Federal Court Cour fédérale

Date: 20100624

Docket: T-165-09

Citation: 2010 FC 687

Ottawa, Ontario, June 24, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CITY OF TORONTO

Applicant

and

TORONTO PORT AUTHORITY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] There are two matters which are the subject of this judicial review. The first is the report of the Federal Disputes Advisory Panel (Panel) respecting the "corporation property values" of four Toronto Port Authority (TPA) properties. The second is the decision of the TPA to pay $5,561,607 as Payments In Lieu of Taxes (PILTs) to the City of Toronto (City) for all of its properties, including those in dispute. The core decision at issue is that of the Board of the TPA to make the payment based substantially on the Panel's Report.

[2] The Panel Report, and thus this judicial review, focused on four particular properties: the Toronto City Centre Airport (TCCA), the Polson Slipwater lot (Polson Slip), the Outer Harbour Marina on Unwin Avenue (Marina) and the Cherry Street Marine Terminal Buildings (Marine Terminal). These properties were used as a form of test case for current and future PILTs payable by the TPA.

[3] The Panel was asked by the parties to give advice as to the "corporation property value" of the four properties so that the applicable PILT owed by the TPA to the City could be determined and paid as provided for in the *Payments In Lieu of Taxes Act*, R.S.C. 1985, c. M-13 (Act) and the *Crown Corporation Payments Regulations*, SOR/81-1030 (Regulations).

II. BACKGROUND

A. *Overview*

[4] Subsequent to the Panel Report, the Supreme Court of Canada in *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, dealt extensively with the legal regime governing PILTs to be paid by Crown corporations. While that case was based on the issue of the "applicable tax rate", the principles enunciated by the Court are applicable to the determination of the property values as well.

[5] The City argues that the Panel and the TPA misinterpreted the relevant legislation and failed to treat the properties as if they were taxable properties for the purposes of arriving at corporation property values.

B. *Regime*

[6] The TPA, as a Crown corporation, is now subject to making payments under the Act as tailored for Crown corporations pursuant to the Regulations.

[7] The legislative scheme bases the PILTs on the calculation of tax which might otherwise be payable if the Crown corporation (otherwise exempt from tax) was a taxable entity.

7. (1) Subject to subsection (2), a payment made by a corporation in lieu of a real property tax for a taxation year shall be not less than the product of	**7.** (1) Sous réserve du paragraphe (2), un paiement versé par une société en remplacement de l'impôt foncier pour une année d'imposition ne doit pas être inférieur au produit des deux facteurs suivants :
(*a*) the corporation effective rate in the taxation year applicable to the corporation property in respect of which the payment may be made; and	*a*) le taux effectif applicable à la société dans l'année d'imposition en cause à l'égard de la propriété de celle-ci pour laquelle le paiement peut être versé;
(*b*) the corporation property value in the taxation year of that corporation property.	*b*) la valeur effective de la propriété de la société pour cette année d'imposition.

[Emphasis added]

[8] In the Regulations, the "corporation effective rate" means:

"corporation effective rate" means the rate of real property tax or of frontage or area tax that a corporation would consider applicable to its corporation property if that property were taxable property; (*taux effectif applicable à une société*)	« taux effectif applicable à une société » Le taux de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie qui, de l'avis de la société, serait applicable à sa propriété si celle-ci était une propriété imposable. (*corporation effective rate*)

and the "corporation property value" means:

"corporation property value" means the value that a corporation would consider to be attributable by an assessment authority to its corporation property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property. (*valeur effective de la propriété d'une société*)	« valeur effective de la propriété d'une société » La valeur qui, de l'avis de la société, serait déterminée par une autorité évaluatrice, abstraction faite de tous droits miniers et de tous éléments décoratifs ou non-fonctionnels, comme base du calcul de l'impôt foncier applicable à sa propriété si celle-ci était une propriété imposable. (*corporation property value*)

[9] The term "assessment authority" means the "authority that has power by or under an Act of Parliament or the legislature of a province to establish the assessed dimension or assessed value of real property or immovables".

Pursuant to the *Ontario Assessment Act*, R.S.O. 1990 C.A-31, that authority rests with the Municipal Property Assessment Corporation (MPAC).

