Federal Court of Appeal  Cour d'appel fédérale

Date: 20240506

Docket: A-52-23

Citation: 2024 FCA 89

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY C.J.**
LOCKE J.A.
HECKMAN J.A.

BETWEEN:

MUNICIPALITY OF CHELSEA

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 5, 2024.

Judgment delivered at Ottawa, Ontario, on May 6, 2024.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

CONCURRED IN BY: LOCKE J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] In a judgment delivered on January 23, 2023 (*Chelsea (Municipality) v. Canada (Attorney General)*, 2023 FC 103), the Federal Court dismissed the application for judicial review of a decision rendered by the National Capital Commission (the NCC or the Commission) determining the amounts that it must pay to the Municipality of Chelsea (the Municipality) as payments in lieu of taxes (PILTs) for the federal properties located within the territory of the

Municipality. These amounts represent approximately 50% of the amounts claimed by the Municipality.

[2] This appeal raises important issues as regards the administration of the PILT scheme set out in the *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13 (the PILT Act) and the *Crown Corporation Payments Regulations*, SOR/81-1030 (the Regulations). These issues include the impact of recommendations made by a Payments in Lieu of Taxes Dispute Advisory Panel (the Panel) and the weight that the Crown corporation must give to them. Also at issue is whether the objective constraints resulting from the acquisition of immovable property by a Crown corporation (in this case, the NCC) must be taken into consideration when calculating the property value of those properties.

[3] For the reasons that follow, I am of the opinion that the appeal should be dismissed.

I. BACKGROUND

[4] The facts that gave rise to this dispute are not contested and have been summarized well by the trial judge. I will therefore limit myself to the most important elements in order to ensure proper understanding of the subsequent analysis.

[5] The parcels of land at the heart of this dispute began to be acquired in 1937 and are all located in Gatineau Park (the Park). This park has many purposes, which are driven by the goal to “conserve permanently those special natural features and rare and fragile resources

representative of the Shield for the enjoyment of the public" (1988 Plan for Canada's Capital, Appendix H at 61, Appeal Book at 3634). It is the second-most-visited park in Canada.

[6] Following the filing of the triennial assessment roll for 2018 to 2020, the appellant submitted PILT applications to the NCC for its properties located in the Park based on increases in the value on the roll ranging from 19% to 25%, while the average increase for all immovable property in the Municipality was 3.9%. Given these considerable increases, the PILTs team at the NCC proceeded to review the file, and justifications were then requested from the Municipality. In response, the NCC received a table of so-called [TRANSLATION] "comparable" sales; however, the parcels of land that were the subjects of those sales were much smaller than the large parcels of land at issue, were located in areas where zoning allows for residential development, and, in most cases, were acquired by real estate developers for development purposes. The PILTs team at the NCC therefore considered that those sales were not [TRANSLATION] "comparable" sales.

[7] Several discussions and meetings followed, without an agreement being reached. Given this deadlock, on September 13, 2018, and September 24, 2019, the appellant submitted to the Panel requests for advice with respect to the large parcels of land and the smaller parcels of land located in residential pockets bordering Kingsmere Lake and Meech Lake, within which residential construction is permitted. Those requests were heard in November 2020.

[8] On February 16, 2021, the Panel provided its advice (Advice of the Panel, P-2, Appeal Book at 130–159). As part of that Advice, the Panel found that the grouping of the large parcels

of land and of certain small parcels of land met the requirements of section 34 of the *Act respecting municipal taxation*, CQLR c. F-2.1 (the ARMT), but it did not recommend such a grouping given the impact it would have on the categories of immovables and the effective rate applicable to the properties. As for how to calculate the property value of the immovables, the majority of the Panel adopted the Municipality's approach, which was that the value of the properties must be based on the behaviour of stakeholders in the local real estate market rather than on the highest and best use (HBU) of the federal properties, which is as a natural area dedicated to conservation and recreation. In the Panel's view, the Municipality's approach was more likely to reflect what the NCC would have to pay if it were both purchaser and vendor of these properties under section 44 of the ARMT.

[9] Upon receiving the Advice, the NCC took note of the Panel's recommendations with respect to the location of the comparable sales. However, the NCC disagreed with the Panel's opinion that the HBU and surface area of the parcels of land should not be taken into consideration in determining the property value of the land. The NCC consequently had to carry out additional analyses. It then provided the appellant with the results of its analyses and invited the appellant to respond before a final decision was made. The appellant refused to do so, and the appellant's counsel instead sent a formal notice calling for the NCC to render a decision that was consistent with the Advice in every respect. In response, the NCC indicated that it considered the Advice to be a recommendation and again asked the appellant to comment on its analysis or provide it with any relevant element. The appellant again refused, and the Chief Executive Officer (CEO) of the NCC therefore rendered a decision on November 19, 2021; that is the decision from which the appellant filed an application for judicial review.

[10] In its decision, the NCC recognizes the importance of seriously considering the Panel's recommendations but notes that it is not bound by them to the extent that its role is to make the decision it considers to be consistent with all the facts before it and with the applicable principles. The NCC also reiterates that it must determine the value and rates of the parcels of land in the same way that an assessment authority and taxing authority would if the lands were subject to real property tax. In this respect, the NCC states the following:

> [TRANSLATION]
>
> ... considering Crown properties as though they were taxable does not mean adulterating them, stripping them of their attributes and constraints, and assigning them a use that is hypothetical or that does not reflect reality. It does not mean creating a fiction about these properties, but rather simply determining how an assessment authority would assess them, as they are, if they were taxable. What the PILT scheme compensates for is tax immunity.
>
> Decision of the NCC's CEO, Appeal Book at 101, para. 13.

