

Court File No. T-2283-23

FEDERAL COURT

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
	OCT 27 2023	
	NATASHA FITTER	
VANCOUVER, BC		1

BETWEEN:

CITY OF VANCOUVER

Applicant

AND

ATTORNEY GENERAL OF CANADA and
CANADA MORTGAGE AND HOUSING CORPORATION

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

October 27, 2023

Issued by: Natasha Fitter

**NATASHA FITTER
REGISTRY OFFICER
AGENT DU GREFFE**

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
3rd Floor
Vancouver, British Columbia
V7Y 1B6

TO:

Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Canada Mortgage and Housing Corporation
700 Montreal Road
Ottawa, Ontario
K1A 0P7

Payments in Lieu of Taxes Dispute Advisory Panel
PO Box 428
Niverville, Manitoba
R0A 1E0
Attention: Mr. Gordon Daman, Chair

APPLICATION

This is an application for judicial review of the decision of the Chair of the Payments in Lieu of Taxes Dispute Advisory Panel (the “DAP”), made and communicated to the Applicant on September 27, 2023 (the “Decision”), to refuse the Applicant’s application to review the payments in lieu of taxes (“PILTS”) paid to the Applicant by Canada Housing and Mortgage Corporation (“CMHC”) for the 2011 to 2022 tax years (the “Application”).

The Applicant makes application for:

1. An order or orders:
 - a. Declaring that the DAP erred in law or in jurisdiction or both by failing to accept the Application in accordance with its mandate under section 11.1(2) of the *Payments in Lieu of Taxes Act*, RSC 1985, c M-13 (the “*Act*”) and section 12.1 of the *Crown Corporation Payments Regulations* (SOR/81-1030) (the “*Regulations*”), including by:
 - i. failing to give consideration to the individual grounds of the Application and unreasonably concluding that the grounds amounted to the same issue;
 - ii. unreasonably interpreting its mandate without regard to the intent of the *Act* and the DAP’s own Rules of Practice; and
 - iii. unreasonably disregarding its Rules of Practice without providing notice to the Applicant or affording the Applicant an opportunity to make further submissions.
 - b. Declaring that the DAP based the Decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - c. Declaring that the DAP failed to observe principles of natural justice, procedural fairness, or other procedure that it was required to by law to observe;
 - d. Declaring the that the Decision was unreasonable for the foregoing reasons;

- e. Declaring that the DAP has jurisdiction under its mandate to Accept the Application for review on one or more of the grounds raised by the Applicant;
 - f. Quashing the decision and directing the DAP to accept the Application for review on one or more of the grounds raised by the Applicant;
 - g. In the alternative, quashing the Decision and referring the Application back to the DAP for redetermination in accordance with the Court's directives.
2. Costs of this application.
 3. In the event that this application is dismissed, an order that the Applicant shall not be required to pay costs to the Respondents, pursuant to Rule 400 of the Federal Court Rules.
 4. Such further and other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties

1. The applicant City of Vancouver is a municipal corporation continued pursuant to section 5 of the *Vancouver Charter*, S.B.C. 1953, c.55.
2. The Attorney General of Canada is named as a respondent on behalf of the DAP. The DAP has statutory responsibilities under the *Act* and the *Regulations* and is the authority responsible for making the Decision. The DAP is a "federal board, commission or other tribunal" within the meaning of sections 2(1) and 18.1 of the *Federal Courts Act* (R.S.C., 1985, c. F-7).
3. CMHC is a Federal Crown corporation continued pursuant to section 3 of the *Canada Mortgage and Housing Corporation Act*, R.S.C., 1985, c. C-7. CMHC manages federally owned properties within the Granville Island development in the city of Vancouver on behalf of the Government of Canada (the "Granville Island Properties").