C. *Process*

[10] The concern over PILTs extends as far back as 1999. It would appear that in March 2002 the City made a request to pay PILTs. The history of the dispute is not relevant except for its crystallization on April 13, 2006 when the City of Toronto initiated the Panel process.

[11] Under the Act, at the request of a party, the Minister may appoint a panel to advise on such matters as the property value of property subject to PILT. The Panel hearings were finally held February 25-28, 2008. The issue before the Panel was the corporation property value for TPA properties for the 2004-2007 years. The parties agreed to proceed with the valuation of four properties with the City retaining the right to have the Panel consider values used by TPA for other properties.

[12] The parties accepted that the "base years" or valuation years specified under the *Ontario Assessment Act* were June 30, 2003 for the 2004 and 2005 taxation years and January 1, 2005 for the 2006 and 2007 taxation years.

[13] The Panel, which is created for each case, was made up of two key persons with experience in assessments/appraisals and a lawyer experienced in real estate law.

[14] A number of witnesses were called by each side; the most critical for purposes here were Bryan Cordick for the City and Victor Manoharan for the TPA.

Cordick had worked for MPAC for 30 years and had retired just a few months before the Panel hearing. His evidence related to the values which would be assessed against each of the properties.

Manoharan is a Regional Manager for the federal department, Public Works and Government Services Canada. He was responsible for the delivery of the PILT program and property valuation services in Ontario. His evidence was a direct challenge to Cordick's and also centred on the property value of the properties in question.

[15] There are no transcripts of the oral evidence and the documentary evidence is laid out in the Court Record. While the Court does not intend to summarize all the evidence, there are some salient features which must be underscored.

[16] Cordick submitted four reports, one for each property, said to have been prepared in accordance with the Canadian Uniform Standards of Professional Appraisal Practice. He adopted the "cost approach" to valuation of the properties which values buildings and land separately and then totals the values to give the "property value". In coming to the value of the land, Cordick relied on "Table 15" prepared by MPAC for the 2003 and 2005 valuation dates. The valuations were tested against sales of four other properties. His valuation for buildings was based on MPAC's Automated Costing System.

[17] Cordick did not use either the direct comparison approach or the income valuation approach in part because it is MPAC policy to value special purpose public service institutions using the cost approach.

[18] Cordick had concluded that the "highest and best use" of the properties was their current use. As a consequence, he found that the federal land use restrictions were not relevant and he was assessing the properties as if they were taxable not as if they were TPA properties (and thus caught up in some of these federal land use restrictions).

[19] The TPA, through its witnesses Manoharan and Alan Paul (the acting president and CEO of TPA), who had been responsible for the file at TPA, gave the TPA evidence both as to background of the dispute and the valuation of the specific properties. Particular objection was taken to the City ignoring the federal land use regulations. TPA looked at the properties not on the basis of redevelopment value - had they been owned by a taxable entity - but on their income producing history. There was a fundamental disagreement as to whether one looked at the properties as if they were taxable and without federal restrictions (which lowered values) or whether one took the properties as they were and based upon what could be done with them given the existing restrictions.

[20] As a consequence of TPA's view, TPA through its expert focused on the Income Approach. However, Manoharan used both income and costs in respect of the Marine Terminal. He also used

MPAC's land table for Hamilton without taking account of the differences in values between the two cities in considering the Marine Terminal.

[21] Manoharan used the Income Approach for the Marina and for the Polson Slip. However, with respect to the TCCA, the TPA relied on Paul's evidence to come up with a per passenger value.

D. *Panel Report*

[22] The Panel did not accept either side's assessment, questioning both appraisers and the means by which they came to their respective conclusions.

[23] A significant feature of the Panel's consideration is their attack on the credibility of Cordick because of his affiliation with MPAC and espousal of its views at the outset of his report.

[24] The Panel, as part of its attack on Cordick's evidence and its credibility, cited significant passages from the Ontario Ombudsman's Report of March 28, 2006, which was highly critical of MPAC. The Ombudsman's Report included references to "MPAC's sense of superiority regarding its mass appraisal techniques", its lack of respect for the very property market that its appraisal system is built upon, and MPAC's lack of adequate respect for the decisions rendered by its appeal body, the ARB.