[11] Relying on the various objective constraints that put conditions on and limit the use of the parcels of land at issue, constraints that stem not only from federal legislation, but also from applicable Quebec legislation in this case, from municipal by-laws and from expert evidence indicating that any residential or commercial development would span over 50 years, the NCC finds that the HBU of the properties under review—namely, the current use of those properties, which is as a natural area dedicated to conservation and recreation—must be considered (Decision of the NCC at paras. 17–26; Appeal Book at 101–106). The NCC also concludes that it is appropriate to group several of the properties under review with the properties adjacent to them since they meet the criteria of section 34 of the ARMT (Decision of the NCC at paras. 27–29; Appeal Book at 106).

[12] The NCC subsequently determines the value of the parcels of land using the comparison approach, which consists of identifying, on the local market, transactions involving similar property to determine the average price. Accepting the Municipality's claims, the Panel had used properties sold for residential development purposes as comparable sales and had not taken their surface area into consideration. The NCC rejects this comparison, which it considers to be based on a fictional usage that is neither permitted nor feasible in the short or medium term. In the NCC's opinion, even a private owner would not accept being taxed on such a value. Consequently, the NCC accepts that the comparable sales are sales that took place within the territory of the Municipality, as recommended by the expert hired by the Municipality, but it specifies that they must be adjusted to take account of the HBU (i.e., as a natural area dedicated to conservation and recreation) and the surface area. On that basis, and after conducting further analyses, the NCC establishes that the parcels of land measuring under 500 hectares should be adjusted 50% based on use, that those between 500 and 1,000 hectares should be adjusted 60% based on use and surface area, and that those between 1,000 and 1,150 hectares should be adjusted 70% based on use and surface area. Applying those adjustments, the NCC assesses the property value of these parcels of land to be $48,309,700 (rather than $106,372,900 according to the Panel's assessment), which translates to the following amounts of PILTs being owed to the Municipality: $358,119.81 for 2018, $370,632.02 for 2019, and $383,240.85 for 2020. These amounts represent a reduction of more than 50% of the amounts recommended by the Panel.

[13] In terms of the small parcels of land located in the Park's residential pockets, the NCC accepts the Advice of the Panel. Even though those parcels are located in sought-after neighbourhoods that have been partially developed and where the Municipality permits residential

construction and provides certain services, and while it is acknowledged that these parcels are part of a natural area where construction must be kept to a minimum, it was justified to establish their value considering municipal zoning, which allows them to be developed for residential purposes (contrary to the large parcels of land in issue).

[14] In a decision rendered on January 23, 2023, the Federal Court dismissed the application for judicial review filed by the Municipality against the NCC's decision. At the end of a detailed judgment, Justice Pamel dismissed the Municipality's claim that the NCC had, through its actions, committed to following the Panel's recommendations in its Advice dated February 16, 2021. He was also of the opinion that the NCC had complied with its duty of procedural fairness. The Federal Court also found that the NCC's decision was reasonable. Firstly, the Court dismissed the Municipality's claims that the NCC has less expertise than the Panel in property assessment, that the proceedings before the Panel are quasi-judicial in nature rather than simply advisory, and that the Panel's advice is binding in nature. Secondly, the Federal Court determined that the Municipality had failed to demonstrate that the decision was contrary to the objective of PILTs and subsection 16(3) of the *National Capital Act*, R.S.C. 1985, c. N-4 (NCA) or that the findings in the decision that deviate from the Panel's recommendations were unreasonable. I will return to these issues as part of my analysis of the issues before this Court.

II. APPLICABLE LEGISLATIVE SCHEME

[15] Under section 125 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, the federal Crown enjoys tax immunity. As an agent of the federal Crown (section 4 of the NCA), the NCC has this immunity. This means that the legal taxation scheme of cities does not apply to its

properties. In the interests of fairness, and in recognition of the services offered by municipalities in support of its properties, as of 1958, the NCC may nevertheless make PILTs to municipalities under section 16 of the NCA. Subsection 16(1) provides that "[t]he Commission may pay grants to a local municipality not exceeding the taxes that might be levied by the municipality in respect of any real property of the Commission if the Commission were not an agent of Her Majesty." As regards Gatineau Park in particular, subsection 16(3) provides that the grants must not exceed the amounts "estimated by the Commission to be sufficient to compensate [the appropriate authorities] for the loss of tax revenue during that tax year in respect of municipal and school taxes by reason of the acquisition of the property by the Commission."

[16] Because it was aware that its properties fit into the fabric of provincial or municipal territory and benefit from a range of services, Parliament also established a general compensation scheme for municipalities through the PILT Act and the Regulations. The purpose of the PILT Act, as set out in section 2.1, is to maintain the Crown's immunity while implementing a fair and equitable compensation mechanism. It also makes it possible to standardize the PILT scheme across the federal system. Under section 15 of the PILT Act, the PILT scheme does not confer any right to payment, nor does it subject the federal Crown to provincial or municipal legislation with respect to taxes or real property tax. As the Supreme Court stated in *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 at paragraph 20 (*Montreal Port Authority*):

> ... Instead, it has, through the *PILT Act*, established a system in which municipalities expect to receive payments but the payments are made within the statutory and regulatory framework that Parliament established without renouncing the principle of immunity from taxation. Thus, the *PILT Act* is designed to reconcile different objectives — tax fairness for municipalities and the preservation of constitutional immunity from taxation — that can be attained only by retaining a structured administrative discretion where the setting of the amounts of payments in lieu is concerned. …

[17] The PILT Act applies to all federal properties owned by His Majesty in right of Canada that are under the administration of a minister of the Crown or a corporation included in Schedule III or IV (section 2). Given that the NCC is included in Schedule III, it is therefore subject to the Regulations notwithstanding any other Act (including its incorporating Act) (see paragraph 11(1)(*a*) of the PILT Act). This means that if there is a conflict between the conditions of section 16 of the NCA and the Regulations in terms of PILTs, the Regulations shall prevail.