Legislative Framework

4. The Federal Crown is constitutionally exempt from provincial and municipal taxation, including the payment of municipal property taxes for federally owned properties. To compensate municipalities for the property taxes that they would have otherwise levied in respect to Federal Crown properties, Parliament created a scheme whereby the Federal Crown and its agents may make discretionary payments to municipalities in lieu of taxes in accordance with the *Act*. Federal Crown Corporations that own or manage Federal Crown properties are responsible for the administration of the payment in lieu of taxes scheme (the “PILT Scheme”) pursuant to the *Act* and the *Regulations*.
5. The Applicant is subject to the PILT Scheme by virtue of falling within the definition of “taxing authority” under s2(1) of the *Act*.
6. The Granville Island Properties are subject to the PILT Scheme by virtue of falling within the definition of “federal property” under s2(1) of the *Act*.
7. CMHC is subject to the PILT scheme by virtue of section 11(1)(a) and Schedule III in the *Act*.
8. Under the PILT Scheme, a payment made by a Crown Corporation shall not be less than the product of the corporation effective rate of taxation in the given tax year and the assessed value of the corporation property. (section 7(1) of the *Regulations*)
9. “Corporation effective rate” is defined as meaning the rate of property tax that the Crown Corporation would consider applicable if the subject corporation property was taxable by the municipality. (section 2 of the *Regulations*)
10. In determining an amount payable under section 7(1), a Crown Corporation may deduct expenses incurred for the provision of services to the property that are not provided by the taxing authority. (section 9(c) of the *Regulations*)
11. The PILT Scheme further establishes the DAP as a dispute resolution mechanism. The DAP is required to provide advice to a Crown Corporation when a taxing authority

disagrees with the corporation's determination of the corporation effective rate applicable to a subject property. (s11.1 of the *Act* and s12.1 of the *Regulations*)

12. The DAP has adopted Rules of Practice (the "Rules") that "provide a process for the fair and equitable consideration of applications for review" (Rule 1).

The City's Application for Review

13. Between 2011 and 2022, the Applicant made annual requests to CMHC for PILTS in respect to the Granville Island Properties (the "PILT Requests"). In each instance the request identified the subject Granville Island Properties and the corresponding assessment values and tax rates used by the Applicant to calculate the PILT amounts sought.
14. The PILT Requests were not assessed or paid by CMHC in accordance with the *Act*. By the end of 2022 the accumulated PILT Requests amounted to over \$4-million.
15. On May 11, 2023, the Applicant received a payment from CHMC for the PILT Requests in the amount of \$406,461.86. In determining the amount payable, CMHC had applied corporation effective rates equal to a 90% discount on the rates applied by the Applicant in the PILT Requests. CMHC justified their assessment of the PILT amounts on deductions that were made pursuant to section 9(c) of the *Regulations*, consideration of the fact that CMHC operates Granville Island "on a cost recovery basis", consideration of the fact that the Granville Island development provides a significant arts and cultural amenity to the City's residents and visitors, and good will.
16. The PILT scheme does not authorize CMHC to invoke the economic benefits or the economic model of the Granville Island development, or the goodwill between the parties, as a basis to arrive at the applicable corporation effective rate.
17. On September 27th, 2023, the Applicant submitted the Application to the DAP for a review of the PILTS paid by CMHC on May 11, 2023. The Application was made pursuant to section 11.1(2) of the *Act*, section 12.1 of the *Regulations*, and Rule 4.5 of the *Rules*.

18. Section 11.1(2) of the Act establishes the mandate of the DAP:

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

(Emphasis added)

19. Section 12.1 of the *Regulations* provides that section 11.1 of the Act applies to crown corporations and corporation properties.

20. Rule 4.5 of the *Rules* set out the DAP's interpretation of their mandate with respect to the extent of their jurisdiction under section 11.1(2) of the *Act*:

4.5 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. [...]

(Emphasis added)

21. The Application raised 4 grounds of review:

1. The PILT payments made by CMHC for the subject properties are unreasonable because they stem from the application of a corporation effective rate that is arbitrarily determined, and not made in accordance with the provisions of the Act or the Regulations.
2. The PILT payments made by CMHC for the subject properties include mitigation measures, claw backs, or discounts under section 9(c) of the Regulations that exceed reasonable expenditures incurred by the corporation to provide services to the subject properties.
3. The PILT payments made to the City by CMHC for the subject properties are unreasonable because the mitigation measures, claw backs, or discounts applied under section 9(c) of the Regulations resulted in a PILT amount that fails to

adequately compensate the City for the services it delivers to the subject properties, including policing and fire prevention services.