[25] The Panel then concluded that Cordick was not conducting himself as an appraiser accredited by the Appraisal Institute of Canada, that he had failed in his duty to question his client's methodology, and had failed his duty to the Panel. From this perspective the Panel then assesses the "merits" of Cordick's and other witnesses' evidence. The salient passage with respect to Cordick is paragraph 15 of the Report as set forth below.

> The City's witness was not conducting himself as an appraiser accredited by the Appraisal Institute of Canada. He demonstrated no independance *[sic]* of thought or application of method. At p.34 of his Marina Report he sets out the three traditional approaches to estimating the value of real estate, namely Cost, Direct Comparison & Income. At p.36 he states that MPAC has arrived at the site value by use of MPAC's industrial land tables which he says are "built using the Direct Comparison Method" and at p.37 states that "table fifteen has been used to value the marina operation." He failed in his duty to question his client's methodology. He probably assumed that there are no other marinas in Ontario or the area. However, there are at least two marinas in the area as in his Polson Slip report, he shows at pp.17 and 18 of tab H, two drawn in water lots opposite the Humber Bay Park East Marina located in the City of Toronto. Additionally, Mr. Manoharan sets forth, starting at p.118 of his report, a series of photographs of the Scarborough Bluffer's Park Marina.
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> ...

[26] Despite this wholesale attack on Cordick's credibility, the Panel in fact uses some of his findings in their recommendation without explanation for the dichotomy between their rejection of his valuations and their acceptance of some or parts of his conclusion.

E. *Re: TCCA*

[27] The Panel, having rejected both experts' conclusions of value, referred to the *Ontario Assessment Act Regulations* which calculated PILTs at certain designated airports, such as Pearson International Airport, on the basis of an amount per passenger. The TPA had made an application to be listed as an airport covered by that particular regulation but it was not listed at the time of the Panel's Report.

[28] The Panel rejected the City's valuation because it was based on MPAC's Table 15 which it had already rejected. The Panel adopted the method used in the *Ontario Assessment Act Regulations* and set the PILT at 80¢ per passenger for the 2004 base year. The Panel never established a valuation for the property itself.

F. *Outer Harbour Marina*

[29] The Panel recognized that the City adopted a direct comparison approach by using Table 15 and testing the values against five subsequent sales. The City valued the land but not the improvements. The TPA on the other hand used an income approach but found significant information lacking.

[30] Having found difficulty with both sides' valuations, the Panel set out its own income approach to the valuation of the property.

G. *Polson Slip*

[31] The Panel again rejected both parties' assessment. Cordick was the only expert to arrive at a concrete value but that was rejected because his opinion was found to be poorly formulated.

[32] As a result, the Panel deemed it necessary to be "relatively arbitrary in formulating its advice". Based loosely on information in Cordick's opinion, the Panel developed its own valuation focusing on the relationship between land values and water lot values.

H. *Marine Terminal*

[33] Again, the Panel rejected both sides' assessment, questioning the methodology, independence and reliability of both experts. The Panel rejected Cordick's comparative sales analysis because it contained too many adjustments and rejected Manoharan's reliance on Hamilton values without adjustment for the relevant differences between the two cities.

[34] Having rejected both experts, the Panel then concluded that they had to "apply generally equal weighting to the land and improvements values indicated" by both sides. The Panel then applied a discount to the resulting value of 30% because it erroneously understood Paul's evidence that the Terminal was operating at 20-30% below capacity whereas his evidence was that it operated at 30% of its capacity.

I. *TPA Board Decision*

[35] The TPA Board then accepted the Panel's Report, made some adjustments and corrections (including the 30% capacity error noted above to reflect a discount of 70%) and paid $269,962 less in PILTs than the Panel had advised. Therefore, the TPA paid $5,561, 607. The amount was accepted by the City without prejudice to its right to contest the payment.

[36] The Panel's Report formed the basis of the TPA's decision to pay the PILT amount. There were other documents and information before the TPA when it made its decision but at the core of that decision is the acceptance of the Panel's Report on "corporation property value". Therefore, it was argued that the reasons of the Panel are, except where clearly changed, the reasons of the Board of TPA in paying the PILT amount.

III. ISSUES

[37] The issues raised by the parties, and variously described, can be distilled to:

(a) What is the subject of the judicial review?