[18] Section 6 and subsection 7(1) of the Regulations provide that PILTs shall be not less than the product of the property's "effective rate" and "value". The Regulations define these two expressions as the rate or value that would be applicable if the property were taxable (see section 2 of the Regulations). In other words, the Regulations require the NCC to use the local tax scheme as a frame of reference to determine the value and rate, which excludes the possibility of basing calculations on a fictitious or arbitrary tax system (*Montreal Port Authority* at para. 40). In Quebec, the guiding principles for property assessment are found in the ARMT and its regulations.

[19] When there is a disagreement between a taxing authority and a Crown corporation concerning the way the calculations to determine PILT amounts must be made, the PILT Act provides for the creation of an advisory panel mandated to give advice to the Crown corporation with respect to, among other things, the property value of a federal property, following a consultation process with the parties (PILT Act, section 11.1; the Regulations, section 12.1).

III. ISSUE

[20] In my opinion, the only issue in this appeal is whether the decision rendered by the NCC was reasonable. In terms of how much weight should be given to the Advice of the Panel and to what extent the Panel has greater expertise than the NCC, those are only contextual considerations that are likely to limit the possible acceptable outcomes when applying the reasonableness standard.

IV. ANALYSIS

[21] It is well established that the role of this Court, when it hears an appeal from a decision disposing of an application for judicial review, is essentially to determine whether the first judge identified the appropriate standard of review and applied it correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10; *Landry v. Abenakis of Wolinak First Nation*, 2021 FCA 197 at para. 57; *11316753 Canada Association v. Canada (Transport)*, 2023 FCA 28 at paras. 27–28; *Canada (Citizenship and Immigration) v. Solmaz*, 2020 FCA 126 at para. 65. In other words, a court of appeal must step into the shoes of the reviewing court and focus on the administrative decision.

[22] Both parties acknowledged in the Federal Court that the applicable standard of review is reasonableness, and neither party questioned this standard before us. This standard requires deference and restraint from the reviewing court, which must avoid substituting its own decision for that of the administrative decision-maker and instead determine whether the decision under

review is based on an internally coherent and rational chain of analysis and whether it is justified in relation to the facts and law that constrain the decision-maker (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 83–86, 101, 102 and 105 (*Vavilov*)).

[23] The appellant presented several arguments in support of its claim that the NCC's decision was unreasonable. First, I will review the Municipality's arguments that the Panel's Advice limited the reasonable outcomes that the NCC could arrive at. I will then address the submissions aimed at demonstrating that the NCC's decision was unreasonable in itself given the factual context and the history of the file, as well as the applicable legal constraints.

A. *The Panel's role and the weight of its Advice*

[24] As it did at trial, the Municipality argued that the Panel has greater expertise than the NCC with respect to property assessment and PILTs, which considerably reduces the scope of the federal commission's discretion. It also maintained that the Panel's Advice, to the extent that it addresses very specialized and specific issues and is the product of a quasi-judicial proceeding, must significantly decrease the NCC's leeway in making PILT-related decisions.

[25] In my opinion, these arguments cannot be accepted for several reasons. There is no doubt that the Panel has expertise given the mandate conferred on it by Parliament, namely to give advice to the Minister in cases of disagreement on four specific subjects: the "property value", the "property dimension", the "effective rate" and when a taxing authority considers that it should be paid a supplement for delay (subsection 11.1(2) of the PILT Act). It must be assumed that Panel

members have relevant training or experience with respect to the issues the Panel is asked to advise on. That said, the same assumption applies to the NCC, which has been authorized to pay PILTs for the Park for over 60 years. I also note that the Panel has no particular expertise or jurisdiction as regards the NCA and is not mandated to interpret the laws or regulations governing the NCC.

[26] Regardless, it appears to me that whether it is the NCC or the Panel that has more expertise in PILTs misses the point. Not only is the evidence in that regard tenuous, but more fundamentally, this issue is not relevant to determining the reasonableness of the NCC's decision. It is true, as the Federal Court recognized, that the administrative decision-maker's expertise remains a relevant factor in carrying out a judicial review on a standard of reasonableness, even though, since *Vavilov* (at paras. 31 and 58), it is no longer a factor in determining the standard of review. The fact remains that it is the decision-maker's expertise that may be taken into account to understand the decision-maker's reasons, not the expertise of a body tasked with advising the decision-maker. Ultimately, the reviewing court must pay attention to the way the administrative decision-maker itself uses its expertise.

