these three alleged errors are errors in law that led the judge to conclude that the appellant's decision regarding the refusal to pay interest was unreasonable. Had

it not been for these errors, the judge would have dismissed the application for judicial review made by the respondent since he would then have been able to see that the delay in paying the principal was entirely warranted.

[6] For the reasons that follow, I believe that the appeal must be dismissed. But before that, a brief summary of the facts of the issue and an excerpt of the applicable legislation are necessary for a proper understanding of the dispute.

Summary of facts

[7] The appellant is a federal Crown corporation and, in that capacity, is immune from taxation. However, it is subject to the *Payment in Lieu of Taxes Act*, R.S.C. 1985, c. M-13 (Act), and the *Crown Corporation Payments Regulations*, SOR/81-1030 (Regulations). Under the Act and the Regulations, the Crown and its corporations must make payments in lieu of taxes that should normally be paid to the taxing authority of the area in which immovables are located.

[8] Before the respondent changed its taxation system in 2003, the appellant was paying the respondent an amount equivalent to the real property tax determined by the respondent. But it was, however, statutorily exempt from paying the business tax.

[9] Right after it changed its taxation system, the respondent abolished its business tax, but not before incorporating an amount that was proportionate to the business tax. For the appellant,

this meant a substantial increase in the amounts claimed by the respondent without there having been an increase in the number or value of the appellant's immovables in the respondent's territory.

[10] In 2004, the appellant unsuccessfully challenged before the Federal Court the amount claimed by the respondent and corresponding to the former business tax. The dispute was brought before the Federal Court of Appeal, where the appellant succeeded on the principal issue of the business tax. The issue was then brought before the Supreme Court, which, on April 25, 2010, in *Montréal (City) v. Montreal Port Authority*, [2010] 1 S.C.R. 427, set aside the decision of this Court and restored the conclusions of the Federal Court: the appellant's payments in lieu of taxes had to take into consideration the new taxation system established by the respondent.

[11] During the entire time of the dispute until the Supreme Court's final decision, that is, from 2004 to 2010, the appellant paid neither the principal corresponding to the amount of the business tax nor the interest on this principal calculated under the new taxation system.

[12] On May 6, 2010, following the judgment of the Supreme Court, the respondent sent the appellant its statements showing the amounts owed for the 2003 to 2010 fiscal years and for the fiscal years since then. Nothing was owed for 2003: see Appeal Book, Vol. 1, at page 50.

[13] The respondent asked that interest be paid on the principal owed, basing this aspect of the claim on section 8.1 of the Regulations and subsections 3.(1.1) and (1.2) of the Act, which

provide for a circumscribed supplement of the amount owed if a payment or part of one has been unreasonably delayed.

[14] The appellant's reply came quickly. On May 27, 2010, the appellant informed the respondent that it would pay the principal for the periods in question, but not the interest on that principal since the principal payments had not been unreasonably late.

[15] In total, the principal amount estimated by the respondent is $18,586,627.05, while the interest amounts to $4,034,554.14 for the years at issue. These amounts are not contested.

[16] Clearly, underlying this latest saga is an exchange of correspondence between the parties that illustrates some confusion, if not a great deal of confusion, in terms of the parties' respective intentions and perceptions. Generally speaking, confusion, be it voluntary or involuntary, leads to more confusion. The present matter is no exception to this rule. At this stage, however, I do not intend to dwell on laying out this confusion as it would result in duplication. I will therefore discuss the parties' respective allegations illustrating the confusion while analyzing their arguments in support of their submissions.

Relevant legislation

[17] Subsections (1), (1.1) and (1.2) of section 3 of the Act confer discretion on the Minister of PWGSC to make a payment to a taxing authority applying for it in lieu of a real property tax for a taxation year. In addition, the Minister may supplement the amount of this payment if the payment has been unreasonably delayed, up to the maximum payable. These provisions read as follows:

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.	**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.
(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.	(1.1) 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) The supplement shall not exceed the product obtained by multiplying the amount not paid by the rate of interest prescribed for the purpose of	(1.2) L'augmentation ne peut dépasser le produit de la somme non versée par le taux d'intérêt fixé en vertu de

section 155.1 of the *Financial Administration Act*, calculated over the period that, in the opinion of the Minister, the payment has been delayed.	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.]

