Federal Court Cour fédérale

Date: 20231124

Docket: T-2441-22

Citation: 2023 FC 1562

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 24, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

AÉROPORTS DE MONTRÉAL

Respondent

JUDGMENT AND REASONS

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I. Introduction

[1] This is an application for determination of an arbitral tribunal's jurisdiction under subsection 16(3) of the *Commercial Arbitration Code* [CAC] (set out in Schedule 1 to the *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp)), and subrule 324(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules].

[2] The Attorney General of Canada [AGC] is seeking the Court's intervention to dismiss, on a preliminary basis by declinatory exception, a claim brought before an arbitral tribunal by Aéroports de Montréal [ADM] under the CAC. ADM brought its claim under an arbitration clause in an agreement between the parties that gives an arbitral tribunal jurisdiction to decide certain issues between the parties.

[3] This dispute began in 2016. However, it is the contract documents entered into by the parties in 1992, as part of transferring the management and development of Pierre Elliott Trudeau Airport [the Airport] from the Minister of Public Works Canada to ADM, that have given rise to this dispute.

[4] At the time of the transfer, it was agreed that the Airport would remain Crown property, so that ADM could be exempted from paying real property taxes. ADM wished to continue the existing arrangement, whereby the Minister of Public Works Canada made payments in lieu of taxes [PILTs] to the municipal authorities under what is now known as the *Payments in Lieu of Taxes Act*, RSC 1985, c M-13 [PILT Act]. The process established in the contract documents between the parties was that ADM would reimburse Public Works Canada for PILTs paid to the municipal authorities.

[5] The relationship between the parties is governed by a number of contract documents, including the Agreement to Transfer [ATT], the General Service Agreement [GSA] and the Ground Lease. The ATT contains an arbitration clause that gives an arbitral tribunal jurisdiction over certain issues, including issues relating to the Ground Lease. The real issue is whether PILTs are included in the Ground Lease as "Additional Rent" within the meaning of the Ground Lease. If so, an arbitral tribunal would have jurisdiction under the ATT arbitration clause.

[6] ADM alleges that the amount it agreed to reimburse Public Works Canada for PILTs paid to the municipal authorities is "Additional Rent" within the meaning of the Ground Lease. ADM then alleges that the calculation of the amounts payable under the PILT Act is part of a contractual obligation under the GSA. The GSA requires that the Minister of Public Works Canada calculate PILTs in accordance with the same [TRANSLATION] "standards and rules governing federal properties". ADM believes that the method used by the Minister of Public Works Canada to calculate PILTs is flawed, with the result that ADM has paid more than it should have in PILT reimbursements and, therefore, in "Additional Rent" under the Ground Lease. Since the dispute is regarding an obligation under the Ground Lease, ADM has decided to refer the matter to an arbitral tribunal in accordance with the ATT arbitration clause.

[7] The AGC has responded that PILT reimbursements are covered not by the Ground Lease but solely by the GSA. Moreover, issues arising from the GSA are not covered by the ATT arbitration clause. Consequently, the arbitral tribunal does not have jurisdiction to hear ADM's claim.

[8] For the reasons that follow, PILT reimbursement is part of ADM's obligations under the Ground Lease as "Additional Rent". A dispute regarding an overpayment of "Additional Rent" is therefore a dispute under the Ground Lease that may be referred to an arbitral tribunal, in accordance with the ATT arbitration clause. Consequently, the AGC's application is dismissed.

II. Background

A. *PILTs*

[9] Section 125 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act, 1867*] provides that "[n]o Lands or Property belonging to Canada or any Province shall be liable to Taxation". In other words, the federal Crown is immune from property, municipal and school taxes.

[10] To recognize and contribute to services provided by municipalities, Parliament introduced a system in 1951 to make fair and equitable payments "in lieu of taxes" to taxing authorities, while maintaining the Crown's immunity from taxation. This was a way to compensate municipalities for their services, through voluntary payments in lieu of taxes (*Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at paras 13–14; *Chelsea (Municipality) v Canada (Attorney General)*, 2023 FC 103 at para 7). The system has changed over the years, and the legislation implementing it has changed names. In these reasons, "PILT" and "PILT Act" also refer to the former system, since the changes made to the PILT system over the years have no bearing on the issues in this case.

[11] Under the PILT Act, the Minister of Public Works Canada (now Public Services and Procurement Canada [PSPC]—in these reasons, "PSPC" is used instead of "Public Works Canada" even though it was Public Works Canada that entered into the GSA with ADM) annually calculates the PILT payable to taxing authorities (in this case, the City of Dorval, the City of Pointe-Claire and the City of Montréal as the central city, collectively referred to as the "Cities") for the federal properties of which the Airport is a part. This amount is equal to the product of the "property value" and "effective rate" of the property. These two concepts, defined in the PILT Act, refer to the value and rate that PSPC considers would apply to the property if it were taxable.

[12] Under the PILT Act, PSPC pays a taxing authority a PILT for a given taxation year for each federal property in the area covered by the taxing authority. This is therefore an alternative way to collect amounts that are equivalent to municipal taxes.

[13] Note that immunity under section 125 of the *Constitution Act, 1867* does not apply to non-Crown entities. For example, third parties such as ADM that lease property from the Crown are not immune.

B. *Transfer history*

[14] ADM was created after the federal government decided to transfer the management and development of certain airports to corporate entities. ADM is a non-profit corporation without share capital. The Crown transferred the management, operation, maintenance and development

of the Airport to ADM under various contract documents, including the Ground Lease, which expires in 2072.

[15] His Majesty (represented by Transport Canada [TC]) and ADM began discussions on leasing the Dorval and Mirabel airports in 1988 (Applicant's Record [AR], vol 1, Exhibit D-3 at 326).

[16] During the discussions on transferring the management and development of the Airport, ADM required that the PILT system be retained. Since ADM is not a Crown corporation, it is not exempted from paying real property taxes under section 125 of the *Constitution Act, 1867*. To avoid a sharp increase in real property taxes payable by ADM to the Cities, a process was agreed upon by which ADM would be exempted from the *Act respecting municipal taxation*, CQLR c F-2.1 [AMT], while PSPC would continue to pay PILTs and ADM would reimburse PSPC for those PILTs. Obviously, the PILT system is more advantageous for ADM than the AMT, which would otherwise apply.

[17] Therefore, the use of the PILT system was an important factor in negotiating the agreements. In fact, ADM requested legislative amendments during the pre-contractual phase, with the consent of the federal government, to exempt the Airport from the application of the AMT so that ADM could benefit from the PILT system despite its being a tenant of the Crown.

[18] The federal government had no objection because, on the face of it, the government saw this as a cost-neutral arrangement with ADM paying for the PILTs. However, in exchange, ADM

had to agree to a protocol for reimbursing PSPC for the PILTs that PSPC would be paying to the Cities. The specific payment terms are set out in three contract documents, which are discussed in the next section.

[19] At ADM's request, and concurrently with the leasing process, the federal and provincial governments legislated to keep the Airport in the PILT system and exempt it from the application of the AMT. The Quebec National Assembly passed the *Act respecting Aéroports de Montréal*, SQ 1991, c 106, and issued an order-in-council exempting ADM from the application of the AMT. The federal government amended the *Municipal Grants Regulations, 1980*, SOR/92-505, so that properties leased to an airport authority would be included in the definition of "federal property" and would therefore be subject to the PILT Act despite their being leased to third parties.

[20] The parties then entered into three agreements. The ATT was entered into on April 1, 1992, the GSA, on June 26, 1992, and the Ground Lease, which was attached to the ATT, on July 31, 1992.

C. *Three agreements*

(1) Agreement to Transfer

[21] PSPC and ADM began by entering into the ATT on April 1, 1992.

[22] Section 10.01 of the ATT contains an arbitration clause:

> [TRANSLATION]
>
> 10.01.01 Any dispute or disagreement between the parties that may arise from this Agreement or any of the Instruments, other than a dispute or disagreement on a point of law, may be referred to an arbitral tribunal upon written request by the Minister or [ADM].

[23] "Instrument" is defined in subsection 1.01.01 of the ATT:

> [TRANSLATION]
>
> "Instrument" means the documents listed in Subsection 3.02.01, when executed and delivered, and as amended from time to time.

[24] The Ground Lease is listed in subsection 3.02.01, but the GSA is not.

[25] Therefore, under section 10.01, any issue relating to the [TRANSLATION] "Lease" may be referred to an arbitral tribunal.

(2) General Service Agreement

[26] On June 26, 1992, ADM and PSPC signed a memorandum of understanding regarding the administration of the Airport's PILTs, entitled "Convention générale de services entre Travaux Publics Canada et Aéroports de Montréal concernant l'administration des subventions en guise d'impôts fonciers". This is an agreement between His Majesty, represented by PSPC, and the private manager of the Airport, ADM, regarding the administration of the government's PILT system, which is the responsibility of PSPC.

[27] Under article 4 of the GSA, PSPC calculates PILTs for the Airport. Article 4 of the GSA reads as follows:

> [TRANSLATION]
>
> 4. Grants in lieu of taxes will be calculated by PWC in accordance with the standards and rules governing federal properties. These grants will be paid in accordance with the *Municipal Grants Act, 1980*, R.S.C. 1985, c. M-13.
>
> [Emphasis added.]

[28] Under article 5.2 of the GSA, ADM must advance the amounts required to pay the grants to the taxing authorities:

> [TRANSLATION]
>
> 5.2 To remit in advance to PWC, within the prescribed time limits and on presentation of the appropriate supporting documents, the amounts required to pay the grants.
>
> [Emphasis added.]

[29] Usually, federal properties are managed by PSPC and not by a non-profit corporation independent of the government such as, in this case, ADM. Here, the GSA sets out the terms and conditions between the parties as to how the government's PILT system applies to the Airport and how the grants paid by PSPC are reimbursed by ADM.

[30] Although the GSA was signed a month before the Ground Lease, it remains in force [TRANSLATION] "… until the expiry of the lease between the Corporation (ADM) and Transport Canada" (article 2, paragraph 2 of the GSA).

[31] The GSA as a whole therefore enables ADM to meet its commitment to ensuring that its categorization as "federal property" is, in theory, cost-neutral to the Crown.

[32] Note that, since March 1995, ADM has been paying PILT amounts on receipt of an invoice from PSPC rather than in advance, as required by article 5.2 of the GSA. In addition, contrary to article 5.3 of the GSA, ADM does not cover PSPC's appraisal costs but instead hires independent appraisers. Both parties have agreed to these changes, although the GSA has not been formally amended (AR, vol 1, Tab 3, AB-2 Affidavits of AGC Witnesses, Tab B Affidavit of Jacques Demers (PWGSC) at paras 25–27 at 280).