[27] This leads me to address the weight that must be given to the Panel's Advice in determining the reasonableness of the NCC's decision. Despite the Municipality's claims to the contrary, there is no doubt that the Panel's Advice is just that, advice, and not a determination, and that that Advice cannot be binding on the decision-maker. This emerges from the very wording of the PILT Act. Section 11.1 provides for the creation of an "advisory" panel. Subsection 11.1(2) also specifies that this panel's mandate is to "give advice" to the Minister or Crown corporation on the four specific subjects listed above in paragraph 25 of these reasons. As for the Regulations, the

definition provided therein of “value” is the value that “a corporation would consider” to be attributable by an assessment authority if the property under review were taxable.

[28] Given this clearly expressed intention by Parliament, I fail to see how it could be concluded that the decision-maker could be bound by advice given by the Panel. This is even more true when the Panel, as it did in this case, takes the liberty of interpreting section 16 of the NCA and its scope with respect to the value of the parcels of land. The Panel is not empowered to interpret the PILT Act, as the Panel itself recognizes in paragraph 4.5 of its rules of practice, and it must therefore be deduced that it has even less authority to interpret another federal statute like the NCA.

[29] None of the decisions relied on by the appellant support its claims. *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 (*Halifax*), *Toronto (City) v. Toronto Port Authority*, 2010 FC 687 and *Montreal Port Authority* instead address what weight should be given to assessments made by taxing and assessment authorities. In all three cases, it was concluded that the point of view of an assessment authority was a factor to take into consideration, but that the Minister or Crown corporation had the final say. By analogy, similar reasoning can be applied to the Panel’s Advice. That is precisely the conclusion that the Federal Court came to in this case, as well as in *Trois-Rivières (City) v. Trois-Rivières Port Authority*, 2015 FC 106 at para. 68. Insofar as the NCC chooses to deviate from the Panel’s recommendations, there is no doubt that the explanations provided for doing so may affect the reasonableness of its decision. But it is clear that the NCC has the final say. The Panel’s Advice cannot turn discretion into non-discretionary power. Furthermore, it should be noted that in *Halifax*, the Supreme Court implicitly criticized the decision-maker for blindly following the

Panel's recommendation without further analysis. It therefore cannot be concluded that the NCC's decision was unreasonable based solely on the fact that it departs from the Panel's Advice.

[30] I hasten to add that in this case, the NCC did not merely disregard the Advice of the Panel. In its decision, the NCC recognized that it needed to consider the Advice of the Panel seriously. It also accepted several of the Panel's recommendations, including those concerning the value of the small parcels of land and the importance of considering the location of the parcels of land in determining their value. It is therefore false to claim, as the Municipality is doing, that upholding the NCC's decision would render any recourse to the Panel useless or would give undue discretion to federal boards, commissions or other tribunals.

[31] In light of the above, I find that the NCC's decision must be reviewed on the merits and that the reasonableness of the decision must be assessed based on what is included in the decision, not on the Panel's Advice. It is the NCC that ultimately has the discretion to determine the value of the parcels of land at issue as well as the PILTs to be paid to the Municipality. The simple fact that the decision departs from the recommendations of the Panel does not make the decision unreasonable. The decision will be reasonable if it is justified in light of the applicable legal and factual constraints, and if it is transparent and intelligible. That is what I will consider now.

B. *Reasonableness of the impugned decision*

[32] The appellant argues that the NCC's decision was unreasonable, in terms of both its conclusions and the reasons supporting those conclusions. Little can be said in relation to the outcome, which the appellant is challenging simply because it apparently completely contradicts

the Panel's recommendations. As I have attempted to demonstrate in the preceding paragraphs, it is not accurate to argue that the NCC disregarded the Panel's Advice as it accepted some of its conclusions. Furthermore, the NCC was not bound by the Panel's Advice, and the mere fact that it did not adopt its entire analysis is not sufficient to render its decision unreasonable.

[33] As for the reasons, the Municipality presented several arguments to demonstrate their unreasonableness.

[34] First, the Municipality claims that the NCC had urged the Municipality to address the Panel so as to settle the PILT dispute and that it thereby created a legitimate expectation that it would follow the process provided for in the PILT Act as well as the recommendations it would receive from the Panel. In this regard, the Municipality is simply reiterating the arguments that it already presented before the Federal Court, without explaining how the Federal Court apparently erred in dismissing them.

[35] Upon reading the file, I see nothing in the NCC's actions that could have created a legitimate expectation with respect to the outcome of the process. At most, the NCC urged the Municipality to bring the matter before the Panel and take part in the process set out in section 11.1 of the PILT Act, given the disagreement between the parties. Even if it had wanted to, the NCC could not refuse to exercise the discretion conferred on it by the PILT Act; the case law also confirms that a public authority cannot be held to its word if those representations conflict with its statutory duties: *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at para. 68; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para. 29. Like

the Federal Court, I fail to see how a sophisticated party like the Municipality, represented by counsel at that, could have inferred, on the basis of the NCC's actions, that there was a duty to comply with the Panel's Advice without deviating from it in any way.

[36] In any case, the objective of the doctrine of legitimate expectations is not to create substantive rights, and this doctrine is only one of the contextual factors likely to confer procedural rights: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (S.C.C.) at paras. 22–28; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at para. 78. Even assuming that the conditions for applying the doctrine of legitimate expectations had been met, the only remedy that a reviewing court could grant would therefore be procedural in nature and would be aimed at ensuring that the aggrieved party is guaranteed the rights that the duty of fairness entails. However, there is no doubt in this case that the Municipality had every opportunity to make its views known. In its letters dated September 28 and October 15, 2021, the NCC clearly indicated to the Municipality that it did not consider itself bound by the Panel's Advice and that it intended to continue its analysis. The NCC also invited the Municipality to share its observations with respect to its draft decision. While it opted not to take advantage of this opportunity, the Municipality cannot claim that its right to procedural fairness was infringed. I therefore find that this first component of its argument cannot be accepted.