[18] Section 6, paragraph 12(1)(*a*) and subsection 12(2) of the Regulations state that the payment made by a corporation in lieu of a real property tax is made without any condition and shall be made within 50 days after receipt of an application for the payment, and that, where a corporation is unable to make a final determination of the amount of a payment, the corporation shall make, within those 50 days, an interim payment that corresponds to the estimated total payment to be made. I reproduce the provisions in question below:

6. The payment made by a corporation in lieu of a real property tax or frontage or area tax in respect of any corporation property that would be federal property if it were under the management, charge and direction of a minister of the Crown is made without any condition, in an amount that is not less than the amount referred to in sections 7 to 11.	**6.** Le paiement effectué par une société en remplacement de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie à l'égard d'une propriété qui serait une propriété fédérale si un ministre fédéral en avait la gestion, la charge et la direction n'est assorti d'aucune condition et ne doit pas être inférieur aux sommes visées aux articles 7 et 11.
12. (1) Subject to subsection (2), where a corporation makes a payment in accordance with section 6, it shall be made	**12.** (1) Sous réserve du paragraphe (2), le paiement effectué par une société en application de l'article 6 est versé :
(a) only to the taxing authority for the area in which the corporation property	a) uniquement à l'autorité taxatrice du lieu où la propriété est située;

is situated; and	
. . .	[…]
(2) Where a corporation is unable to make a final determination of the amount of a payment made in accordance with section 6 within the time referred to in paragraph (1)(*b*), the corporation shall make, within that time, an interim payment that corresponds to the estimated total payment to be made.	(2) Lorsqu'une société est incapable de déterminer de façon définitive le montant du paiement à verser aux termes de l'article 6 au cours du délai visé à l'alinéa (1)*b*), elle doit, au cours de ce délai, effectuer un versement provisoire qui correspond au montant estimatif total du paiement.

[Emphasis added.]

Judge's analysis and parties' submissions

[19] I will begin with the interpretation of the legislative framework applicable in the present case. According to the appellant, this interpretation unjustifiably limited its discretion.

Was the judge's interpretation of the statutory and regulatory framework applicable in the present case wrong?

[20] According to the appellant, the judge's error is rooted in the fact that he conferred the normative value of a regulation on a PWGSC administrative policy and a simple letter of the appellant, which, at best, constituted instructions with no imperative value. The judge also turned the appellant's letter, written by Tim Neal, the appellant's head of corporate management and administration, and dated November 27, 2002, into a policy of the appellant. With respect, I do

not believe that the appellant's interpretation of the judge's decision on this point does the judge justice.

[21] First, the judge recognizes that the appellant's impugned decisions are the result of the exercise of a discretion: see paragraph 5 of the reasons for his decision, Appeal Book, Vol. 1, at page 7.

[22] Second, it is clear from paragraph 9 of his reasons that he examined the reasonableness of the impugned decisions in light of the statutory and regulatory scheme: *ibidem*, at page 8. In considering subsections 3(1.1) and (1.2) of the Act, he recognized the dual discretion conferred on the Minister in subsection (1.1) to supplement a payment in lieu of a real property tax if the Minister is of the opinion that the payment to the taxing authority has been unreasonably delayed. This power of the Minister is conferred on the appellant by way of section 8.1 of the Regulations, which makes these powers applicable to the appellant: *ibidem*, at paragraph 12, at page 9. That section reads as follows:

8.1 In respect of a taxation year starting on or after January 1, 2000, subsections 3(1.1) and (1.2) and paragraph 3.1(*b*) of the Act apply to a corporation as if any reference in those provisions to "the Minister" were a reference to "a corporation" and any reference to "federal property" were a reference to "corporation property".	**8.1** Les paragraphes 3(1.1) et (1.2) et l'alinéa 3.1*b*) de la Loi s'appliquent à la société pour toute année d'imposition débutant le 1er janvier 2000 ou après cette date, les mentions du ministre et des propriétés fédérales valant respectivement mention de la société et des propriétés de la société.