(b) What is the applicable standard of review?

(c) Is there any error of law or jurisdiction regarding the valuations?

(d) Are the valuations reasonable?

IV. ANALYSIS

A. *Subject of Judicial Review*

[38] The issue of whether a panel's report/recommendation is subject to judicial review was addressed by this Court in *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2009 FC 670. It was held that it was not but the decision by the Minister effectively adopting and implementing a panel's recommendation opens the reasoning of the panel to scrutiny because they are the reasons of the decision maker.

[39] In this case, the adopting and implementing of a panel's recommendation and its rationale by a Crown corporation opens the Crown corporation's decision to judicial review on the same basis.

[40] There is a slight difference between the Act which governs a Minister's decision and the Regulations which govern a Crown corporation's decision but that difference relates principally to the deference owed to the respective decision makers not the right or basis to challenge the decision.

Payments In Lieu of Taxes Act, s. 2(1)

"property value" means the value that, in the opinion of the Minister, would be attributable by an assessment authority to federal property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any	« valeur effective » Valeur que, selon le ministre, une autorité évaluatrice déterminerait, compte non tenu des droits miniers et des éléments décoratifs ou non fonctionnels, comme base du calcul de l'impôt foncier qui serait applicable à une propriété fédérale si celle-ci

real property tax that would be applicable to that property if it were taxable property;	était une propriété imposable.

[Emphasis added]

Crown Corporation Payments Regulations, s. 2

"corporation property value" means the value that a corporation would consider to be attributable by an assessment authority to its corporation property, without regard to any mineral rights or any ornamental, decorative or non-functional features thereof, as the basis for computing the amount of any real property tax that would be applicable to that property if it were taxable property. (*valeur effective de la propriété d'une société*)	« valeur effective de la propriété d'une société » La valeur qui, de l'avis de la société, serait déterminée par une autorité évaluatrice, abstraction faite de tous droits miniers et de tous éléments décoratifs ou non-fonctionnels, comme base du calcul de l'impôt foncier applicable à sa propriété si celle-ci était une propriété imposable. (*corporation property value*)

[Emphasis added]

[41] In this instance, since the TPA largely adopted the Panel's Report as the rationale for its conclusion as to PILT owed and "corporation property value", the Report becomes part of the reasons for the TPA's decision. The Report is subsumed in the analysis of the reasonableness of the TPA's decision.

B. *Standard of Review*

[42] In the *Montréal (City)* decision, the Supreme Court analyzed the standard of review applicable to a Crown corporation determining the "effective rate". The Court held the standard in

respect to the Crown corporation's discretion to determine the rate applicable to be that of reasonableness.

"effective rate" means the rate of real property tax or of frontage or area tax that, in the opinion of the Minister, would be applicable to any federal property if that property were taxable property;	« taux effectif » Le taux de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie qui, selon le ministre, serait applicable à une propriété fédérale si celle-ci était une propriété imposable.

Payments In Lieu of Taxes Act, s. 2(1)

[43] In respect of this instant case and the Crown corporation's discretion regarding "corporation property value", the discretion is similar except that it is conditioned not just by what the Crown corporation considers applicable in terms of tax rate but what the Crown corporation considers attributable by an assessment authority.

"assessment authority" means an authority that has power by or under an Act of Parliament or the legislature of a province to establish the assessed dimension or assessed value of real property or immovables;	« autorité évaluatrice » Autorité habilitée en vertu d'une loi fédérale ou provinciale à déterminer les dimensions fiscales ou la valeur fiscale d'un immeuble ou d'un bien réel.

Payments In Lieu of Taxes Act, s. 2(1)

[44] Despite this difference, the rationale for the discretion, as described in *Montréal (City)*, above, is the same for both provisions – the preservation of the Crown's immunity to taxation; the need for flexibility nationwide; practicality in terms of potential disagreements; difficulty of choice of rate (or property value); and protection of federal interests.

[45] Therefore, as held in *Halifax*, above, and reinforced by *Montréal (City)*, above, the applicable standard of review is reasonableness. However, on issues of law and procedural fairness, the standard would be correctness.