[37] The appellant also argued that the NCC's decision-making process was irrational and unjustified given that it proceeded with further analyses following the Panel's observations in relation to the HBU and surface area of the properties and that it obtained additional expertise from

the property assessment firm that it had previously hired. In acting this way, the NCC allegedly acted unreasonably: not only did it add an additional element to the file after the Panel had delivered its Advice, but the Panel had also found the firm in question not credible. According to the appellant, this demonstrates that the NCC's sole objective was to go back to square one and ignore the Panel's Advice.

[38] With respect, I find that the appellant's claims are more akin to assumptions and do not reflect reality. First, I note that while the Panel did not retain several arguments put forward by the independent expert, it did not entirely dismiss its report. In addition, the Panel did not question the credibility of the firm on behalf of which the expert was acting. At most, it questioned the credibility of the approach taken by this firm to analyze the value of the large parcels of land as well as the resulting conclusions. However, the Federal Court underscored that the approach adopted by the expert was neither extravagant nor fundamentally inconsistent with property assessment principles. Furthermore, the appellant itself did not question its qualification as an expert or its expertise, even though it disagreed with some of its conclusions.

[39] I would add that the additional analyses carried out by the NCC and the supplementary expert report that it relied upon in no way violated the appellant's rights to procedural fairness. On two occasions, the NCC invited the Municipality to comment on the contents of its additional analyses and the new values resulting from its calculations, but the Municipality declined to do so on the grounds that the exercise would be futile and incur additional costs. The Municipality was certainly entitled to make that decision, but it cannot now complain that it was not heard.

[40] Once again, it should be reiterated that the NCC has the final say and that the PILT Act is silent on the decision-making process or the evidence that it can take into consideration to fulfill its mandate. Of course, the Panel's Advice is an important element that a decision-maker must consider, and it goes without saying that the justifications provided by the decision-maker to depart from it will be taken into account by the Court hearing an application for judicial review. The fact remains that the NCC has the final say in this case and that it could continue its analysis and obtain additional information if it disagreed with the Panel's Advice. That is precisely what it did in this case in order to consider the HBU and surface area, which were not taken into account by the Panel in its Advice.

[41] The appellant also argues that the NCC's decision was unreasonable because it disregards the insights provided by the Panel, in relation to both the grouping of the properties and their property value, and because it essentially goes back to the value that it had initially proposed for the properties, which the Panel had rejected. In the appellant's view, the NCC attempted to make its decision seem reasonable by basing itself on the comparable sales that the Municipality's expert took into consideration, but then proceeded to make considerable adjustments (HBU and surface area) that had not been presented to the Panel and that were based on new elements.

[42] The NCC's decision cannot be qualified as unreasonable based solely on the fact that it did not adopt all the Panel's conclusions and that the property value of the properties used to determine the PILTs that were ultimately paid to the Municipality is close to the value initially given by the NCC. To succeed, the Municipality needed to demonstrate that the NCC's decision was intrinsically unreasonable and inconsistent with property assessment principles. However, as was

the case in the Federal Court, the Municipality did not make this demonstration and did not explain how the NCC's decision, and notably the consideration given to the objective constraints affecting the parcels of land at issue, was inconsistent with the PILT scheme and deviated from the principles that emerge from the case law in this regard. That is the crux of the dispute in this appeal, and that is the issue I will focus on in the following analysis.

[43] The appellant relies on the decision rendered by the Supreme Court in *Halifax* to argue that the discretion conferred on the NCC in establishing its PILTs is not without limits, and that the 50% reduction in the value of the properties contradicts both the letter and spirit of the PILT scheme and subsection 16(3) of the NCA. More specifically, it criticizes the NCC of basing its assessment on the constraints associated with its mission and with the location of the properties in Gatineau Park; this is apparently contrary to the purpose of subsection 16(3), which is to compensate for the loss of tax revenue by reason of the acquisition of tax-exempt property.

[44] The appellant is not questioning the starting point of the exercise that the NCC must carry out in calculating its PILTs. The definitions of "effective rate" and "property value" set out in the PILT Act and the Regulations clearly establish that the point of reference is the local real property tax scheme that would be applicable if the property in dispute were a taxable property. The "effective rate" means the real property tax rate that would apply if the federal property were taxable, while the "property value" is the value that an assessment authority would determine as a basis for calculating the real property tax that would apply to a federal property if it were a taxable property. Section 2 of the PILT Act also defines "taxing authority" as "any municipality, province,

municipal or provincial board, commission, corporation or other authority that levies and collects a real property tax … pursuant to an Act of the legislature of a province".

[45] Although the assessment conducted by the assessment authority is the starting point for determining PILTs, it is in no way binding on the NCC, which still has the discretion to determine the property value that will be used in calculating PILTs. As the Supreme Court underscored in *Montreal Port Authority* (at paras. 22 and 33–35) and *Halifax* (at paras. 40–42), PILT calculations cannot be limited to a mechanical application of the assessments and tax rates determined by the municipality. This is not only because the PILT Act upholds the principle that the federal Crown is immune from taxation, but also so that the Minister can ensure some consistency across the country while taking into account the diverse and unique nature of federal properties, and even as needed so that the Minister can protect federal interests from municipalities that might use their taxing authority in bad faith.