[23] At paragraph 17 of the reasons for his decision, the judge refers to PWGSC's 2009 policy that, regarding departmental properties, established a procedure and criteria for the application and administration of applications for the payment of interest on late payments. He points to the policy's definition of unreasonable delay, namely, the fact that this concept refers to a delay in making a payment, either in part or in full, beyond the payment due date established for that payment, where the reason for the delay is a result of an action or inaction on the part of the federal government (emphasis added).

[24] The appellant submits that the excerpt from the PWGSC Procedure emphasized above makes the awarding of interest automatic as soon as there is a delay. [TRANSLATION] "In the face of such a definition," it writes at paragraph 42 of its memorandum of fact and law, "the administration has no choice but to conclude in every instance that the delay is unreasonable. The Procedure eliminates any discretion and is therefore invalid and inapplicable".

[25] Here, too, the appellant misapprehends what the judge did and how the emphasized excerpt should be construed. Quite plainly, the excerpt simply means that the delay must be the debtor's own doing, be it due to an action or inaction on its part. In no way does the excerpt prejudge whether or not the delay is unreasonable. In other words, the issue of whether the debtor's action or inaction was reasonably justified in the circumstances so as to make the resulting delay a delay that was not unreasonable remains entirely open. The Procedure, to paraphrase the appellant, does not remove all discretion. On the contrary, the judge recognized at paragraph 26 of his reasons and reiterated that:

(a) "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";

(b) "subsection 3(1.1) requires the delay to be undue (or unreasonable)"; and

(c) "(e)ach case must therefore be decided on its merits".

[26] I will now deal briefly with the letter from Tim Neal.

The scope of Tim Neal's letter

[27] As already mentioned, Mr. Neal was the head of the appellant's corporate management and administration sector. On November 27, 2002, soon after the Act came into force, Mr. Neal wrote to all taxing authorities that are home to federal properties that include Canada Broadcasting Corporation properties.

[28] The contents of that letter are interesting from more than one perspective. First, Mr. Neal informs the taxing authorities of the new government policies adopted as a consequence of the Act. He indicates that these policies have repercussions for the grants paid in lieu of taxes.

[29] The second paragraph of the letter is more important. In it, Mr. Neal informs the taxing authorities, including the respondent, that the policies developed by the Canadian government apply to the appellant: see Appeal Book, Volume 1, at pages 145 and 146.

[30] Appended to the letter is a copy of each new application form from the appellant on which the taxing authority is asked to make its annual application for payment. The recipients of the letter are invited to contact the Transmission unit of Property Management regarding [TRANSLATION] "any questions about Canada Broadcasting Corporation documentation and the abovementioned method for making PILTs", PILT being the acronym for payments in lieu of taxes.

[31] The adopted government policies included one regarding additional charges for late payments. It came into effect on January 1, 2000, and was the subject of a first amendment on June 1, 2003: respondent's arguments, at Tab 10. In 2009, PWGSC published the *Late Payment Supplements (LPS) Procedure - PILT*, which became effective on July 20, 2009. This procedure reiterates the purpose of the Act and explains the steps to be followed by the taxing authority and the debtor when payments in lieu of taxes are late. It [TRANSLATION] "is based on the fair, equitable and predictable treatment of all stakeholders participating in the Payments in Lieu of Taxes Program and is designed to ensure that all reasonable measures are taken to properly compensate taxing authorities when payments . . . are unreasonably delayed": *ibidem*.

[32] I can understand the respondent's surprise when it learnt that the appellant alleged in its trial memorandum dated January 7, 2011, that there was no late payment supplements policy, that the policy was not a policy but a procedure and that [TRANSLATION] "there was no evidence that the Canada Broadcasting Corporation had been informed of the existence of said document, let alone reviewed it": *ibidem*, at Tab 7 referring to paragraphs 97 to 100 of the Appellant's memorandum.