[33] The parties acknowledge that the GSA is not an "Instrument" within the meaning of the ATT and that the ATT arbitration clause does not apply to disputes arising from the GSA.

(3) Ground Lease

[34] The Ground Lease for the lands and facilities at the Montréal-Trudeau and Mirabel airports was signed on July 31, 1992, for a 60-year term. It was attached to the ATT.

[35] Subsection 4.02.01 of the Ground Lease defines "Additional Rent":

> [TRANSLATION]
>
> 4.02.01 "Additional Rent" means <u>any sum of money or charges</u> payable to the Landlord by the Tenant under this Lease, <u>other than Airport Rent, whether or not referred to as "Additional Rent"</u>.
>
> [Emphasis added.]

[36] The Ground Lease defines "Real Property Taxes" as follows:

> [TRANSLATION]
>
> Paragraph 5.01—Definitions
>
> 5.01.01 "Real Property Taxes" means, in respect of the Demised Premises, all taxes, contributions, duties and assessments (including local improvement, frontage, water, snow clearance and sewerage taxes and levies) and other charges, taxes, and development taxes or levies, whether general or special, ordinary or extraordinary, foreseen or unforeseen, of any kind whatsoever and whether or not existing at the Date of Commencement, and any fines, penalties, interest and costs related thereto, which are levied, imposed, appraised, assessed or collected (collectively, "Imposed") on all or any part of the Demised Premises at any time by any taxing authority, whether federal, provincial, municipal, school or other, as well as any taxes or other amounts Imposed in lieu of or in addition to Real Property Taxes (whether or not of the nature referred to above and whether or not existing on the Date of Commencement) and all Real Property Taxes Imposed on the Landlord in respect of its ownership of or interest in all or part of the Demised Premises, as well as any Real Property Taxes Imposed on the Tenant or any other Person as holder or occupant of all or part of the Demised Premises.
>
> …
>
> [Emphasis added.]

[37] Section 5.04 is also relevant because it is the only provision of the Ground Lease that deals specifically with [TRANSLATION] "Grants in Lieu of Taxes", now known as "PILTs":

> [TRANSLATION]
>
> Section 5.04—Grants in Lieu of Taxes
>
> 5.04.01 Subject to any agreement between Her Majesty, as represented by the Minister of Public Works, and the Tenant with respect to the matters referred to in paragraphs (a) and (b) below, the Tenant must, upon request, promptly advance to the Landlord, as Additional Rent, any sum required by the Landlord to

> (a) pay grants in lieu of Real Property Taxes for any part of the Demised Premises in accordance with the *Municipal Grants Act*, R.S.C. 1985, c. M-13 or any similar or successor legislation; and
>
> (b) cover all reasonable general and administrative expenses of the Landlord.
>
> 5.04.02 The Tenant agrees to comply fully with all the terms and conditions of any agreement referred to in subsection 5.04.01.
>
> [Emphasis added.]

[38] Since the Ground Lease is an "Instrument" within the meaning of the ATT, any dispute arising from the Ground Lease may be referred to arbitration under the arbitration clause in article 10.01.01 of the ATT.

[39] In contrast, since the GSA is not an "Instrument" within the meaning of the ATT, the arbitral tribunal will have jurisdiction only if the parties' obligations under the GSA are incorporated into the Ground Lease. That is the issue in this case.

D. *Dispute between parties*

[40] This dispute stems from a disagreement between the parties regarding PILTs calculated by the Minister of PSPC under the GSA and reimbursed by ADM.

[41] ADM alleges that the PILTs were not calculated [TRANSLATION] "in accordance with the standards and rules governing federal properties" as required by the GSA. ADM alleges non-compliance with certain [TRANSLATION] "standards and rules" that it considers to be applicable to calculating the PILTs paid to the Cities, where the Airport is located. In other words, ADM disagrees with the appraisal parameters used by the Minister to determine the "property value"

and "effective rate" for the Airport, which were then used to calculate the PILT due each year. Since article 4 of the GSA requires that PSPC follow the same [TRANSLATION] "standards and rules" as for other federal properties, ADM must show that the Minister used a PILT calculation method that differs from the one used for other federal properties.

[42] ADM considers that its PILT reimbursements to PSPC under the GSA are "Additional Rent" within the meaning of the Ground Lease and are therefore subject to the ATT arbitration clause, that is, the dispute is over an item provided for in the Ground Lease, namely the "Additional Rent". ADM therefore filed a notice of arbitration under the ATT arbitration clause, since the Ground Lease is an "Instrument" that may be the subject of a claim before an arbitral tribunal. In the notice of arbitration, the arbitral tribunal was asked to do the following:

> [TRANSLATION]
>
> (a) **SET** the total Property Value of Airport Lands for the property assessment roll for the fiscal three-year period 2017–2018–2019;
>
> (b) **SET** the total Effective Rate of Airport Lands for the property assessment roll for the fiscal years 2017–2018–2019;
>
> (c) **SET** the Additional Rent for Payments in Lieu of Taxes for the three-year assessment roll in 2017–2018–2019; and
>
> (d) **ORDER** the defendant to pay the plaintiff the overpayment in Additional Rent corresponding to the Payments in Lieu of Taxes for the Pierre Elliott Trudeau Airport for the fiscal years 2017 and 2018, subject to amplification, in addition to interest at the legal rate and the additional interest provided for in art. 1619 of the *Civil Code of Québec*, as of April 20, 2017.
>
> …

[43] ADM states that, under sections 5.01 and 5.09 of the Ground Lease, which deal with "Real Property Taxes", it may dispute PILT amounts that it describes as "Additional Rent" to be reimbursed to PSPC. In this regard, ADM notes that, under sections 5.01.01 and 5.04 of the Ground Lease, ADM must pay "Additional Rent" to reimburse "Real Property Taxes". "Real Property Taxes" include PILTs; therefore, PILT reimbursement payments to PSPC are compensation for Real Property Taxes in the form of "Additional Rent" under the Ground Lease. ADM therefore submits that the GSA is incorporated into subsections 5.04.01 and 5.04.02 of the Ground Lease and, consequently, payments in lieu of PILTs are included in the Ground Lease.

[44] The AGC filed a declinatory exception before the arbitration tribunal, asking it to reject ADM's claim on the grounds that it lacked jurisdiction to hear the dispute. The AGC submits that the ATT arbitration clause does not apply to the GSA, which sets out the calculation of the PILT and its reimbursement by ADM. In short, the AGC submits that ADM should have applied to the Federal Court for judicial review because article 4 of the GSA, which refers to [TRANSLATION] "standards and rules governing federal properties" and which forms the basis of ADM's application, is excluded from the arbitration clause, as the GSA is not on the exhaustive list of "Instruments" in article 3.02.01 of the ATT.

[45] The AGC believes that the calculation of the amount to be paid under the PILT Act should be the subject of judicial review, as it is a discretionary administrative decision of the Minister of PSPC. The AGC alleges that neither the Lease, the ATT nor the GSA sets out a contractual regime that enables an arbitral tribunal to set the amount of "Additional Rent"

consisting of PILTs. The AGC claims that the dispute does not stem from the contractual agreements, but rather from the PILT Act.

E. *Arbitral tribunal's decision*

[46] The three-member arbitral tribunal ruled that it had jurisdiction to determine only ADM's final claim, that is, the overpayment of PILT under the Lease and the GSA.

[47] The arbitral tribunal found that the arbitration clause that is binding on the parties does apply to the dispute because ADM is claiming damages resulting from contractual breaches by PSPC in its PILT calculations under the GSA, which is incorporated into the Ground Lease.

[48] Specifically, the arbitral tribunal found that, in accordance with the terms of the GSA, ADM pays "Additional Rent" in lieu of PILT under subsections 4.02.01 and 5.04.01 of the Ground Lease. Moreover, the terms of the GSA are incorporated by reference into subsections 5.04.01 and 5.04.02 of the Ground Lease, since the obligation to make PILTs, set out in subsection 5.04.01, must be read in conjunction with the GSA, under article 4 of which PILT calculations are subject to the [TRANSLATION] "standards and rules governing federal properties" (AR, vol 1, Tab 2, Decision on Jurisdiction at paras 45–46, 49–50, 54, 58).

[49] It should be noted that the arbitral tribunal ruled that it had no jurisdiction to determine the other three issues raised by the applicants:

> [TRANSLATION]
>
> **SET** the total Property Value of Airport Lands for the property assessment roll for the fiscal three-year period 2017–2018–2019;

> **SET** the total Effective Rate of Airport Lands for the property assessment roll the fiscal three-year period 2017–2018–2019;
>
> **SET** the Additional Rent for Payments in Lieu of Taxes for the three-year assessment roll in 2017–2018–2019;

[50] The tribunal stated that these matters were within the exclusive and discretionary power of the Minister of PSPC and that an application for judicial review to set aside or review the Minister's decision should be brought before the Federal Court.

[51] Accordingly, the AGC's declinatory exception was allowed in part by the arbitral tribunal, since it declared that it had jurisdiction to determine only one of the four issues brought before it. The AGC is asking the Court to declare that the arbitral tribunal does not have jurisdiction over the one remaining issue, regarding which it ruled that it has [TRANSLATION] "jurisdiction to determine [ADM's] claim of a breach of contract and, if applicable, [to] award damages under the Ground Lease, the Agreement to [Transfer] and the General Services Agreement".

[52] Since the Court cannot judicially compel an arbitral tribunal to exercise jurisdiction that it has ruled it does not have, ADM cannot appeal the decision with respect to the other three issues that it had originally raised in its claim ("Report of the United Nations Commission on International Trade Law on the work of its eighteenth session" (UN Doc A/40/17) in Yearbook of the United Nations Commission on International Trade Law, vol XVI, Part 1, c VII, Vienna, UN, 1985 at para 163 at 22).

III. Issues

[53] The issue before the Court is whether the ATT arbitration clause includes the issue raised by ADM regarding the PILTs it had to reimburse to His Majesty under the GSA, since PILTs under the GSA are incorporated into the Ground Lease.