[46] Lastly, it should be underscored that in exercising discretion, the Minister or Crown corporation may not base its calculations on a fictitious tax system. The PILT Act and the Regulations provide that the calculation of the tax rate and property value must be done as though the federal property were a taxable property in the hands of a private owner. This requirement stems not only from section 2 of the Regulations and the corresponding provision of the PILT Act, but also from the very objective of fairness and justice towards Canadian municipalities that underlies this scheme.

[47] That is precisely why the Supreme Court concluded in *Halifax* that attributing a nominal value to land located in downtown Halifax was unreasonable. In that case, the Advisory Panel had attributed a nominal value of $10 to a 42-acre piece of land that was a national historic site. The Supreme Court concluded that the decision of the Minister, who had accepted the Panel's advice, was unreasonable for two reasons. First, the Minister had attributed a nominal value to the land in dispute only because it would be impossible to develop that land based on the fact that it was designated as a national historic site. However, the competent assessment authority had not used this assessment method, and nothing in the evidence provided to the Minister showed that any assessment authority in Canada had used such a method to assess sites of that nature. While the Minister was not bound by the competent assessment authority, it nevertheless had to be used as a point of reference. In acting as he did, the Minister based his assessment on a fictitious tax system that he had created himself.

[48] In addition, the Minister's decision was also unreasonable because it was inconsistent with the very purpose of the PILT Act. As the Supreme Court aptly highlighted, the Minister's position that a national historic site has no value because it cannot be used for commercial purposes is in direct contrast with Parliament's intention to include national historic sites in the PILT scheme: *Halifax* at paras. 47 and 52–57.

[49] The Supreme Court was, however, careful to specify that its decision should not be interpreted as stripping the Minister of all discretion or as preventing him from considering the constraints that restrict the use of a property or that result from its possession by the NCC, as the appellant seems to suggest in paragraphs 71, 72 and 74 of its memorandum. In this regard, the final

paragraph of the Supreme Court's analysis in *Halifax* seems abundantly clear to me and merits, in this case, being reproduced in full:

> [58] It is a challenging task to determine the market value for appraisal purposes of a property whose highest and best use is as a national historic site. While I have concluded that the Minister's approach to this task was unreasonable on the record before him, nothing that I have said in my reasons is intended to approve or adopt any particular approach to this appraisal conundrum or to suggest that the Minister, in order to act reasonably in this case, was obliged to adopt the appraisal method put forward on behalf of the municipality or was required to ignore the use restrictions inherent in the property's highest and best use as a national historic site. What will constitute a reasonable approach on the part of the Minister depends on the evidence placed before him in the particular case, viewed through the lens of his statutory duties under the Act and in light of the reasons which he gives for the particular exercise of his statutory discretion.

[50] It is in light of these considerations that the NCC's decision must now be assessed. In Quebec, the ARMT governs the establishment of the property assessment roll. For our purposes, the key provisions of that Act are sections 45 and 46, which the trial judge cited in his judgment. In these sections, it is specified that the elements to be taken into account to establish the actual value of a unit of assessment are as follows: (1) the most likely use made of the unit and the property market conditions on the assessment date (July 1, 2016, in this case); (2) if the unit of assessment is not likely to be the subject of a sale, the price that the person in whose name the unit of assessment is entered on the roll would be justified in paying if that person were both purchaser and vendor; (3) the incidence that the realization of the benefits or losses it may bring, considered objectively, may have on the most likely sale price of the unit of assessment; and (4) the condition of the unit, including its physical condition, its economic and legal situation, as well as its physical surroundings.

[51] On the basis of these provisions, under Quebec legal commentary and case law, the first step to be taken in estimating the actual value of a property is determining its HBU. This concept is commonly defined as [TRANSLATION] "the reasonable, likely and legal use of a unit of assessment, which is physically possible, appropriately substantiated, and financially feasible and which attributes the highest value to the unit of assessment": see Desjardins, Jean-Guy, *Traité de l'évaluation foncière* (Montréal: Wilson & Lafleur, 1992) at 31 [*Desjardins 1992*]. The standards of professional practice of the Ordre des évaluateurs agréés du Québec (Intro Page-9) also specify that the appraiser must demonstrate that the best use meets the following conditions:

- the use is physically feasible;
- it must be permitted by regulations and law;
- it must be financially feasible;
- it must be achievable in the short term;
- it must be associated with probability of occurrence rather than mere possibilities;
- there must be market demand for the property assessed in terms of its best use; and
- it must be the most profitable use.

(See also: Ordre des évaluateurs agréés du Québec, *Les normes de pratique professionnelle des évaluateurs agréés*, Rule 1.2, Standard 1, Point 11 at 1921; *Fernand Gilbert ltée c. Procureure générale du Québec*, 2022 QCCA 209 at para. 58; Desjardins, Jean-Guy, Steven Lavoie & Sébastien Caron, *Traité de l'évaluation foncière*, 2nd ed. (Montréal: Wilson & Lafleur, 2021) at 39 [*Desjardins 2021*]).

[52] A property assessment must therefore be carried out based on an objective analysis of the characteristics, benefits or losses affecting the property. Legal, economic, environmental or other constraints that restrict the use of a property obviously affect its value. The uses considered to be

HBUs cannot be hypothetical and must therefore be realistic in the short or medium term and permitted by law and regulations: see *Desjardins 2021* at 40.