[33] The appellant's allegation is especially surprising given that, on March 2, 2004, the respondent wrote to Ms. Powers, the Canada Broadcasting Corporation's property administration manager, to remind her of Mr. Neal's letter sent to all taxing authorities following the enactment of the Act: *ibidem*, at Tab 11. In the course of her examination in February 2006, Ms. Powers admitted that she had been trained by Public Works managers [TRANSLATION] "as soon as the Act came into force": *ibidem*, at Tab 13.

[34] Since the respondent had been making its grant applications on the appellant's form since it received Mr. Neal's letter, it is hard to imagine how the appellant was able to forget where these forms came from and Mr. Neal's letter sent to all taxing authorities, especially in light of the reminder of this letter sent to the appellant in 2004 and the courses taken by the appellant's employee who was responsible for property administration.

[35] It is true that the 2009 publication is entitled "Procedure" and not "Policy". But this does not change the fact that, as of 2002, the applicant applied the [TRANSLATION] "*Late Payment*

Supplements Policy". In the circumstances, it is hardly surprising that the respondent reacted with impatience and frustration when the appellant submitted that the 2009 Procedure did not apply or that, if it applied, only as of 2009. In so doing, for 2003 to 2009, that is, for six of the eight years at issue, the appellant repudiated for the first time—as Ms. Powers did not do so in 2004—Mr. Neal's letter and the appellant's and respondent's recognized and enforced application of the [TRANSLATION] "Late Payment Supplements Policy".

[36] Whether or not the 2009 Procedure applies to the appellant, and it is far from established that it does not apply, makes little difference to the legal situation of both parties to the dispute: Through Mr. Neal, the appellant adopted a policy of which it informed the taxing authorities and with which the respondent complied. It is inappropriate now for it to want to dissociate itself from that policy when the Act, the Regulations and the 2009 Procedure, which replaced the 2000 Policy, clearly reveal Parliament's intention for late payments to be supplemented when the delay is unreasonable.

[37] In short, the appellant's submission that the judge gave the administrative policy that existed in 2000 and the 2009 Procedure a normative value has no factual basis in the evidence and no legal basis in the reasons for the judge's decision. As for the appellant's alleged ignorance of the existence of a late payments policy, it only has itself to blame.

Was the appellant's delay unreasonable in the circumstances?

[38] At paragraphs 26 to 36 of his decision, the judge concluded that the appellant's delay in paying the amounts at issue was unreasonable and that the appellant's reasons for this delay were unreasonable, capricious and arbitrary. I reproduce these paragraphs below:

> [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.

[39] As I mentioned at the beginning of my reasons, the appellant criticizes the judge for not ruling on its argument that the respondent denied it the right to recover an overpayment, should there be one, and the right to effect compensation between the overpayments and the amounts

owed. He allegedly ignored the appellant's position and the exchange of correspondence between the parties, which demonstrate the respondent's intransigence on these two issues.

[40] I will begin with the issue of the right to compensation claimed by the appellant. I believe that the appellant is mistaken when it partly bases its refusal to pay the owing principal and the related interest on that right.

[41] Whether or not the appellant legally has the right to effect compensation, I do not believe that this right can apply in the circumstances. For there to be compensation, there must be two persons that are reciprocally debtor and creditor of each other. In the case at bar, the appellant forcefully argues that payments in lieu of taxes and payment supplements are discretionary: it therefore simply does not owe the respondent a debt. If that is the case, it cannot effect compensation for a non-existent debt.

[42] Assuming, however, that the Act and the Regulations, for all intents and purposes, give rise to an obligation on the part of the appellant to pay a grant to the respondent applying for it in lieu of taxes, the appellant is still not a creditor of the respondent such that it can effect any kind of compensation. The appellant's debt to the respondent allegedly arises from the appellant's having to pay the contested portion of the applied for grant, which was not owing in its opinion and which it refused to do. This is how the appellant justifies its refusal to make the payment since, it alleges, the respondent is denying it the right to future compensation for amounts that would thus be overpaid.