[54] To deal with this issue, the Court must answer the following questions:

A. *What is the legal framework that should guide the arbitration tribunal's analysis of a declinatory exception raised under subsection 16(3) of the CAC?*

B. *What are the rules of interpretation governing the agreements in this case and the arbitration clause?*

C. *Does the tribunal have jurisdiction over the issue resulting from the PILTs, since it is included in the Ground Lease?*

D. *Does the true nature of ADM's application require judicial review of the Minister of PSPC's exercise of discretion?*

IV. Analysis

A. *Legal framework that should guide the analysis of the arbitral tribunal's jurisdiction in the context of an application for declinatory exception under subsection 16(3) of the CAC*

[55] Unlike an appeal or judicial review, the Court must make a *de novo* decision on the jurisdiction that the arbitral tribunal has ruled it has (CAC, ss 6, 16(3)).

[56] Although the Court is proceeding *de novo*, it may still consider and draw from the arbitral tribunal's decision, without giving it deference (*Code of Civil Procedure* [CCP], art 632;

Khalilian c Murphy, 2020 QCCS 831 at para 22; *Groupe Dimension Multi Vétérinaire inc c Vaillancourt*, 2020 QCCS 1134 at paras 9–10 [*Groupe Dimension*]; *Alice & Smith Divertissement Inc c Duro*, 2020 QCCS 2253 at paras 8, 37–38).

[57] Since this is a declinatory exception, the Court need not rule on the merits of the dispute. The Court, "rather, is to take as averred the facts that are alleged by the plaintiff to bring it within the jurisdictional competence" of the tribunal (*Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78 at para 31 [*Spar Aerospace*]; *Stormbreaker Marketing and Productions Inc c Weinstock*, 2013 QCCA 269 at para 30; see also CCP, art 163).

[58] However, when facts that are *prima facie* taken as averred are contested in the declinatory motion or in the application to dismiss, it is necessary to prove the elements that establish the tribunal's jurisdiction. The parties may then present evidence in support of the application. The Court must not embark on an exhaustive analysis and rule on the merits of the dispute, but there must be sufficient evidence to enable it to conclude that there has been a *prima facie* demonstration of the arbitral tribunal's jurisdiction.

[59] The Court must therefore make the necessary findings of fact on the basis of the evidence to establish the jurisdiction of the arbitral tribunal (*Spar Aerospace* at paras 31–32; *Transax Technologies inc c Red Baron Corp Ltd*, 2017 QCCA 626 at paras 13–16, 23; *Barer v Knight Brothers LLC*, 2019 SCC 13 (CanLII), [2019] 1 SCR 573 at paras 33–34; *OSE Coaching immobilier inc c Pelletier*, 2021 QCCQ 2784 at paras 11–13; *Hornepayne First Nation v Ontario First Nations (2008) Ltd*, 2021 ONSC 5534 at paras 13–28; *Electek Power Services Inc v*

Greenfield Energy Centre Limited Partnership, 2022 ONSC 894 at paras 22, 26–29, 128, 131–34, 157–62 [*Electek*]; *Groupe Dimension* at paras 9–10).

[60] As the Ontario Court of Appeal stated in *Russian Federation v Luxtona Limited*, 2023 ONCA 393 at paragraphs 34 to 40, citing international case law on the subject, the power of an arbitral tribunal to rule on its own jurisdiction does not limit the powers of the Court to weigh and make its own findings of fact, on the basis of the evidence, to consider and rule *de novo* on that jurisdiction. These statements also apply to this case:

> [34] That is as far as the competence-competence principle goes. It does not require any special deference be paid to an arbitral tribunal's determination of its own jurisdiction. Competence-competence is best understood as "a rule of chronological priority" rather than as "empowering the arbitrators to be the sole judge of their jurisdiction": see Emmanuel Gaillard & John Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), at paras. 659-60.
>
> [35] As the Divisional Court correctly noted, the "uniformity principle" set out in Article 2A(1) of the Model Law makes international decisions strongly persuasive in Ontario. The very nature of international arbitration makes it highly desirable that Ontario's regime should be coherent with those of other countries, especially (but not exclusively) those that have also adopted the Model Law. The weight of international authority shows that the competence-competence principle does not limit the fact-finding power of a court assessing an arbitral tribunal's jurisdiction.
>
> …
>
> [38] Because the court retains the final say over questions of jurisdiction, it necessarily follows that the court must be, as a Singapore court put it, "unfettered by any principle limiting its fact-finding ability": *AQZ v. ARA*, [2015] SGHC 49, at para. 57.
>
> …
>
> [40] For these reasons, as the Singapore court held in *AQZ*, a court assessing an arbitral tribunal's jurisdiction is not limited to

> the record that was before the tribunal. Put another way, an application to set aside an arbitral award for lack of jurisdiction is a proceeding *de novo*, not a review of or appeal from the tribunal's decision.
>
> [Emphasis added.]

[61] In short, I agree with the arbitral tribunal, which also agreed to admit evidence to assess its jurisdiction while first taking as averred the alleged facts on the merits of the dispute. There is a significant distinction between the allegation that must be taken as averred at this stage (that the Minister of PSPC erred in failing to calculate the PILT reimbursements [TRANSLATION] "in accordance with the standards and rules governing federal properties") and the tribunal's jurisdiction to rule on this allegation on the merits, which involves the interaction between the ATT, the GSA, and the Ground Lease. In its decision, the arbitral tribunal stated the following:

> [TRANSLATION]
>
> [26] At this stage, the Tribunal may initially take as averred the facts alleged in the plaintiff's detailed claim. A party that raises the Tribunal's lack of jurisdiction and disputes the facts alleged in the claim may, to a certain extent, prove facts in support of its allegations (*Transax Technologies inc. c Red Baron Corp. Ltd.*, 2017 QCCA 626; *Spar Aerospace Ltd. v American Mobile Satellite Corp.* 2002 SCC 78).
>
> [27] At this preliminary stage, however, it is not a question of undertaking a detailed examination of the evidence or its bearing on the merits of the case.

[62] The Court may therefore consider evidence regarding the scope of the contractual provisions referred to by the parties, namely, the ATT arbitration clause, the GSA and the Lease, at a preliminary stage but without determining the merits of the case.

B. *What are the rules of interpretation governing the agreements in this case and the arbitration clause?*

[63] The main issue in this case is whether the three agreements, read together, give the arbitral tribunal jurisdiction to hear ADM's claim regarding its PILT reimbursements to PSPC. ADM alleges that PILTs have been calculated by PSPC contrary to His Majesty's contractual obligations as set out in the GSA and that ADM is required to make PILT reimbursements as "Additional Rent" under the Ground Lease.

[64] In *Uniprix Inc v Gestion Gosselin et Bérubé inc*, 2017 SCC 43 at paragraphs 34 to 37, the Supreme Court of Canada [SCC] explained how to interpret a contract:

> [34] The first step in interpreting a contract is to determine whether its words are clear or ambiguous (*Droit de la famille — 171197*, 2017 QCCA 861, at para. 62 (CanLII); *Samen Investments Inc. v. Monit Management Ltd.*, 2014 QCCA 826, at para. 46 (CanLII)). The purpose of this step, which some authors refer to as the clear act rule (*règle de l'acte clair*) (Gendron, at p. 27), is to prevent judges from departing, deliberately or unexpectedly, from a clearly expressed intention of the parties. In short, a judge must defer to a clear contract. This step thus [TRANSLATION] "'serves as a bulwark' against the risk of an interpretation that deviates from the true intention of the parties and subverts the scheme of their agreement" (Baudouin and Jobin, at No. 413 (citation omitted); see also Lluelles and Moore, at No. 1570).
>
> [35] Although this step is based first and foremost on a reading of the words themselves, it is not necessarily limited to that in every case, as there may be situations in which a contract's language is not faithful to the parties' common intention (Lluelles and Moore, at No. 1574; *Droit de la famille — 171197*, at para. 62). Indeed, [TRANSLATION] "[w]hen considered in the context of the agreement's other clauses or of the circumstances in which it was concluded, the seemingly clear words of a clause may [sometimes] prove to be ambiguous and to be inconsistent with the scheme of the contract, the true intention of the parties" (Baudouin and Jobin, at No. 413; see also Lluelles and Moore, at Nos. 1572-74; Tancelin, at No. 316; Gendron, at pp. 27, 31 and 34;

Éolectric inc. v. Kruger, groupe Énergie, 2015 QCCA 365, at paras. 18-19 (CanLII); *Rouge Resto-bar inc. v. Zoom Média inc.*, 2013 QCCA 443, at paras. 78-79 (CanLII)). Likewise, a clause that might be perceived to be ambiguous may be perfectly clear when considered in its context.

[36] If the words of the contract are clear, the court's role is limited to applying them to the facts before it. If, on the other hand, the court identifies an ambiguity, it must resolve the ambiguity by proceeding to the second step of contractual interpretation (Baudouin and Jobin, at No. 413; Lluelles and Moore, at Nos. 1584-86; *Samen Investments*, at paras. 46-47). The distinction between these two steps can be difficult to see, but it is fundamental. At the first step, the judge might, for example, consider the context of the conclusion and performance of the contract in order to confirm that its language is clear (see e.g. *Habitations Gilles Stébenne inc. v. 9166-9929 Québec inc.*, 2016 QCCS 2953, at paras. 34 and 41-47 (CanLII)). In principle, however, the judge should not have recourse to the principles of interpretation set out in arts. 1425 to 1432 of the *Code* (Baudouin and Jobin, at No. 413; Lluelles and Moore, at No. 1571). In this sense, the interpretation of the contract is more superficial at the first step than at the second (Lluelles and Moore, at No. 1572).

[37] The cardinal principle that guides the second step of the interpretation exercise is that "[t]he common intention of the parties rather than adherence to the literal meaning of the words shall be sought" (art. 1425 *C.C.Q.*). In this exercise, it is necessary to consider intrinsic aspects of the contract, such as the words of the clause at issue and the other clauses, in order to ensure that each of them is given a meaningful effect and that each is interpreted in light of the others (arts. 1427 and 1428 *C.C.Q.*; Baudouin and Jobin, at No. 417; Lluelles and Moore, at Nos. 1593-94). The interpretation of a contract also requires consideration of the nature of the contract and of the context extrinsic to it, including the factual circumstances in which it was formed, how the parties have interpreted it, and usage (art. 1426 *C.C.Q.*; Baudouin and Jobin, at No. 418; Lluelles and Moore, at Nos. 1600, 1603 and 1607).

[Emphasis added.]

[65] In other words, if the contract is clear, no further questions are necessary. One should not try to find a different interpretation in extrinsic evidence. Evidence is therefore required only where there is ambiguity.