[53] In accordance with those principles, which the appellant is not challenging, the NCC assessed all the types of constraints that the properties under review are subject to and concluded that the HBU of the large properties under review is clearly their current use, namely as a natural area dedicated to conservation and recreation. To come to this conclusion, the NCC took the following factors into consideration:

- Constraints included in the federal statutory scheme that limit land development. Under the NCA, any proposals for the sale of public lands in the National Capital Region, and any proposals to work on such lands or change the use of these lands, shall be submitted to the NCC for approval prior to the sale (sections 12 and 12.1). In that respect, it must be underscored that the NCC's decisions must be consistent with the mandate the NCA conferred on it and with the guidelines included in the Gatineau Park Master Plan. These are therefore not, as the appellant suggests, subjective constraints that the NCC imposed on itself. Any decision by the NCC that is inconsistent with the mandate it was given by Parliament can be set aside on judicial review on the grounds that it does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law: see *Gatineau (Ville) v. National Capital Commission*, 2013 FC 439 at para. 38.
- Constraints under the Quebec legal scheme. Given the Park's inclusion on the register of Quebec's Minister of Sustainable Development, the Environment and Parks, there are other constraints on the lands within the Park under the *Natural Heritage*

Conservation Act, CQLR c. C-61.01. Section 6 of that Act provides that lands that are within protected areas and in the above-mentioned register may not be assigned to a new use, be sold or exchanged or be the subject of any other transaction that affects their protection status, unless the Minister of Sustainable Development, the Environment and Parks has been informed beforehand. Such a constraint has been described as a legal servitude under public law that affects the actual value of immovable property: see *Sidcan inc. c. Lee*, 2000 CanLII 7010 (QC CA) at paras. 19–22. And, as the Court of Appeal of Quebec decided in *Québec c. La fondation Bagatelle Inc.*, 2001 CanLII 15060 (QC CA) at paragraph 23, such constraints cannot be treated as constraints that owners deliberately self-impose. Rather, they are imposed in the interests of the community and must be taken into consideration in assessing a property.

– Constraints included in by-laws. As the NCC notes in its decision, the Municipality itself supports the Park's primary aims, namely conservation and its natural areas. The land use plan (Appeal Book, vol. 21, Appendix "R"), development plan and zoning regulations (regulation no. 635-05, Appeal Book, vol. 22, appendices "S" and "T") are consistent with the aims identified in the Plan for the National Capital and specified in the Gatineau Park Master Plan. It is interesting to note that a special development plan adopted by the municipality in 2011 identifies the residential areas that the municipality would like to develop, which are all located outside the Park (Appeal Book, vol. 20, Appendix "Q", Central Area of the Municipality of Chelsea – special development plan and concordance by-laws). However, the properties under

review are not in those areas, and there is no evidence in the record that the Municipality ever wanted to develop those areas.

- Jurisdictional constraints. Some of the parcels of land under review were ceded to the Crown by the Right Honourable William Lyon Mackenzie King. However, the donation was on the condition that these lands be ceded "in trust" for conservation purposes for time immemorial for the public good (Appeal Book, vol. 23, Appendix "W").

[54] As a result of the foregoing, many objective constraints negatively affect the parcels of land under review and have an impact on their property values. The appellant is not contesting these factors but maintains that the purpose of the parcels of land in dispute, namely as a park and conservation area, is purely subjective and is based solely on the NCC's decision to maintain these parcels of land as a park in fulfilling its mission. In its memorandum, the Municipality stated that the NCC could not reasonably use the constraints resulting from its possession of the properties to establish the PILT amounts, and that such a decision would be inconsistent with the teachings in *Halifax*.

[55] However, the preceding paragraphs demonstrate that the value attributed to the parcels of land covered by the NCC is neither arbitrary nor purely subjective. On the contrary, it is derived from the mandate that Parliament itself gave to the NCC as well as the appellant's own by-laws. The evidence shows that the Municipality agrees with the NCC's objectives and that the development of the parcels of land at issue for residential purposes is purely hypothetical. Two of the experts who testified before the Panel, including the managing director of the firm of accredited

appraisers who signed the assessment rolls of the regional county municipality (RCM) that the Municipality is a part of, stated that any residential or commercial development would take 50 or even 100 years to happen, given the large surface area of the parcels of land and other constraints on these locations: see testimony of Marc Lépine of November 17, 2020, Appeal Book at 5625 and 5667 and testimony of Neil Gold of November 19, 2020, Appeal Book at 6205–6206.

[56] Like the Federal Court, I therefore consider that it was not unreasonable for the NCC to conclude that the HBU of the parcels of land for which the assessment is being contested is as a natural area dedicated to conservation and recreation. The residential development that could eventually take place on these parcels of land is purely hypothetical given the many constraints on them, as well as the historic and geographical context. Given that the PILT Act and the Regulations require that the parcels of land at issue be assessed as though they were taxable properties owned by a taxpayer, their value cannot be determined based on a fictitious or arbitrary tax system (*Montreal Port Authority* at para. 40). In that regard, and like the trial judge, I fully agree with the NCC's argument that a decision-maker's determination of PILTs does not mean creating a chimera simply because the parcels of land assessed belong to the Crown, adulterating them, stripping them of their attributes or constraints and assigning them to a use that is hypothetical and contrary to reality and to the wishes of the parties. I find this approach to be entirely consistent with the Supreme Court's decision in *Halifax*, wherein the Court recognized that a decision-maker was not required to ignore the use restrictions inherent in the highest and best use of a property serving as a national historic site (or, as in this case, for the purposes of conservation and recreation) for the decision to be considered reasonable.