[43] It is one thing to legally want to set off two liquid, due and payable debts. It is quite another thing to decide unilaterally as the debtor that an amount is neither due nor payable and, from that moment, to presume that one is right and that one has a right to compensation if the amount were paid and, consequently, to feel entitled not to make the disputed payment.

[44] Imagine the chaos that would ensue and the enormous costs that would be incurred by taxing authorities if every taxpayer could take the law into his or her own hands and compel taxing authorities to institute proceedings, as happened in this case, for a declaration that the amount is due such that the taxpayer's alleged debt has no basis and cannot give rise to compensation. All of this would be done with no risk of the taxpayer having to pay interest since his or her initial decision, albeit erroneous as regards the taxpayer's obligation to pay the disputed amount, would justify the delay in making the payment. Using a different approach and different terms from mine, the judge gave precisely this analysis in paragraphs 26 to 36 of the reasons for his decision, which I cited above. It is incorrect to say, in my opinion, that the judge did not consider the appellant's right to compensation. I agree with the conclusion he reached.

[45] Had the appellant paid the total amount claimed by the respondent and then successfully argued that part of that amount had not been due, thus resulting in an overpayment, it would not have been deprived of a remedy to recover that overpayment.

[46] Since the dispute arose in Quebec, the *Civil Code of Québec* (C.C.Q.) applies: see *Attorney General of Canada and Treasury Board of Canada v. Constance St-Hilaire*, 2001 FCA 63; the *Interpretation Act*, R.S.C., 1985, c. I-21, section 8.1, and the *Federal Law—Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4.

[47] In fact, article 1491 of the C.C.Q. obliges the recipient to restore payments made in error or made despite the person making it claiming that he or she owes nothing:

SECTION II **RECEPTION OF A THING NOT DUE**	SECTION II **DE LA RÉCEPTION DE L'INDU**
Art. 1491. A person who receives a payment made in error, or merely to avoid injury to the person making it while protesting that he owes nothing, is obliged to restore it.	**Art. 1491**. Le paiement fait par erreur, ou simplement pour éviter un préjudice à celui qui le fait en protestant qu'il ne doit rien, oblige celui qui l'a reçu à le restituer.

In *Kingstreet Investments Ltd. v. New Brunswick*, [2007] 1 S.C.R. 3, at paragraph 41, Justice Bastarache wrote that, in Quebec, the Supreme Court recognized that actions for recovery of illegally collected taxes could be brought under both article 1491of the C.C.Q. and articles 1047 and 1048 of the *Civil Code of Lower Canada*. As examples, the Supreme Court referred to certain of its judgments dated 1902, 1983, 1993 and 1994 and to Baudoin and Jobin's work *Les obligations* (6th ed., 2005). Given that this remedy was available, there was nothing to stop the appellant from paying, or that entitled it not to pay, the applied for amounts and thus avoid them bearing interest.

[48] Moreover, the appellant is also not without a remedy under the common law, even though, as acknowledged by the Supreme Court in *Kingstreet Investment Ltd.*, *supra*, the recovery mechanism is simpler in Quebec civil law. The Supreme Court unanimously confirmed that when the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law and breaches the constitutional principles that the Crown may not levy a tax except with authority of the Parliament or the legislature and may not spend public funds except with authority of the Parliament or the legislature.

[49] In taking this position, the Supreme Court intended to simplify the taxpayer's remedy for recovering taxes that were not due. "The right of the party to obtain restitution for taxes paid under *ultra vires* legislation", stated the Court, "does not depend on the behaviour of each party but on the objective consideration of whether the tax was exacted without proper legal authority": *ibidem*, at paragraph 53. It should be noted that the appellant's argument was precisely that the respondent did not have the power to impose a business tax on it under paragraph 236(1)(*a*) of the *Act Respecting Municipal Taxation*, R.S.Q., c. F-2.1.