C. *Law and Fairness*

[46] There was no error of law in the Panel not accepting the MPAC assessment, as outlined by Cordick's expert report. The City's position that the Panel must accept the MPAC valuation would undercut the very discretion confirmed by the Supreme Court of Canada.

[47] Further, the Panel did not err in law in taking into account the existence of the federal land use restrictions as they applied to the relevant properties. While the Crown corporation must be treated as if it is taxable, that does not mean that the realities of land restrictions, such as zoning, is not relevant use in the same way it is for non-Crown corporations.

[48] In the *Montréal (City)*, the Supreme Court underscored that the corporation had to take the system as it was. In *Halifax*, the restricted use of the Citadel to that of a fort and the regional municipality's Regional Park Zone under its land use by-law were facts that could not be ignored. They were relevant considerations for valuation purposes.

[49] In both *Halifax* and this case, the properties were used at their "highest and best use" given the existing regimes. The Panel in the present case could not ignore land use restrictions and find

that the properties could be more valuable if used differently any more than the panel in *Halifax* could have found the Citadel would be more valuable than, for example, if used for high end condominiums.

[50] Where the Panel went awry was its consideration of the Ombudsman's Report and in its basis for finding Cordick not credible. In this regard, the Panel acted unfairly and unreasonably and failed to appreciate the import of the MPAC assessment evidence.

[51] In expressing its distain for MPAC's assessment methods, the Panel relied upon the Ombudsman's Report, as discussed in paragraph 24. That document was never raised by either party nor was it put to the City or its witnesses. Yet that Report is cited as part of the rationale for rejecting MPAC's mass appraisal techniques and for its questioning the conduct of Cordick.

[52] At a minimum, the City was entitled to notice of the intended use of the document and an opportunity to respond. Further, that report is no more than the opinion of the Ombudsman and as opinion evidence it was untested. The report is directed at issues not entirely in sync, if at all, with the Panel's mandate and its relevance is highly questionable.

[53] The Panel had a right to reject MPAC's approach on sound reasons related to valuation but the criticism of MPAC's attitude and the alleged loss of public confidence in that institution are far removed from property values in the Toronto Harbour and the mandate of the Panel.

[54] The Panel committed a further error in discounting the basis of Cordick's evidence. The Court was advised that Cordick's evidence was also intended to show how MPAC assessed or would assess the properties in issue. The Panel's comments exhibit a failure to appreciate the nature of that evidence.

[55] Further, the Panel failed to appreciate the importance of the evidence which has now been clarified by the *Montréal (City)* decision. That decision confirms the importance of evidence as to the existing provincial or municipal taxation regimes in the analysis of either the tax rate or property value.

> **20** ... For the purpose of establishing those amounts, the *PILT Act* must define the relationship between the system for setting payments in lieu, on the one hand, and the provincial and municipal tax systems, which can vary from place to place in Canada, on the other.
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> ...
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> **22** The reference point used in the *PILT Act* is the real property tax established by a "taxing authority", which is defined in s. 2 as "*(a)* any municipality, province, municipal or provincial board, commission, corporation or other authority that levies and collects a real property tax ... pursuant to an Act of the legislature of a province".

[56] There was nothing untoward in bringing forward MPAC's assessment methods and the Panel's attack on that purpose and on the character of the witness was unwarranted.

[57] As pointed out in *Halifax*, this type of evidence of provincial taxing considerations is germane to the valuation process but neither the Panel nor the ultimate decision maker is bound by

it. However, the Panel never appeared to appreciate the importance of that evidence within the legislative scheme. Its rejection of the evidence on those grounds is an error that goes to the root of the decision.

D. *Reasonableness*

[58] The Supreme Court has pointed out that reasonableness means more than transparency and intelligibility, it encompasses a qualitative requirement that applies to those reasons and to the outcome of the decision-making process (*Montréal (City)*, para. 38).

[59] The Court must accord deference to the judgments of the Panel on matters which are open to reasonable disagreement. However, in this case there are areas of the Panel's Report which do not meet this qualitative aspect of the reasonableness criterion. In assessing the reasonableness of the Panel's recommendation, the Court assumes, for this purpose only, that the legal infirmities discussed are not present and that the Panel had a proper basis for rejecting the City's evidence.