[57] Lastly, the appellant is attempting to deviate from the HBU by claiming that the property assessment principles that normally apply must be disregarded as a result of subsection 16(3) of the NCA. As I previously mentioned (see para. 17 of these reasons), that argument cannot be accepted given the notwithstanding clause provided for in subsection 11(1) of the PILT Act. It would also not be logical at all for Gatineau Park to be subject to a separate scheme rather than being assessed as a taxable property as per the local property tax scheme in the same way as any other federal property.

[58] As for the grouping of certain properties with adjacent properties, section 34 of the ARMT provides that four conditions must be met. The guiding principle that must be kept in mind when applying this provision is that a unit of assessment must consist of the greatest possible aggregate of immovables so that units are not counted more than once. The Panel recognized that the parcels of land under review met the four criteria provided for in the ARMT, but it nevertheless found that they should not be grouped for a reason that is not mentioned in section 34. The NCC departed from this recommendation and decided to group seven properties with adjacent properties. These groupings involve small parcels of land, which are part of residential pockets, adjacent to other large-surface-area parcels of land, and are similar to other groupings established in the past by the RCM the Municipality belongs to. Given that the appellant did not explain how that decision was unreasonable or put forward any arguments to contest the NCC's decision in that regard, I do not find it necessary to focus on this matter any further.

[59] After determining the HBU of the parcels of land and making certain groupings, the NCC established their value using the comparison method. This is also the method that the Panel had

used, and it is one of the most commonly used methods of assessment in light of its relative simplicity. It also provides the most reliable result in terms of the actual value of a property given that it is based on direct evidence from market data: see *Les Entreprises Monlavert Inc. c. Mont-Tremblant (Ville)*, 2021 QCTAQ 06200 at para. 49. This method consists of finding local market transactions related to a similar property to the one being assessed, determining the average price of those transactions, and applying that average price to the property being assessed: *Desjardins 1992* at 153. The comparable sales used as part of this method must be subject to the same constraints as the properties in dispute, notably in terms of use, location and size.

[60] Since there were no truly comparable local sales with similar or the same characteristics, the expert hired by the NCC selected parcels of land throughout Quebec and even in Ontario that had substantially the same purpose as the Park. The Panel rejected this approach, in particular because the parcels of land chosen were much farther from urban centres than those at issue in this case. The expert hired by the Municipality instead chose sales of comparable parcels of land on the local market, which is also the method that the Panel adopted. The NCC took note of this recommendation and also focused on comparable sales reflecting the local market.

[61] In its Advice, however, the Panel did not take into consideration the surface area and use of the parcels of land associated with the sales identified as comparable, assuming that their highest and best use would be a purely economic value established without consideration for their own characteristics and all the types of constraints on them. However, the comparable sales used by the Municipality's expert and accepted by the Panel were for properties that were over 20 times smaller on average than the properties in question and that were located in areas where zoning

allows residential and even commercial development in some cases (briefing note to the CEO, Appeal Book at 3421, para. 222).

[62] Following subsequent analyses carried out by the team responsible for determining PILTs at the NCC, ranges were set to determine the necessary adjustments to the value of the properties considering the surface area and the HBU. For parcels of land under 500 hectares, this meant a 50% adjustment for use. For parcels of land measuring 500 to 1,000 hectares, a 60% adjustment was made for use and surface area, and for those measuring 1,000 to 1,150 hectares, this adjustment was 70%. The NCC maintains that these values, totalling an overall amount of $48,309,700 for all its parcels of land within the Municipality, represent the values that an assessment authority would have determined on July 1, 2016, if the properties had been taxable, accounting for the location, surface area and HBU of those properties.

[63] While the NCC gave the Municipality the opportunity to comment on its analysis and determinations, the Municipality did not do so and instead requested, through a formal notice, a decision that followed the Advice of the Panel exactly. Rather than contesting the NCC's adjustments and process and explaining why the amounts payable to the Municipality in PILTs were unreasonable, the Municipality merely criticized the NCC for conducting additional analyses after receiving the Advice, and for using the same expert as before the Panel. This did not convince the Federal Court, and I do not find it convincing either.

[64] All things considered, the NCC's decision is transparent and intelligible and falls within the range of possible outcomes which are defensible in respect of the facts and law. Once again,

the NCC was bound by neither the assessment of the taxing authority nor the advice of the Panel and could arrive at its own determination of what value a taxing authority would establish for the parcels of land at issue if they were taxable properties. Of course, the value that the Municipality, and then the Panel, attributed to the parcels of land was a point of reference for the NCC. However, the decision-maker could deviate from it, so long as it explained itself by providing reasons that met the reasonableness standard. In *Halifax*, the Minister did not discharge his burden in that he attributed only a nominal value to a property subject to the ARMT, thereby undermining Parliament's intention. In this case, the NCC did not commit that error and properly explained why it was departing from the Panel's advice in certain regards; the NCC paid substantial amounts in PILTs to the Municipality based on an assessment of the property value of the parcels of land representing approximately half of the value recommended by the Panel, following a rigorous analysis consistent with both the ARMT and the evidence.

V. CONCLUSION

[65] For all of the above reasons, I find that the appeal should be dismissed, with costs.

"Yves de Montigny"
Chief Justice

"I agree.
George R. Locke, J.A."

"I agree.
Gerald Heckman, J.A."

Certified true translation
Melissa Paquette, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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