[66] If the language of the contract is unclear, the rules of interpretation set out in articles 1425 to 1432 of the *Civil Code of Québec* [CCQ] apply. This is the second step, where the common intention of the parties rather than adherence to the literal meaning of the words must be sought (CCQ, art 1425), while taking into account the nature of the contract. Moreover, the clauses of the contract must be interpreted together so that each clause is given the meaning derived from the contract as a whole (CCQ, art 1427; Jean-Louis Baudoin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed (Cowansville, QC: Yvon Blais, 2013) at paras 416–17 at 497–98 [*Les obligations*]; Didier Lluelles and Benoit Moore, *Droit des obligations*, 3rd ed (Montréal: Les Éditions Thémis inc, 2018) at paras 1593–98 at 891–95 [*Droit des obligations*]).

[67] The Court must consider the intrinsic elements as well as analyze the extrinsic evidence of the circumstances in which the agreements were formed and the interpretation given to them by the parties through their conduct (CCQ, art 1426; *Uniprix inc v Gestion Gosselin et Bérubé inc*, 2017 SCC 43 at paras 34–37, 52 [*Uniprix*]; see also *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 57).

[68] Where there is ambiguity, article 1426 of the CCQ allows for the use of elements external to the contract itself, such as testimonial evidence of the circumstances in which it was formed, and the interpretation made by the parties as deduced from their conduct after the contract was

formed. In this way, the common intention of the parties can be determined (*Les obligations* at para 196 at 500; *Droit des obligations* at paras 1599–1606 at 895–901).

[69] Extrinsic evidence may also be admitted despite an entire agreement clause (*Invenergy Wind Canada c Eolectric inc*, 2019 QCCA 1073 at para 10 [*Invenergy*]). In this case, and as the arbitral tribunal stated at paragraph 31, the Court may take evidence into account if the interpretation of the agreements is ambiguous, despite the entire agreement clause in the Ground Lease.

[70] Regarding the interpretation of arbitration clauses, in *Desputaux v Éditions Chouette (1987) inc*, 2003 SCC 17 at paragraph 35 [Desputaux], the SCC stated that such clauses granting jurisdiction to an arbitral tribunal must be given a liberal interpretation reflecting the intention of the parties:

> [35] Despite the unfortunate uncertainties that remain as to the procedure followed in defining the terms of reference for the arbitration, they necessarily included the problem referred to as "co-authorship" in the context of this case. In order to understand the scope of the arbitrator's mandate, a purely textual analysis of the communications between the parties is not sufficient. The arbitrator's mandate must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement. The mandate also includes everything that is closely connected with that agreement, or, in other words, questions that have [TRANSLATION] "a connection with the question to be disposed of by the arbitrators with the dispute submitted to them" (S. Thuilleaux, *L'arbitrage commercial au Québec: droit interne — droit international privé* (1991), at p. 115). Since the 1986 arbitration reforms, the scope of arbitration agreements has been interpreted liberally (N. N. Antaki, *Le règlement amiable des litiges* (1998), at p. 103; *Guns N'Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, 1994 CanLII 5694 (QC CA), [1994] R.J.Q. 1183 (C.A.), at pp. 1185-86, *per* Rothman J.A.). From a liberal interpretation of the arbitration

> agreement, based on identification of the objectives of the agreement, we can conclude that the question of co-authorship was intrinsically related to the other questions raised by the arbitration agreement. For example, in order to determine the rights of Chouette to produce and sell products derived from Caillou, it is necessary to ascertain whether the owners of the copyright in Caillou assigned their patrimonial rights to Chouette. In order to answer that question, we must then identify the authors who were authorized to assign their patrimonial rights in the work.
>
> (see also *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46 at para 22 [*GreCon*]; *Elliott c Forecam Golf Ltd*, 2011 QCCA 1029 at para 7)

[71] The importance of arbitration clauses should not be underestimated, especially as arbitration has become a preferred form of dispute resolution that takes precedence over the courts when the parties so agree (*Specter Aviation c Laprade*, 2021 QCCA 1811 at para 21; *GreCon* at para 22; CCP, arts 1, 622).

[72] If an arbitration clause is capable of two meanings, one of which provides for arbitration of the disagreement, courts should privilege that interpretation (*Electek* at paras 159, 161 citing *Hopkins v Ventura Custom Homes Ltd*, 2013 MBCA 67 at paras 58–64; *Ontario v Imperial Tobacco Canada Ltd*, 2011 ONCA 525 at para 60; *Wright v Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 101 at para 77). As Justice Frédéric Bachand, then of the Quebec Superior Court, stated in *Groupe Dimension*:

> [TRANSLATION]
>
> [32] In light of the "broad and liberal" interpretation that must be given to arbitration clauses and the legislative policy promoting the increased use of conventional arbitration, the presumption that should guide the analysis of the scope of an arbitral tribunal's jurisdiction is rather that the parties, in the interests of efficiency, wish to confer on the arbitral tribunal the power to hear all disputes arising directly or indirectly from their contractual relationship, in

> order to avoid multiple proceedings and the possibility of contradictory decisions. …
>
> [33] In short, the jurisdiction of a conventional arbitral tribunal should be considered to cover all disputes relating directly or indirectly to the contract in which the arbitration clause is found, unless it is clear from the wording of the clause or from relevant contextual elements that the parties truly intended to limit its scope.
>
> [Emphasis added.]

C. *Does the tribunal have jurisdiction over the issue resulting from the PILTs, since it is included in the Ground Lease?*

[73] In applying these principles, the question is whether, in the light of the agreements signed by the parties and the parties' intentions, the ATT arbitration clause applies to the PILTs reimbursed by ADM to His Majesty under the GSA and, according to ADM, the Ground Lease.

[74] Like the arbitral tribunal before me, I note an ambiguity in the scope of the agreements. Although ADM's interpretation is plausible, it is equally clear that the parties could have specifically included the GSA in the "Instruments" to which the ATT arbitration clause applies. The failure to include the GSA in the definition of "Instrument" in article 1.01.01 of the ATT and in sections 1.04 and 1.10 of the Ground Lease creates considerable confusion with respect to the interpretation proposed by ADM. Since the language of the agreements is not sufficiently clear regarding the common intention of the parties, the Court must therefore proceed to the second step, in which "the common intention of the parties rather than adherence to the literal meaning of the words shall be sought" (*Uniprix* at para 37).

[75] In my view, an examination of the intrinsic elements of the agreements, read together, as well as the extrinsic context, including the factual evidence surrounding their conclusions, leads me to conclude, as did the arbitral tribunal before me, that the GSA is incorporated into the Ground Lease through subsections 5.04.01 and 5.04.02 and through the definition of "Real Property Taxes" in section 5.01 of the Ground Lease.

(1) Intrinsic elements of agreements

(a) *AGC's arguments*

[76] Regarding the elements intrinsic to the agreements, the AGC submits that the Ground Lease itself, in sections 1.04 and 1.10, incorporates clauses external to the Ground Lease, but no article of the GSA is included, which explicitly indicates that the parties intended to exclude the GSA from the Ground Lease. These sections of the Ground Lease incorporate various provisions and documents, in particular from the ATT, but not from the GSA. The Ground Lease also includes an entire agreement clause, in subsection 1.05.01.

[77] As for the ATT, the arbitration clause applies to the "Instruments" included in the ATT. The definition of "Instrument" in article 1.01.01 refers to a list of 14 documents (in article 3.02.01). However, the GSA is specifically omitted from this list. Consequently, since the ATT does not incorporate the GSA, it must by definition exclude it.

[78] As for section 5.04 of the Ground Lease and whether it incorporates the GSA, the AGC states that a referential clause incorporating an external instrument must be explicit and

unambiguous that the instrument's content is deemed to be an integral part of the main contract (citing *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 93 [*Dell Computer*]; *Les obligations* at para 196 at 309; Frédéric Levesque, *Précis de droit québécois des obligations – Contrat, responsabilité, exécution et extinction* (Cowansville, QC: Yvon Blais, 2014) [*Précis de droit québécois*]; Didier Lluelles, "Le mécanisme du renvoi contractuel à un document externe : droit commun et régimes spéciaux" (2002) 104 R du N 11 at 21 [*Le mécanisme de renvoi*]). Moreover, the arbitration clause cannot be presumed to apply to every issue between the parties (*Cut & Run Holdings v Booze Bros Holdings et al*, 2005 BCSC 167 at para 24).

[79] In the AGC's opinion, section 5.04 of the Ground Lease is not sufficiently specific or explicit to incorporate the GSA. To incorporate an external clause such as the GSA into the Ground Lease, it is not enough for the Ground Lease to merely refer to it, as is the case in section 5.04. Section 5.04 therefore fails to meet the requirement in *Dell Computer* that the referential clause be explicit and unambiguous and that it form an integral part of the main contract as if the GSA were written into it.

[80] In addition to not incorporating the GSA, section 5.04 of the Ground Lease is conditional and gives precedence to the GSA with the expression [TRANSLATION] "subject to any agreement between Her Majesty … and the Tenant". ADM's claim that PILT reimbursement is "Additional Rent" also renders article 5.2 of the GSA meaningless, even though the GSA takes precedence over subsection 5.04.01 of the Lease.

[81] The AGC states that the effect of subsection 5.04.02 of the Ground Lease is limited to incorporating ADM's obligations under the GSA, since this undertaking applies only to ADM. Therefore, this subsection cannot be used as a basis for incorporating into the Ground Lease a contractual obligation set out in article 4 of the GSA.

[82] The AGC submits that the "Additional Rent" in section 5.04 of the Ground Lease comes into play only if ADM fails to reimburse the PILT to PSPC in accordance with the GSA or fails to meet its other obligations. If ADM fails to reimburse the PILT, the Landlord may make an express demand for the amount as "Additional Rent", failing which the Landlord may invoke the default clause in article 20 of the Lease. The concept of "Additional Rent" is therefore intended to enable His Majesty to recover amounts paid to compensate for ADM's failure to cover an expense relating to the Demised Premises. The reference to the GSA in subsection 5.04.01 is therefore with a view to protecting the Crown's rights should ADM fail to reimburse a PILT.

[83] Consequently, in the AGC's opinion, the absence of the GSA in three explicit provisions of the various agreements indicates a clear and unequivocal intention to exclude the GSA from their content. The general principle of broad and liberal interpretation of arbitration clauses must therefore be overridden by the parties' intention to exclude the GSA and PILT issues from the jurisdiction of the tribunal (AR, vol 2, Memorandum of Fact and Law at paras 162–63, citing *Groupe Dimension* at paras 31–33).