[50] In order to simplify the taxpayer's remedy for recovering payments made to public authorities, the Supreme Court eliminated the requirements that these be made under protest and compulsion. At paragraph 57, Justice Bastarache wrote:

> I would therefore discard the doctrine of protest and compulsion insofar as it applies to payments made to public authorities, whether pursuant to unconstitutional legislation or as the result of a misapplication of otherwise valid

> legislation. Once the immunity rule is rejected, there is no need to distinguish between cases involving unconstitutional legislation and cases where delegated legislation is merely *ultra vires* in the administrative law sense. In all such cases, the payment of the charge should not be viewed as voluntary in a sense that would prejudice the taxpayer. Rather, the plaintiff is entitled to rely on the presumption of validity of the legislation, and on the representation as to its applicability by the public authority in charge of administering it.
>
> [Emphasis added.]

[51] The Supreme Court also does not rule out claims of unjust enrichment against the government since these may be appropriate in certain circumstances: *ibidem*, at paragraph 34.

[52] In short, the appellant had remedies available to recover an overpayment. And its requirement that the respondent recognize that it was entitled to effect compensation or be reimbursed for the overpayment if it paid the disputed amounts could not justify its refusal to pay and, consequently, its delay, particularly as paragraph 12(1)(*b*) of the Regulations requires that, when it is impossible to make a final determination of the amount to be paid, the appellant shall make an interim payment that corresponds to the estimated total payment to be made (emphasis added).

Exchange of correspondence between the parties regarding the right to compensation

[53] Given the conclusion I have reached on the issue of compensation, it is unnecessary to review the exchange of correspondence between the parties that was filed in evidence. I would say this, however. The appellant's claim regarding a right to compensation or reimbursement of

the overpayment has undoubtedly sown confusion. The appellant, who also manages public funds, characterized the respondent's position on the recovery of the overpayments as equivalent to the sword of Damocles hanging over its head. Also, in 2007, it offered to pay the respondent the impugned principal amount subject to the respondent agreeing to reimburse the appellant if the appellant was successful on the merits of the payability of a business tax.

[54] In addition, the appellant refused to let the respondent first apply the amount it would receive to the payment of the interest since the appellant denied owing any interest: see the affidavit of Lise Powers, Appeal Book, Volume 2, page 410, at paragraphs 8, 9 and 10. The appellant's letter containing the offer was sent to the respondent on October 16, 2007.

[55] On October 30, 2007, the respondent replied to the appellant, stating that it accepted the appellant's offer of payment, but informing it that it would first apply the payment to the interest due and that the balance of the principal would continue to accrue interest until a final payment was made. The respondent added the following:

> [TRANSLATION]
> Note that the City is also obliged to keep the amounts in reserve.

[56] The appellant fount that the respondent's reply did not clearly express the respondent's commitment to reimburse the overpayment in the event that the appellant was successful: affidavit of Lise Powers, Appeal Book, Volume 2, page 410, at paragraph 10. The appellant does

not mention the respondent's note that it would keep the amounts received in reserve and the meaning that has to be attributed to this note.

[57] I note that this exchange of correspondence took place in a legal context where section 6 of the Regulations stipulates that the appellant's payment "is made without any condition", where article 1570 of the C.C.Q. provides that any partial payment "is imputed first to the interest", where article 1491 of the C.C.Q. clearly confers a right of restitution of what is not due, and, lastly, where the respondent could not, for its ends, commit the impugned amounts.

[58] At a meeting between the parties held on November 21, 2007, the appellant offered to pay the respondent the principal only. In a letter dated January 8, 2008, the respondent refused this offer and reiterated the position it had taken in its letter dated October 30, 2007. It therefore again undertook to keep in reserve the amounts that it would be paid.

[59] Far be it from me to criticize anyone, yet I cannot help but feel that the vagueness surrounding the concept of the compensation claimed by the appellant, the respondent's ambiguous position on the reimbursement of the overpayment, the appellant's conditional offer of payment even though payment should be made without condition and the appellant's refusal to make the interim payment required by the Regulations have, I believe, created an atmosphere of mistrust on the part of one party, of frustration on the part of the other, and an unwillingness to understand the other party's position on the part of both.

Conclusion

[60] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

"I agree
Pierre Blais C.J."

"I agree
J.D. Denis Pelletier J.A."

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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