4. The PILT payments made by CMHC for the subject properties are unreasonable because they improperly take into account purported benefits that Granville Island provides to the City as justification for the corporation effective rate applied by CMHC.

The DAP Decision

22. On September 27, 2023, the DAP refused to accept the Application on the basis that the “issue” raised by the Applicant was not “within the legislative mandate of DAP”. The DAP Chair based the Decision on the finding that:

“The matter you have applied to the DAP to consider, in my opinion, is one regarding the reasonableness of deductions made by Granville Island under Section 7 (c) of the Payments in Lieu of Taxes Act.

Determination of reasonability, within the Payments in Lieu of Taxes Act, rests with the Federal Court as DAP has no legislative authority to consider such matters.”

23. The Decision erroneously cites section 7(c) of the *Act* as the authority for CMHC to make deductions for services. The correct authority is section 9(c) of the *Regulations*.
24. At no time prior to rendering the Decision was the Applicant advised that the DAP would resign from its interpretation of its mandate in the Rules.
25. At no time prior to rendering the Decision was the Applicant provided an opportunity to make further submissions on the issues, prepare and produce statements of issues, evidence and analysis, or attend a review management conference, as the DAP Chair is entitled to provide under Rule 9.1
26. At no time was there any indication that the Application was in any way deficient or did not comply with the Rules.

Grounds

27. Pursuant to section 11.1(2) of the Act and section 12.1 of the Regulations, it was mandatory for the DAP to provide advice to CHMC if the Application satisfied the threshold test, being that the Applicant disagreed with CHMC's determination of the corporation effective rate applicable to the Granville Island Properties.
28. The DAP's conclusion that the review of section 7(c) [SIC] deductions fell outside of its mandate was an error in law that stemmed from an unreasonable interpretation of section 11.1(2) of the *Act*. Properly construed, with consideration of the intent of the *Act* and the DAP's own rules, the only reasonable interpretation is that section 7(c) [SIC] deductions are tax mitigation measures that effectively impact the corporation effective rate of taxation and are thus subject to review under section 11.1(2).
29. Moreover, the DAP's conclusion that the 4 grounds of review amounted to the same issue of section 7(c) [SIC] deductions was unreasonable. On its face, the Application's first ground posits that the corporate effective rate applied by CMHC was arbitrary, meaning that there was an absence of a lawful scheme or reason to explain how CMHC came to apply a corporation effective rate that was 90% less than the rate applied by the Applicant in the PILT requests. Ground #1 fell squarely within the DAP's mandate. In collapsing the Application's four grounds into the single 7(c) [SIC] issue, the DAP based the Decision on an erroneous finding of fact that it made in a capricious manner and without regard to the material before it, rendering the Decision unreasonable.
30. Moreover, the DAP's decision to disregard its own interpretation of its mandate set out in Rule 4.5 without notice to the Applicant or without providing the Applicant an opportunity to make further submissions amounts to a denial of procedural fairness and renders the Decision unreasonable.
31. The Applicant further relies upon the following as general grounds for the application:
 1. *Federal Courts Act*, RSC 1985, c F-7;
 2. *Federal Courts Rules* (SOR/98-106);

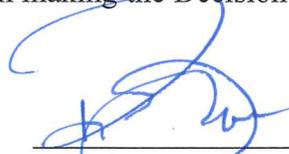
3. *Payments in Lieu of Taxes of Taxes Act, RSC 1985, c M-13;*
4. *Crown Corporation Payments Regulations (SOR/81-1030);*
5. *Payments in Lieu of Taxes Dispute Advisory Panel Rules of Practice; and*
6. *Such additional grounds as counsel may identify and this Honorable Court may consider.*

This application will be supported by the following materials:

1. The Application.
2. The Decision.
3. An affidavit of Julia Aspinall.
4. Such further and other materials as counsel may advise and this Court may allow.

Rule 317 Request: The Applicant requests the DAP send a certified copy of all materials that were placed before and considered by the Chair in making the Decision to the Applicant and the Federal Court Registry.

October 27, 2023



W. Robert LeBlanc
Tel: 604-873-7512
Fax: 604-873-7445
Email: robert.leblanc@vancouver.ca

City of Vancouver
Law Department
453 West 12th Avenue
Vancouver, BC V5Y 1V4

Solicitor for the Applicant