(b) *ADM's arguments*

[84] Regarding the intrinsic elements of the agreements, ADM alleges that PILT reimbursements to His Majesty are "Real Property Taxes" under the Ground Lease and that ADM must reimburse them as "Additional Rent" under the Ground Lease. If ADM is correct, the GSA is incorporated into the Ground Lease, giving effect to the ATT arbitration clause, which applies to [TRANSLATION] "[a]ny dispute or disagreement … arising out of this Agreement or any of the Instruments …". Since the Lease is one of the "Instruments", the arbitral tribunal has jurisdiction. A broad and liberal interpretation of the arbitration clause therefore gives jurisdiction to the arbitral tribunal.

[85] In response to the AGC's arguments, ADM submits that the Ground Lease is an "Instrument" under articles 1.01.01 and 10.01.01 of the ATT. The arbitration clause therefore applies to the Ground Lease, and the GSA is specifically incorporated into subsection 5.04.02 of the Ground Lease. Therefore, the issue before the arbitral tribunal, namely, an excessive amount paid as "Additional Rent" under the Ground Lease, which ADM has a contractual obligation to pay, is an issue that arises precisely from the Ground Lease.

[86] ADM also points out that article 5 of the Ground Lease sets out the obligations of the parties in relation to taxes. ADM cites subsection 5.01.01, which defines "Real Property Taxes" as including [TRANSLATION] "all taxes, contributions, duties and assessments … and other charges, taxes and … levies … of any kind whatsoever … which are levied, imposed, appraised, assessed or collected … whether federal, provincial, municipal, school or other, as well as any taxes or other amounts Imposed in lieu of … Real Property Taxes" [emphasis added]. ADM states that PILTs are included in the definition of "Real Property Taxes" through the wording

[TRANSLATION] “any … other amounts Imposed in lieu of … Real Property Taxes” in subsection 5.01.01.

[87] Further down, subsection 5.04.01 of the Ground Lease explicitly provides that ADM must [TRANSLATION] “advance to the Landlord, as Additional Rent, any sum required by the Landlord to pay grants in lieu of Real Property Taxes” [emphasis added]. ADM is of the opinion that the advance payment required under subsection 5.04.01 is “Additional Rent” for purposes of paying PILTs.

[88] ADM states that, if the parties had intended that the payment of “Additional Rent” in lieu of PILTs be made exclusively under the GSA and not under the Ground Lease, they would not have included subsection 5.04.01, which establishes ADM’s obligation to pay such amounts and confirms that such amounts are in fact “Additional Rent”. The AGC’s argument therefore renders subsection 5.04.01 meaningless and redundant.

[89] ADM states that this conclusion is supported by subsection 4.02.01 of the Ground Lease, which defines “Additional Rent” as [TRANSLATION] “any sum of money or charges payable to the Landlord by the Tenant under this Lease … whether or not referred to as ‘Additional Rent’” [emphasis added]. This is further proof that the amount to be reimbursed by ADM must be considered to be “Additional Rent” under the Ground Lease.

[90] ADM also submits that the wording [TRANSLATION] “subject to any agreement …” in subsection 5.04.01 is intended to confirm that the payments in lieu of PILT are covered by the

Ground Lease, even though the manner of performance may in part be set out in the GSA. ADM also points out that the GSA and the Ground Lease are so closely linked that the survival of the obligations under the GSA depends on the Ground Lease's remaining in force (under article 2 of the GSA).

[91] ADM states that, contrary to the AGC's argument, the application of section 5.04 of the Ground Lease is intended to ensure the recovery of PILTs [TRANSLATION] "only in the event of ADM's failure" to pay. In ADM's opinion, it would be surprising for such a term defined in the Ground Lease to have a different meaning depending on the party referring to it. ADM states that the effect of the AGC's argument is that payments made in lieu of PILTs may be "Additional Rent" only when ADM has failed to pay and the amount is then claimed by His Majesty under the Ground Lease, but that the same payments would not be "Additional Rent" for the purposes of arbitration when ADM is complaining that it is paying too much. Moreover, if a payment by ADM in response to a request by the Crown is "Additional Rent" as submitted by the AGC, the matter could be referred to the arbitral tribunal by the Crown. ADM would then be in a position to argue, as a defence, that the amount required by the Crown was contrary to its contractual obligations. This is the same argument it is making in this case.

(2) Extrinsic context of agreements

(a) *AGC's arguments*

[92] In terms of the extrinsic context, the AGC notes that, given the discretion of the Minister of PSPC to calculate PILTs under the Act, the overall context of the agreements must lead to a

result that promotes consistency between the provisions of the contract and the public law obligations imposed by the PILT Act. The proceedings must therefore be judicial review and not conventional arbitration.

[93] The AGC relies on the affidavit and testimony of Baffour Apraku, the manager of the Ground Lease, asserting that His Majesty (represented by TC for the management of the Lease with ADM) considers the GSA to be the sole agreement governing PILT matters for the Airport. According to this testimony, TC is not involved in the payment of PILTs to the authorities or in the collection of these amounts by PSPC, and TC does not consider PILTs to be "Additional Rent". Mr. Apraku states that TC has never sent a request for payment of "Additional Rent" to ADM under subsection 5.04.01, and ADM has not paid any "Additional Rent" to TC to reimburse PILTs.

[94] Moreover, according to the annual reports and the Tenant's Annual Statements, ADM does not process PILT payments and has never paid "Additional Rent" to reimburse the Crown for PILTs (AR, vol 1, Tab 3, AB-3, Exhibit D-50.1 Tenant's Annual Statements at 1452; AR, vol 1, Tab 3, AB-2 Affidavits of AGC's Witnesses, Tab B, Affidavit of Jacques Demers (PWGSC) at paras 32, 82–84 at 281, 288; AR, vol 1, Tab 3, AB-2 Affidavits of AGC's Witnesses, Tab C, Affidavit of Baffour Apraku (TC) at paras 28, 37–51 at 308, 309–12). These are out-of-court admissions, which cannot be contradicted by the testimonial evidence presented by ADM, given that these documents are private writings signed by ADM.

(b) *ADM's arguments*

[95] In response to the AGC's argument that ADM failed to state in its annual statements that it had paid an amount as "Additional Rent" for 2016 and 2017, ADM states that such an argument about the parties' conduct goes to the merits. It also states that the purpose of these annual statements is merely to provide His Majesty with the amounts of Airport Revenue, which are required to calculate the Airport Rent. Since the PILT reimbursements were made in response to invoices from PSPC, it was unnecessary to include these amounts in the annual statements. In addition, since ADM is not required to certify as true the information required to calculate "Additional Rent", no information in that regard is included in the annual statements (Respondent's Record, vol 1, Tab 3C, Tab 06 Affidavit of Ginette Maillé at paras 18–21 at 198–99).

[96] ADM then relies on correspondence between the parties before the agreements were entered into, that is, the circumstances in which the agreements were formed, which is admissible evidence under article 1426 of the CCQ. ADM states that the correspondence shows not only that the parties agreed on terms and conditions for PILT reimbursement but also that the terms and conditions were included as obligations in the Ground Lease.

(3) Application of principles to determine whether PILT issue is subject to ATT arbitration clause because it is included in Ground Lease

[97] Given the teachings of the SCC in *Uniprix* and the Court's finding of ambiguity in the overlap of the agreements, it is necessary to interpret the common intention of the parties, on the basis of the terms they used, the intrinsic elements and the extrinsic context.

[98] As stated above, the real question is whether the GSA is incorporated into the Ground Lease despite its exclusion from the incorporation clauses in sections 1.04 and 1.10. If the GSA is incorporated into the Ground Lease, then the arbitration clause applies to it, since the Lease is an "Instrument" within the meaning of the ATT. The ATT does not otherwise apply to the GSA, since it is not an "Instrument" within the meaning of the ATT.

[99] First, it is worth noting that ADM and His Majesty are the parties to the various agreements, even though His Majesty is represented by TC in the ATT and the Lease, but by PSPC in the GSA. At the hearing, the AGC acknowledged that it made no distinction in this respect and did not recommend separating the various Crown entities.

[100] In my opinion, and as the arbitral tribunal also found, the key terms of the GSA discussed below are incorporated into the Ground Lease, which is why it was not necessary to incorporate them by reference into the definition of "Instrument" in the ATT or in the two incorporation sections of the Ground Lease, sections 1.04 and 1.10. I will explain.

(a) *Intrinsic elements of agreements*

[101] Subsection 5.01.01 of the Ground Lease defines "Real Property Taxes" very broadly. The reference to [TRANSLATION] "all taxes … taxes and … levies … of any kind whatsoever … as well as any taxes or other amounts Imposed in lieu of … Real Property Taxes …" [emphasis added] must necessarily include PILTs.

[102] At the hearing, the AGC presented two arguments to refute this claim. First, subsection 5.01.01 uses the term “Imposed” in relation to “Real Property Taxes”. However, PILTs are assessed in accordance with the [TRANSLATION] “standards and rules governing federal properties”. Moreover, PSPC does not “impose” anything on ADM but receives a reimbursement—PILTs are imposed by the Cities. Therefore, subsection 5.01.01 cannot apply to PILTs reimbursed by ADM. Second, subsection 5.01.01 states that the French wording “montant Perçus au lieu des Impôts Fonciers” cannot refer to PILTs, which are payments “en lieu de taxes” and not “au lieu”.

[103] I cannot agree with those arguments. First, subsection 5.01.01 includes all amounts imposed by [TRANSLATION] “any … authority, whether federal, provincial, municipal, school or other”. Thus, although PILTs may not ultimately be “imposed” by PSPC as the AGC suggests, they remain an amount [TRANSLATION] “of any kind whatsoever” and may be “imposed” by a municipal taxing authority within the meaning of subsection 5.01.01. As for the wording “au lieu des Impôt Fonciers” rather than “en lieu”, this can only be a mistake. The parties have offered no possible interpretation of what “au lieu” of tax might mean, and subsection 5.01.01 in French already contains three grammatical errors of agreement in the phrase “administration fiscale … fédéral [sic], provincial [sic], municipal [sic] …”. Since “au lieu” of tax is an unknown concept, whereas “en lieu” of tax refers to PILTs, there is reason to believe that the intention of the parties in using those words was to refer to “en lieu” of tax and to include PILTs in the definition of “Real Property Taxes” within the meaning of the Ground Lease.

