



# Focus On



## MUNICIPAL & PLANNING LAW

# PILT ruling gives cities 'greater certainty'

## Lawyer predicts SCC decision will assist in Pearson airport dispute

BY GLENN KAUTH  
Law Times

A recent Supreme Court of Canada decision that upheld the City of Montreal's authority to collect payments from two federal Crown agencies helps clarify the relationship between municipalities and the national government, says a leading municipal and planning lawyer.

The case, *Montreal (City) v. Montreal Port Authority*, dealt with municipalities' authority to collect payments in lieu of property taxes from the federal government for land it owns. The issues dated back to 2003, when the city, following amalgamation on the island of Montreal, abolished its occupancy tax in favour of a variable-rate property tax. As the CBC and port authority hadn't been paying the occupancy levy under the previous arrangement, they deducted that amount from their property tax increase. In doing so, they cited their discretion under the federal Payments in Lieu of Taxes (PILT) Act.

John Mascarin, a partner with Aird & Berlis LLP in Toronto, notes the dispute originated in s. 125 of the Constitution Act, which grants the federal government immunity from taxation by other levels of government. As a result, acknowledging that not paying for the services it uses would be unfair, it has done so anyway under the PILT framework. But while the legislation grants the government discretion over the payments, the top court's ruling in April restricted its scope. "You can't just make decisions that are purely, completely discretionary," says Mascarin. "I think it adds a lot of clarity and it gives a much more clear road map as to the rules to be applied."

The case essentially involved a judicial review of the federal government's decisions, which the Federal Court first allowed and the Federal Court of Appeal later overturned. In allowing the appeal, Supreme Court Justice Louis LeBel noted the constitutional dilemma at the heart of the case. "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 obtained only by retaining a structured administrative discretion where the setting of the amounts in lieu is concerned," LeBel wrote.

So how much authority do municipalities have to



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collect? Can federal agencies arbitrarily set their PILT payments — minus the equivalent of Montreal's former occupancy tax, for example — against a municipality's wishes?

As it turns out, they don't have much scope to do so, according to LeBel, who wrote that "in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does, of course, exist, it must be exercised within a specific legal framework."

As a result, LeBel granted that federal agencies should have some leeway to deal with disputes with municipalities in cases where, for example, the lower level of government has shown bad faith, there are technical issues related to property assessment or there is some question about how to classify a piece of land.

Despite that discretion, LeBel said the CBC and port authority's positions contained a "fundamental flaw" given PILT regulations requiring that federal levies "be calculated as if the federal property were taxable property belonging to a private owner."

LeBel also noted that "they cannot base their calculations on a fictitious tax system they themselves have created arbitrarily."

For Mascarin, the decision is important given its focus on setting out the degree to which the federal government has discretion over PILT payments. "I think

before there was at least some doubt [about] whether they have to exercise their discretion with the utmost reasonableness," he says.

Mascarin, in fact, notes the ruling may be helpful in a case he's dealing with involving the City of Mississauga, which is seeking a review of development charges payable by the federal government over the massive redevelopment at Toronto's Pearson International Airport. "I think the case is of great assistance to Mississauga's position," he says, adding the dispute centres on the amount Public Works and Government Services Canada must pay rather than on whether it is responsible for development charges in the first place.

In that case, the city is seeking about \$26 million, whereas the federal government has offered up \$890,000. The difference, Mascarin points out, centres on whether improvements made to the land count as credits against the development charges payable. "They've built roads, they've built storm-management facilities that aren't creditable," he maintains.

To be eligible for credit, a road, for example, must be part of the municipal infrastructure, something Mascarin says doesn't apply in the Mississauga case. "We're really surprised that the federal government hasn't acceded to making some sort of settlement," he adds.

The Toronto area does, of course, have other disputes over similar issues. A long-running one, for example, involves PILTs payable by the Toronto Port Authority to the City of Toronto. The parties reached a so-called macro settlement on the matter in December. For its part, the port authority said in April that the Supreme Court ruling on the Montreal case involved issues unrelated to its own matter.

For Jeff Cowan, a partner at WeirFoulds LLP, the recent top court decision is "good law" that should give municipalities "greater certainty to collect" levies from federal agencies.

"It's a sound reading of the legislation," he says, noting the ruling goes some way to circumscribing the discretion the federal government has.

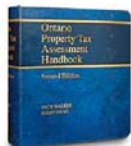
"I think it's important that it doesn't give Public Works an open-ended discretion to pay what they want to pay," he adds.

For Cowan, the ruling essentially means the federal government has to live by the constraints set out in the PILT legislation. "If they want more [discretion], then they'll have to change the regulations," he says. **LT**

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