(1) Polson Slip

[60] The parties acknowledged that the Panel referred to the wrong Manoharan evidence. Manoharan valued the properties on the basis of income whereas the Panel used Cordick's method. This is despite their general rejection of Cordick's evidence and the absence of any explanation for its acceptance in this case.

[61] Neither side advanced any discount for pollution or a pollution factor. The Panel made its own calculation. The Respondent says that the basis for a pollution factor arose in cross-examination of Manoharan and therefore there was a basis for the Panel's conclusion.

[62] While there may be some difficulties with the Panel's reasoning, they are not sufficient, in and of themselves, to conclude that the Panel's finding on this matter was so unreasonable as to warrant quashing of the TPA's decision on its acceptance of this finding alone.

(2) Marina

[63] In regard to this property, the Panel explained clearly why it would not adopt the MPAC assessment value. The Panel, having expertise in the area, could and did articulate its basis for accepting the income approach.

> **45.** With this is *[sic]* mind our decision relies on the basic appraisal principal in the analysis of Highest and Best Use. On page 32 of Mr. Cordick's report, he indicates 'the use of the site as a marina is legally permissible, probably, marketable and *financially feasible.*' In addition, consideration was given to typical market transactions and the expectation that were the property to be offered on the open market it would trade based on its income producing capabilities. As such, it is our opinion that the Marina, operating as an income producing marina, should be valued by the Income Approach to value and having no other evidence than that provided by the Port Authority we must depend upon that.

[64] Therefore, the Panel's conclusion is reasonable and thus the TPA's acceptance of it is likewise reasonable.

(3) Marine Terminal

[65] While the Applicant argued that obsolescence as a valuation factor was not raised by TPA, Manoharan does in fact raise the issue.

[66] As noted earlier, the Panel erroneously used a discount rate based on the property being used only to the extent of 30% of capacity. The TPA Board corrected that error. As the issue is the TPA's decision, to the extent that it revised and thus did not accept the Panel's advice, the determination of reasonableness focuses on the TPA Board not the Panel.

[67] The more problematic area of the Panel's consideration of this property is the decision to average the values of both sides. The Panel had generally not accepted Cordick's evidence. In this case the Panel specifically rejected both parties' valuations as unreasonable. Despite this rejection the Panel averaged the two valuations in arriving at its recommendation.

[68] Absent a rationale for averaging rejected evaluations, the Panel's recommendation is not reasonable. There may have been a rationale but the record does not give any basis for the Court to conclude what it may have been. This recommended value cannot stand.

(4) TCCA

[69] The valuation for the airport is unique in that it is not a valuation but a recommended PILT amount of 80¢ per passenger. The Panel recommended the amount which was adopted and applied by the Board.

[70] The Panel's mandate never encompassed specifying the amount of the PILT. Its function was to make a recommendation of property valuation. The scheme of the legislation is that a property value must be established to which a tax rate is then applied to arrive at a possible PILT amount. Both the Act and the Regulations make that clear. Section 3 of the Act authorizes the Minister to make a PILT on the basis that:

4. (1) Subject to subsections (2) and (3) and 5(1) and (2), a payment referred to in paragraph 3(1)(*a*) shall not exceed the product of	**4.** (1) Sous réserve des paragraphes (2), (3) et 5(1) et (2), le paiement visé à l'alinéa 3(1)*a*) ne peut dépasser le produit des deux facteurs suivants :
(*a*) the effective rate in the taxation year applicable to the federal property in respect of which the payment may be made, and	*a*) le taux effectif applicable à la propriété fédérale en cause pour l'année d'imposition;
(*b*) the property value in the taxation year of that federal property.	*b*) la valeur effective de celle-ci pour l'année d'imposition.

Section 7 of the Regulations has the same basis in respect of a Crown corporation:

7. (1) Subject to subsection (2), a payment made by a corporation in lieu of a real property tax for a taxation year	**7.** (1) Sous réserve du paragraphe (2), un paiement versé par une société en remplacement de l'impôt

shall be not less than the product of	foncier pour une année d'imposition ne doit pas être inférieur au produit des deux facteurs suivants :
(*a*) the corporation effective rate in the taxation year applicable to the corporation property in respect of which the payment may be made; and	*a*) le taux effectif applicable à la société dans l'année d'imposition en cause à l'égard de la propriété de celle-ci pour laquelle le paiement peut être versé;
(*b*) the corporation property value in the taxation year of that corporation property.	*b*) la valeur effective de la propriété de la société pour cette année d'imposition.