[104] Next, subsection 5.04.01 of the Ground Lease reads as follows:

> [TRANSLATION]
>
> 5.04.01 Subject to any agreement between Her Majesty, as represented by the Minister of Public Works, and the Tenant with respect to the matters referred to in paragraphs (a) and (b) below, the Tenant must, upon request, promptly advance to the Landlord, as Additional Rent, any sum required by the Landlord to
>
> (a) pay grants in lieu of Real Property Taxes for any part of the Demised Premises in accordance with the *Municipal Grants Act*, R.S.C. 1985, c. M-13 or any similar or successor legislation; and
>
> (b) cover all reasonable general and administrative expenses of the Landlord.
>
> [Emphasis added.]

[105] First, as discussed above, the parties to the Ground Lease are ADM and His Majesty (represented by TC), while the parties to the GSA are His Majesty (represented by PSPC) and ADM. In both cases, His Majesty is the co-contracting party. His Majesty is therefore the "Landlord" under the Ground Lease and also the one who calculates the PILTs payable to the Cities through PSPC under the GSA.

[106] The parties also agree that the GSA is the [TRANSLATION] "agreement between [His] Majesty, as represented by the Minister of [PSPC], and the Tenant" referred to in subsection 5.04.01.

[107] Articles 4 and 5.2 of the GSA provide that PSPC (which represents His Majesty pursuant to section 5.04 of the Ground Lease) will calculate the PILTs and that ADM must pay them in advance to His Majesty (represented by PSPC). Moreover, subsection 5.04.01 of the Ground Lease provides that ADM must pay a sum in advance to enable the Landlord (His Majesty, but

represented by TC) to pay the PILTs and that such payment will be deemed to be "Additional Rent" under the Ground Lease.

[108] Subsection 5.04.02 of the Ground Lease then provides that [TRANSLATION] "[t]he Tenant agrees to comply fully with all the terms and conditions of any agreement referred to in subsection 5.04.01", namely, the GSA.

[109] Therefore, both the GSA and the Ground Lease reiterate ADM's obligation to pay amounts in advance to His Majesty to reimburse the money required for PILTs. In the Ground Lease, these amounts are "Additional Rent". It could not be otherwise because, in subsection 4.02.01 of the Ground Lease, "Additional Rent" is defined as [TRANSLATION] "any sum of money or charges payable to the Landlord by the Tenant under this Lease … whether or not referred to as 'Additional Rent'" [emphasis added].

[110] Subsections 5.04.01 and 5.04.02 reiterate and incorporate the key terms and conditions of the GSA into the Ground Lease. Although subsection 5.04.01 states that ADM's obligation to pay is [TRANSLATION] "subject to" the GSA, all of the material conditions imposed by the GSA on ADM are incorporated into the Ground Lease through subsection 5.04.02.

[111] The terms and conditions of the GSA applicable to ADM are included in the Ground Lease even though the GSA is not specifically included in sections 1.04 and 1.10 of the Ground Lease, and even though there is an entire agreement clause in subsection 1.05.01 of the Ground Lease. The terms and conditions of the GSA are therefore subject to the ATT's arbitration

clause, since this clause applies to any dispute arising under the Ground Lease, even though the GSA is not included as an "Instrument" under article 1.01.01 of the ATT. Therefore, a dispute over an obligation of ADM under the GSA is subject to subsection 5.04.01 or, at the very least, subsection 5.04.02 of the Ground Lease and is within the jurisdiction of the arbitration tribunal.

[112] Regarding the wording [TRANSLATION] "subject to any agreement between Her Majesty … and the Tenant", there is every reason to believe that the intention of the parties was to provide for certain PILT payment terms and conditions that would be excluded from the Ground Lease, for example concerning administration and ADM's participation in the calculation of PILTs by the Minister of PSPC.

[113] Next, the AGC's argument that ADM's interpretation that PILT reimbursements are "Additional Rent" renders section 5.2 of the GSA meaningless and is contrary to article 1428 of the CCQ (even though the GSA takes precedence over subsection 5.04.01 of the Ground Lease) is without merit. Article 5.2 of the GSA requires that ADM remit, [TRANSLATION] "in advance" and [TRANSLATION] "within the prescribed time limits and on presentation of the appropriate supporting documents, the amounts required to pay the grants". However, the wording of article 5.2 of the GSA, far from being rendered meaningless by ADM's interpretation, is also incorporated in its entirety into the Ground Lease through subsection 5.04.01, which requires that ADM [TRANSLATION] "upon request, promptly advance … any sum required … to pay grants". If article 5.2 of the GSA, which was adopted by the parties before the Ground Lease was entered into, has become moot, it is because it now forms an integral part of subsection 5.04.01. In fact,

article 5.2 of the GSA is a clear example of the explicit incorporation of the GSA into the Ground Lease.

[114] Moreover, the parties agree that neither article 5.2 of the GSA nor the obligation under the Ground Lease to [TRANSLATION] "advance" the amounts required for PILTs are being applied. Just like other provisions of the GSA (such as the reimbursement of fees and disbursements for appraisal services under clause 5.3) which are also obsolete despite the fact that no amendment was made to the GSA (AR, vol 1, Tab 3, AB-2 Affidavits of AGC's Witnesses, Tab B Affidavit of Jacques Demers (PWGSC) at paras 25–27 at 280).

[115] Lastly, the AGC's interpretation that subsection 5.04.01 is a [TRANSLATION] "Crown recovery mechanism" that applies only if ADM fails to reimburse PILTs under the GSA and that addresses a situation that could lead to the use of the default clause in article 20 of the Ground Lease is not consistent with subsection 5.04.01. This subsection requires ADM to [TRANSLATION] "advance to the Landlord, as Additional Rent," the PILT amount required. If the Ground Lease requires [TRANSLATION] "advance" payment, then the circumstance provided for in the Ground Lease is [TRANSLATION] "before" the PILT has been paid and is consistent with article 5.2 of the GSA, which is incorporated as described above.

[116] However, under the Ground Lease, if ADM does not pay in advance, then there is a breach of subsection 5.04.01, which may enable the use of the default clause in article 20 of the Ground Lease, as well as subsection 5.04.02, which requires ADM to comply with the GSA, including article 5.2, which requires advance payment. The default clause in section 20 of the

Ground Lease may therefore be invoked if payment is not [TRANSLATION] "advanced" to PSPC in accordance with article 5.2 of the GSA, or subsections 5.04.01 and 5.04.02 of the Ground Lease. A breach of the GSA may therefore lead to the use of the default clause without the [TRANSLATION] "recovery mechanism" in the AGC's argument.

[117] Contrary to the AGC's argument, there is no need to request "Additional Rent" under subsection 5.04.01 of the Ground Lease in order to trigger the default provisions of the Ground Lease. The AGC's argument that the sole purpose of section 5.04.01 is to ensure that ADM reimburses a PILT should it fail to [TRANSLATION] "advance" the necessary sums of money under article 5.2 of the GSA is therefore inconsistent with the very terms of subsections 5.04.01 and 5.04.02 of the Ground Lease.

[118] This interpretation is also supported by subsection 4.02.01 of the Ground Lease, which defines "Additional Rent" as [TRANSLATION] "any sum of money … whether or not referred to as 'Additional Rent'". Therefore, whether the repayment is required by TC in the circumstances suggested by the AGC or under section 5.04.02 because ADM must comply with the GSA and make a payment, the amount to be reimbursed by ADM is "Additional Rent" within the meaning of the Ground Lease.

[119] I agree with ADM that the AGC's interpretation suggesting that subsection 5.04.01 applies only in the event of ADM's failure or refusal to pay PILTs is not only inconsistent with the subsection requiring an "advance" payment but also asymmetrical. The AGC suggests that payments made in lieu of PILT may be "Additional Rent" only where ADM has failed to pay

and the amount is claimed by the Landlord (who is His Majesty) under the Ground Lease. However, the same payments would not be "Additional Rent" if they were paid in the ordinary course of business (as required by subsections 5.04.01 and 5.04.02) because, in that case, the payment would have been made not under subsections 5.04.01 and 5.04.02 of the Ground Lease but under article 5.2 of the GSA.

[120] According to the AGC's argument, if the circumstance it identifies is true, then ADM's refusal to pay the "Additional Rent" required by TC under subsection 5.04.01 could be the subject of arbitration, at His Majesty's request, since it would then be a dispute falling under subsection 5.04.01 of the Ground Lease. However, taking the logic a step further, in the case of a notice of arbitration by His Majesty under subsection 5.04.01, ADM could then present the defence that it has not failed to pay, but His Majesty is not entitled to claim the amount because it exceeds the amount that ADM is required to pay for PILTs under the [TRANSLATION] "standards and rules governing federal properties". ADM could then present the same arguments that it is presenting in this case, namely, that the amount required is too high because the Minister of PSPC failed to comply with the [TRANSLATION] "standards and rules governing federal properties". The arbitral tribunal would then be able to hear ADM's defence. Consequently, the arbitral tribunal should also have jurisdiction to consider the same issue if it is brought before it by ADM and not by His Majesty.

[121] I therefore agree with the arbitral tribunal at paragraphs 45 and 46 that the GSA is incorporated by reference into the Lease by virtue of its inclusion in subsections 5.04.01 and 5.04.02 of the Ground Lease. Contrary to the AGC's arguments, the Ground Lease does not

specifically exclude any incorporation of the GSA by omitting it from the two incorporation sections. Rather, ADM's obligation to reimburse PILTs must be read in the context of the relationship between the parties under the Ground Lease, in particular subsection 5.04.01, and the GSA, which subjects the calculation of PILTs to the [TRANSLATION] "standards and rules governing federal properties".

(b) *Extrinsic context of agreements*

[122] The extrinsic context does not support the AGC's argument. I note first of all that, under article 1426 of the CCQ, evidence of the circumstances in which the agreements were formed, and of the interpretation already given to them by the parties, is admissible in order to interpret them because of ambiguity. Evidence is also admissible notwithstanding the entire agreement clause in subsection 1.05.02 of the Ground Lease; the scope of such clauses is limited when the contract is ambiguous (*Invenergy* at para 10).

[123] The extrinsic evidence shows that the payment of PILTs was originally to be the subject of a memorandum of understanding, which was ratified on June 26, 1992, in the form of the GSA. The Ground Lease was signed on July 31, 1992. Communications between the parties before the Ground Lease was signed show that it was the common intention of the parties that the Ground Lease include ADM's obligation to reimburse His Majesty for PILTs.

[124] In June 1991, the parties exchanged correspondence in which it was noted that [TRANSLATION] "[w]ith the approval of the Minister of PSPC, ADM would compensate PWC in advance by paying an equivalent amount, through the rent paid or otherwise" [emphasis added]

(AR, vol 1, Tab 3, AB-3, AGC's Exhibits, Exhibit D-6 Letter from Yvon Soucy of TC to Jacques Auger of ADM dated June 18, 1991, at 353). This is confirmed in subsection 5.04.01 of the Ground Lease.

[125] Between September 17, 1991, and July 3, 1992 (Exhibit D-10), the parties exchanged drafts of the Ground Lease. In correspondence dated September 17, 1991, the draft Ground Lease included a subsection 5.04.01 referring to the payment of PILTs to the "Landlord" (His Majesty) under the Ground Lease, but without referring to the GSA. It would appear that the GSA had not yet been signed but that a PILT reimbursement "system" was already provided for in the Ground Lease. Obviously, since the GSA had not yet been signed, subsection 5.04.01 was not yet [TRANSLATION] "subject to" the GSA (AR, vol 1, Tab 3, AB-3, Exhibit D-10 Correspondence and Drafts of Article 5 of the Ground Lease, in bundle at 370, 430).

[126] A letter between the parties dated October 8, 1991, mentions discussions regarding the inclusion of new clauses in the Ground Lease [TRANSLATION] "to include the payment in lieu of taxes system" [emphasis added] (AR, vol 1, Tab 3, AB-3, Exhibit D-13 Letter from Yvon Soucy of TC to Jacques Auger of ADM dated October 8, 1991, point 8 at 616), and this [TRANSLATION] "system" referred to an earlier letter dated September 24, 1991 (AR, vol 1, Tab 3, AB-3, Exhibit D-11 Letter from Yvon Soucy of TC to Arthur P Earle of ADM dated September 24, 1991 at 608), which described a [TRANSLATION] "memorandum of understanding" that ultimately took the form of the GSA. The common intention therefore appears to have been to include the planned [TRANSLATION] "system", namely the GSA, in the Ground Lease.

[127] Subsequently, on October 22, 1991, in an exchange between the parties on the content of the Ground Lease clauses, counsel for ADM commented to counsel for TC on article 5 of the Ground Lease. He stated that the article would have to be "subject to" the GSA, that PSPC would have to give notice to ADM before any payment of PILTs, that evaluation of property for PILTs must be in accordance with the "standards generally applied to HM's property", and that ADM's payment would be made to the "Landlord" (His Majesty) (AR, vol 1, Tab 3, AB-3, Exhibit D-15 Letter from Daniel Picotte to Yvon Soucy dated October 22, 1991, at 636).

[128] The comment that PILTs would be "subject to" does not appear until later. In a letter dated June 17, 1992, to ADM, the Department of Justice shared comments, notes and appendices, including proposed amendments to the Ground Lease. A draft dated February 7, 1992 (but included in this exchange of June 17, 1992, and therefore still before the GSA was signed), includes for the first time a "subject to" condition in subsection 5.04.01 of the Ground Lease and, at the same time, a newly inserted subsection 5.04.02. A comparison of the version of section 5.04 dated February 7, 1992, with the previous version of September 17, 1991, shows that "subject to" was added to subsection 5.04.01, subsection 5.04.02 was added, and the reference to paying the Landlord was replaced by "advance to the Landlord, as Additional Rent", which ultimately became, in the final version of subsection 5.04.01 of the Ground Lease, an obligation to "advance to the Landlord, as Additional Rent," the amounts of PILTs (AR, vol 1, Tab 3, AB-3, Exhibit D-10 Correspondence and Drafts of Article 5 of the Ground Lease, in bundle at 578, 582).

[129] Therefore, it has always been the common intention of the parties that ADM have an obligation to reimburse His Majesty for PILTs under the Ground Lease and that this obligation be the subject of a particular [TRANSLATION] "system". This particular [TRANSLATION] "system" was necessary because the amount was the result of an exercise of discretion by the Minister of PSPC under his obligations in the PILT Act.

[130] Then, on August 27, 1992, when the *Municipal Grants Regulations, 1980*, were amended so that the PILT Act would apply to the Airport, the regulatory impact analysis statement itself noted that the amendment had been requested by TC (and not PSPC) to keep the Airport under the definition of "federal property", such that the amendment applied to the Ground Lease between TC and ADM and would enable PSPC to pay PILTs even though the facilities were being leased to ADM (AR, vol 1, Tab 3, AB-3, Exhibit D-22 *Municipal Grants Regulations, 1980*, dated August 27, 1992, at 1234–35).

[131] Finally, a letter from TC (representing His Majesty, who is the Landlord under the Ground Lease) dated December 1994, after the agreements had been entered into, confirmed that ADM had accepted the PILT payment terms in a "long-term agreement … as well as under the Ground Lease" [emphasis added]. The letter also requested that ADM not become involved but leave it to TC (not PSPC) to contact the municipalities, even though it was the Minister of PSPC who was responsible for calculating PILTs (AR, vol 1, Tab 3, AB-3, Exhibit D-25 Letter from François Brazeau of PWGSC to Richard Cacchione of ADM dated December 23, 1994, at 1308).

[132] The extrinsic evidence filed by the parties therefore demonstrates that it was always the intention of the parties to incorporate PILT payments into the Lease, in one way or another. The reason was quite simple: His Majesty needed to be able to terminate the Ground Lease if ADM refused to reimburse the PILTs, and the only way to do this was to incorporate the obligation into the Ground Lease itself. This was done through subsections 5.04.01 and 5.04.02. This extrinsic evidence therefore supports the interpretation that the Ground Lease incorporates the issue of PILTs. Moreover, there is an additional connection between the GSA and the Ground Lease: under article 2 of the GSA, the GSA is valid until the Ground Lease expires.

[133] In drawing this conclusion, I also note that I have examined the AGC's evidence that ADM never reported "Additional Rent" in its financial statements. I also note the AGC's argument that, under article 2863 of the CCQ, an act set forth in writing may not be contradicted by testimonial evidence and that, consequently, the Court may not accept ADM's evidence in response.

[134] The AGC has presented evidence that ADM never reported PILT reimbursements as "Additional Rent" in its financial statements, to show that the interpretation of the parties, as deduced from their subsequent conduct, was that PILT reimbursements were not "Additional Rent". This evidence is admissible under article 1426 of the CCQ.

[135] That said, the evidence presented by ADM in this case does not contravene article 2863 of the CCQ, since it does not contradict or vary the terms of an act set forth in a writing (its financial statements) or the terms of the Ground Lease. Rather, it explains the conduct of the

parties and their interpretation of the agreements. Of course, ADM is entitled to present evidence in response that is admissible under article 1426 of the CCQ to refute the AGC's allegation regarding the parties' interpretation of the agreements. ADM's evidence in response is not intended to contradict a writing (its financial statements) but rather to demonstrate its understanding of what should have been included in its financial statements as "Additional Rent". With this evidence, ADM is also seeking to demonstrate that PILT reimbursements were not to be included in its financial statements for the reasons noted in its evidence. The determination of the parties' intention, through testimonial evidence, takes precedence over the prohibition against contradicting an act set forth in a writing (*Les obligations* at para 418 at 500).

[136] In this regard, ADM's evidence is meant to show that its financial statements were used to establish the "Airport Rent" and to include financial information unknown to His Majesty. ADM also submits that it was not required to "certify as true" any PILT reimbursements, since they were billed and paid by PSPC. Therefore, these amounts were not to be reported as "Additional Rent" because the parties were aware of the amounts involved.

[137] In my opinion, the AGC's evidence of the exclusion of PILT payments as "Additional Rent" is not compelling. It is possible that ADM correctly interpreted that it was unnecessary to include the amounts in its financial statements, and it is possible that ADM erred in not reporting them in its financial statements as "Additional Rent". It is also possible, as the AGC suggests, that ADM also interpreted "Additional Rent" as excluding PILTs.

[138] Nonetheless, in my opinion, this evidence is not sufficient to refute the other elements noted above, both intrinsic and extrinsic, relating to the interpretation of the agreements in this case.

[139] I therefore agree with the tribunal at paragraph 61 that the excerpts from the testimony and from the letters between the parties do not support the conclusion that the parties excluded PILTs from their contractual arrangements.

(4) Conclusion

[140] In any event, weighing the evidence as a whole, and considering articles 1425 to 1432 of the CCQ, I conclude that the PILT payments are "Additional Rent" within the meaning of section 5.04 of the Ground Lease and that the GSA is incorporated into the Ground Lease through subsections 5.04.01 and 5.04.02. This conclusion is the result of my interpretation of the parties' original common intention, as shown by the wording used in the overall context of the agreements interpreted together, as well as the circumstances in which the agreements were formed, as shown by the communications between the parties before their ratification.

[141] Moreover, I am of the opinion that subsections 5.04.01 and 5.04.02 of the Ground Lease, interpreted in the context discussed above, are sufficiently explicit and unambiguous. The GSA is reasonably available because it was ratified by the same parties and is therefore an external clause that is binding on the parties with the Ground Lease under article 1435 of the CCQ (*Précis de droit québécois* at para 131; *Le mécanisme de renvoi* at 21). Moreover, the agreements

in question are not consumer contracts or contracts of adhesion, and the caution noted by the SCC in *Dell Computer* at paragraph 93 does not apply in this case.

[142] Finally, since the arbitration clause must be interpreted broadly and liberally, or even if both interpretations proposed by the parties are possible, priority must be given to an interpretation that favours the jurisdiction of the arbitral tribunal (*Desputaux* at para 35; *Groupe Dimension* at paras 32–33). In this case, although the AGC's interpretation is not unfounded, it is rather the interpretation suggesting that the GSA is incorporated into the Lease that should be accepted. Accordingly, the ATT arbitration clause applies and the arbitral tribunal has jurisdiction to deal with the issue raised by ADM.