[71] The Panel also exceeded its own Rules of Practice in not determining the property value.

2.5 Only a disagreement by a Taxing Authority as to the property value, the property dimensions, the effective rate including the method of application of any tax mitigation measures such as capping and claw back provisions, rebates and discounts applicable to any federal or corporation property, or a claim that a payment should be supplemented under subsection 3 (1.1) of the Act is admissible as an application to the Advisory Panel. Issues dealing with the eligibility of a property, improvement or structure or decisions arising from the interpretation of the Act and its Regulations are outside the mandate of the Advisory Panel and should be	**2.5** Seule une contestation par l'autorité taxatrice de la valeur effective, de la dimension effective, du taux effectif incluant toutes méthodes d'application de déductions de taxes, telles que les dispositions en matière de plafonnement et de prélèvement, de dégrèvements et de rabais applicables à toute propriété fédérale ou d'une propriété de société ou de l'augmentation ou non d'un paiement déterminé au paragraphe 3(1.1) de la *Loi* est admissible devant le Comité consultatif. Les questions touchant notamment l'admissibilité d'une propriété, les améliorations et la structure ainsi que les décisions découlant de l'interprétation de la *Loi* et de son *Règlement* ne

addressed directly to the federal organization.	relèvent pas du mandat du Comité consultatif. Ces questions doivent être soumises directement à l'organisme fédéral.

[72] In effect, neither the Panel nor the TPA established a valuation of the airport property. The TPA attempted to enjoy the benefits of the PILT regime under the *Assessment Act* (see paragraphs 27 and 28 of these Reasons) without having had its application for inclusion in that regime approved.

[73] The Panel and the Board's legal error is compounded by the absence of any explanation as to the merits of the quantum of the per passenger amount.

[74] Therefore, the valuation, to the extent that it may be classified as such, is not sustainable as a matter of jurisdiction nor as a matter of reasonableness.

[75] In summary and based on disregarding the legal errors referred to, some but not all of the valuations found by the Panel are reasonable. The TPA Board's decision to pay the $5,561,607 is not entirely supported by reasonable conclusions.

V. CONCLUSION

[76] Having found parts of the decision of the TPA to be unreasonable, the Court ought to also consider the decision as a whole. A court should not find unreasonable and lightly overturn a panel

recommendation. If the decision as a whole but not necessarily all its constituent parts is reasonable or if parts can be segregated and kept whole, a court should consider letting the decision stand or consider letting those parts of the decision which are not infirmed, remain valid.

[77] However, in this case, the problematic areas are significant and multiple. They cover areas of jurisdiction, of law and of procedural fairness. They include a failure to appreciate the significance of evidence and they contain conclusions as to specific properties which are unreasonable. Further, if the Panel had properly considered the City's evidence and its import, its conclusions on specific properties might well have been different.

[78] Considered as a whole, the Court concludes that it would be preferable to commence the process again. A proper PILT determination is potentially a bedrock for the future amounts and provides stability and certainty to both parties.

[79] Therefore, the TPA's decision to pay $5,561.607 is quashed, the Panel's Report is to be set aside and at the request of either party a new PILT process is to be commenced before a differently constituted panel. The City shall have its costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the Toronto Port Authority's decision to pay $5,561,607 is quashed, the Federal Disputes Advisory Panel's Report is to be set aside and at the request of either party, a new Payments In Lieu of Taxes process is to be commenced before a differently constituted panel. The City of Toronto shall have its costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-165-09
STYLE OF CAUSE:	CITY OF TORONTO and TORONTO PORT AUTHORITY
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 22 and 23, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	June 24, 2010

APPEARANCES:

Ms. Diana Dimmer Mr. Angus MacKay	FOR THE APPLICANT
Mr. Philip L. Sanford	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CITY OF TORONTO Solicitor's Office Toronto, Ontario	FOR THE APPLICANT
McCARTHY TETRAULT LLP Barristers & Solicitors Toronto, Ontario	FOR THE RESPONDENT