[143] The context is therefore that His Majesty and ADM have entered into three agreements and have included an arbitration clause that gives the arbitral tribunal jurisdiction to determine any issue between the parties arising out of the Ground Lease, among other things. In this case, both the Lease and the GSA state that ADM must advance amounts to His Majesty to pay PILTs. Although the Minister of PSPC has discretion to determine the amount payable to the Cities, His Majesty has agreed to charge ADM a PILT amount in accordance with the [TRANSLATION] "standards and rules governing federal properties". It is quite possible that the amount calculated by the Minister of PSPC under the PILT Act is also an amount calculated in accordance with the [TRANSLATION] "standards and rules governing federal properties". However, if the amount calculated by the Minister of PSPC is valid and reasonable under the PILT Act, but nonetheless inconsistent with the [TRANSLATION] "standards and rules governing federal properties", His Majesty cannot require ADM to pay the amount, and the arbitral tribunal has jurisdiction to

decide the issue on the merits. The issue that the tribunal has jurisdiction to decide is therefore very narrow, but it is provided for in the Ground Lease and is subject to the arbitration clause.

D. *Does the true nature of ADM's application require judicial review of the Minister of PSPC's exercise of discretion?*

(1) AGC's arguments

[144] The AGC disputes the jurisdiction of the arbitral tribunal because the true nature of ADM's claim is to challenge the validity of the amount calculated by the Minister of PSPC under the PILT Act. The AGC is of the opinion that ADM should instead apply to the Federal Court for judicial review and, if it is successful, it will be able to recover any overpayment. ADM therefore does not have to carry out the two steps in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*].

[145] The AGC states that the Court must determine the essential nature of the claim and look beyond the facts alleged and the remedy sought (*Windsor (City) v Canadian Transit Co*, [2016] 2 SCR 617 at paras 25–26). According to the AGC, the essential and concrete purpose of the request for arbitration is to obtain a review of the PILT amount calculated by PSPC under the PILT Act, specifically with respect to determining the "property value" and "effective rate" of federal properties.

[146] The AGC submits that ADM's claim is an attack on the discretionary decision of the Minister of PSPC under the PILT Act, and article 4 of the GSA does not establish a remedy or contractual obligation towards ADM beyond the application by the Minister of PSPC of the rules

governing federal properties set out in the PILT Act [emphasis added] (AR, vol 2, AGC's Memorandum of Fact and Law at para 130 at 1747).

[147] The AGC submits that if ADM's reasoning is followed, it would mean that the Minister of PSPC has agreed to allow an arbitral tribunal to review the Minister's decisions under the PILT Act, which is not possible because this reasoning would otherwise result in a violation of the PILT Act and the fettering of the Minister's discretion (citing *Cold Lake (City) v Canada*, 2021 FC 405 at paras 35–36 [*Cold Lake*]).

[148] Lastly, the AGC relies on *Morin v Canada*, 2013 FC 670 [*Morin*] and submits that an application for damages cannot be based on grounds giving rise to judicial review, which is the case here since the basis of ADM's application is that the Minister of PSPC misapplied the criteria set out in the PILT Act.

(2) ADM's arguments

[149] ADM submits that it is not seeking to have the Minister's discretionary decision set aside or reviewed, nor is it seeking to have the Cities reimburse the amounts to PSPC. ADM is seeking damages as a result of the Minister of PSPC's failure to calculate PILTs in accordance with the [TRANSLATION] "standards and rules governing federal properties". In other words, the Minister's decision is not in dispute, and the PILT amounts paid may be reasonable under the PILT Act but not established in accordance with the [TRANSLATION] "standards and rules governing federal properties", as provided for in the GSA.

[150] ADM relies on *Uniroc inc v Ville de Saint-Jérôme*, 2022 QCCA 1032 at paragraphs 33 and 34 [*Uniroc*], which cites the SCC in *Entreprises Sibeca inc v Frelighsburg*, 2004 SCC 61 at paragraphs 15 to 16, which states that there is a fundamental difference between reviewing the legality of the exercise of a public power and compensating for the harm resulting from the contractual non-performance of that same public power. This distinction applies to the remedy sought. An action for damages to compensate for a loss is a private action involving civil liability, whereas the setting aside of a decision is a public action.

[151] ADM submits that the principles in *TeleZone* apply. Contrary to the AGC's argument, if it were to seek judicial review in order to challenge the determination of the effective rate and property value of the immovables, it could not be compensated for the damage suffered. As the SCC explained in *TeleZone* at paragraphs 26 and 27, the very nature of judicial review is to invalidate a government decision through an expedited process, while also confirming that such a remedy does not allow for the recovery of damages (see also *Huronne-Wendat First Nation v Canada*, 2014 FC 91 at para 28; *Uniroc* at paras 40–41). Therefore, in accordance with *TeleZone*, no prior judicial review is required as a condition of an action for damages.

(3) Whether judicial review necessary

[152] As the AGC points out, it is important to understand the nature of ADM's claim.

[153] Under the PILT Act, the Minister of PSPC establishes the PILT payable annually to the Cities. At the same time, ADM has a contractual obligation to reimburse His Majesty for the PILTs calculated in accordance with the [TRANSLATION] "standards and rules governing federal

properties". At paragraph 130 of its memorandum, the AGC acknowledges that His Majesty has a contractual obligation towards ADM to apply the [TRANSLATION] "standards and rules governing federal properties" in calculating PILTs.

[154] The dispute between the parties is therefore whether the [TRANSLATION] "standards and rules governing federal properties" are severable from the obligations of the Minister of PSPC under the PILT Act. Since the PILT Act requires the Minister to apply the [TRANSLATION] "standards and rules governing federal properties", ADM's claim also involves determining whether the amount calculated and paid by PSPC, and reimbursed by ADM, is valid. If this were the real consequence of ADM's action, judicial review might be necessary. However, this is not what ADM is seeking.

[155] Rather, ADM is interested solely in the obligation of the Minister of PSPC to apply the [TRANSLATION] "standards and rules governing federal properties", that is, the contractual obligation. If the Minister of PSPC did indeed apply these [TRANSLATION] "standards and rules", while simultaneously exercising his discretion in accordance with the PILT Act, ADM's claim would fail, even if a measure of discretion remained. Thus, while the Minister of PSPC undertook to apply the [TRANSLATION] "standards and rules governing federal properties", the Minister did not undertake to exercise his discretion favourably towards ADM. In other words, although an application of the [TRANSLATION] "standards and rules governing federal properties" may reasonably result in two different amounts (while complying with the PILT Act), the Minister of PSPC has not undertaken to impose the most favourable (that is, the lowest) amount on ADM.

[156] I agree with ADM that the claim in this case does not require that the decision of the Minister of PSPC be set aside. Rather, ADM is claiming compensation if His Majesty (through the Minister of PSPC) calculated and imposed a PILT amount on ADM that was not established in accordance with the [TRANSLATION] "standards and rules governing federal properties", even though it had a contractual obligation to do so under the Ground Lease and the GSA. The true nature, or essence, of ADM's recourse is therefore not to have the PILT amount that was determined under the PILT Act reviewed, but to obtain compensation if the amount is inconsistent with the method required under the parties' contractual obligations.

[157] It follows that the teachings of the SCC in *TeleZone* apply in this case (at paras 3–5, 19, 25–27; see also *Uniroc* at paras 33–34, 40–41). It is possible, at least theoretically, that the Minister of PSPC reasonably applied the PILT Act in calculating the PILTs, while failing to follow the [TRANSLATION] "standards and rules governing federal properties". If so, this is a breach of ADM's contractual right giving rise to a remedy, notwithstanding the fact that the Minister's decision remains reasonable and enforceable against the Cities under the PILT Act. However, it is also theoretically possible that the [TRANSLATION] "standards and rules governing federal properties" are the same as those set out in the PILT Act, in which case His Majesty has not breached His Majesty's contractual obligations. The arbitral tribunal will have to determine this issue on the merits.

[158] Consequently, ADM need not apply for judicial review of the Minister of PSPC's decision. Moreover, I reject the AGC's argument that judicial review would enable ADM to obtain the remedy it is seeking. At the hearing, the AGC argued that, if ADM succeeded in its

application for judicial review, His Majesty would not retain the overpayment but would return it to ADM. This position is indeed fair, but it is not required. Normally, to recover overpayments, or if the parties were in disagreement on the terms, ADM would have to bring an action for damages before the Court or before an arbitral tribunal.

[159] Therefore, since the arbitration clause includes any dispute relating to the Ground Lease, the arbitral tribunal has jurisdiction to determine the issue raised by ADM, namely whether His Majesty (through PSPC) breached His Majesty's contractual obligations by establishing a PILT amount that is not in accordance with the [TRANSLATION] "standards and rules governing federal properties".

[160] Finally, the AGC's arguments regarding *Cold Lake* and *Morin* do not apply in this case and can be distinguished. In *Cold Lake*, the Court ruled that an entity could not contract with the Crown under the PILT regime. However, in this case, and contrary to AGC's argument, the issue of His Majesty's contractual obligation does not directly imply that the arbitral tribunal is applying the PILT Act, "property value" or "effective rate", nor is it reviewing the Minister's decisions under the PILT Act. In fact, the arbitral tribunal declined jurisdiction in this respect in its decision on the AGC's declinatory exception.

[161] In *Morin*, the Court ruled that an action for damages arising from the rejection of a visa application had to be dismissed because no fault had been alleged against the Crown. In that case, the action was based on grounds giving rise to judicial review and not an action for damages. Only a judicial review could therefore be initiated against the decision. In this case, a

fault has been alleged against the Minister for failing to determine PILT amounts in accordance with the [TRANSLATION] “standards and rules governing federal properties”, which has resulted in damage and which does not require the preliminary determination of a judicial review.

V. Conclusion

[162] For these reasons, the AGC’s declinatory exception is dismissed.

[163] As ADM submits in its memorandum at paragraph 101, the arbitral tribunal is free to conclude, in light of all the evidence, that the issue and the remedy sought do not fall within the scope of the ATT arbitration clause or that they fall within the exclusive jurisdiction of the Federal Court (*Marques Nuway inc c Jardin Jouvence inc*, 2014 QCCA 825 at para 9).

[164] However, in this case, the Court must consider the allegations on the merits to be true. If, in the opinion of the arbitral tribunal and according to its findings on the evidence, these allegations are proven, then the arbitral tribunal has jurisdiction to decide the dispute.

[165] At the hearing, ADM claimed costs in accordance with the Court’s Tariff. Under rule 400 of the Rules, and having considered the applicable criterion, ADM is entitled to costs calculated on the basis of the middle of Column III of Tariff B.

JUDGMENT in T-2441-22

THIS COURT'S JUDGMENT is as follows:

1. The declinatory exception is dismissed.
2. The respondent is granted costs, calculated on the basis of the middle of Column III of Tariff B.

"Guy Régimbald"
Judge

Certified true translation
Vincent Mar

FEDERAL COURT

SOLICITORS OF RECORD

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