SC CV 94 005

CV 03213

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the **Property Assessment and Taxation Act;**

BETWEEN:

POLAR PANDA DEVELOPMENTS LTD.

Appellant

- and -

THE CITY OF YELLOWKNIFE and THE GOVERNMENT OF THE NORTHWEST TERRITORIES (DEPARTMENT OF MUNICIPAL AND COMMUNITY AFFAIRS)

Respondents

Appeal against an order of the Assessment Appeal Tribunal confirming an assessment of certain improvements made under the **Property Assessment and Taxation Act** allowed in part.

Heard at Yellowknife on January 20th 1994

Judgment filed: March 14th 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Appellant: **James R.** Posynick, Esq.

Counsel for the Respondent: The City of Yellowknife — **Earl D.** Johnson, Q.C.

Counsel for the Respondent: Government of the Northwest Territories (Department of Municipal and Community Affairs) — Dan J. Jenkins, Esq.

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REASONS FOR JUDGMENT

1 This appeal comes before the Court pursuant to s.69 of the **Property Assessment and Taxation Act**, R.S.N.W.T. 1988, c. P-10.

2 Polar Panda Developments Ltd. ("Polar") appeals against an order made by the Assessment Appeal Tribunal under the Act confirming the 1990 assessment of the improvements on Lots 7 to 12 (both inclusive), Block 22, Plan 65, Yellowknife, the property of Polar. The Government of the Northwest Territories (Department of Municipal and Community Affairs) ("M.A.C.A.") made the assessment on behalf of The City of Yellowknife ("The City"). They are the respondents in this appeal.

classification would yield a substantially lower amount in municipal property tax payable on the property by Polar.

7 Neither Polar nor the respondents have put forward any other proposed classification of the property.

II. The Legislation

1. General interpretation

8 Counsel on both sides have referred to what was said in **Canada Tungsten Mining Corp. v. Northwest Territories (Department of Municipal and Community Affairs)**, [1993] N.W.T.R. 242 (S.C.) regarding the interpretative approach to be taken to the **Property Assessment and Taxation Act**. The same general approach is necessary in reference to municipal by-laws enacted under s.15(1) of the Act:

> 15. (1) The council of a municipal taxing authority may, by by-law, establish two or more classes of property and describe the kind of assessed property that is to comprise each class.

9 By s.1, the Act defines "a municipal taxing authority" to include a city, among other municipal bodies; and it likewise defines "assessed property" to mean "assessable property that has been assessed" and "assessable property" to include "any land, improvement" and other specified things "liable to assessment". It is common ground that s.15(1) authorised The City to enact by-laws establishing two or more property classes for purposes of the Act. The **Property Classification By-law**, enacted

3 The assessed improvements comprise a building complex located on the six lots above mentioned. The complex includes a seven-storey office tower with service penthouse above, all on Lots 10, 11 and 12. The tower rises above a shopping mall at and below ground level within those three lots. The complex also includes a ground floor retail sales facility adjoining the shopping mall but located almost entirely on Lots 7, 8 and 9. A second storey office unit is located above that facility on Lot 7; and a basement used for storage extends immediately below and for the length and breadth of the retail sales facility.

4 All six lots have been assessed as one parcel. The entire building complex has likewise been assessed as a single improvement on that parcel. The assessed value of that improvement, as confirmed by the Tribunal, is $2,824,376.00.

I. The Issue

5 The central issue in this appeal is whether the Tribunal erred in law on the face of the record of its proceedings by refusing to change the property class, assigned to the improvements by M.A.C.A. for purposes of its 1990 assessment under the **Property Assessment and Taxation Act** and By-law No. 3453, being The City's **Property Classification By-law**, as requested by Polar.

6 That assessment, confirmed by the Tribunal, results in the classification of the entire building (as well as all six lots on which it rests) as "commercial high rise". Polar contends that the classification should instead be "commercial low rise". The latter

classification would yield a substantially lower amount in municipal property tax payable on the property by Polar.

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under s.15(1), is therefore to be interpreted and applied in conformity with the Act and with the general interpretative approach mentioned above.

10 Counsel for Polar submits that, in addition to what was said in the **Canada Tungsten** case, the following should also be remembered, as stated in **Johns-Manville Canada Inc. v. The Queen**, [1985] 2 S.C.R. 46, [1985] 2 C.T.C. 111, 85 D.T.C. 5373, 21 D.L.R. (4th) 210, 60 N.R. 244 (*sub nom*, **Johns-Manville Can. Inc. v. M.N.R.**), at page 52 (S.C.R.):

> ... where the taxing statute is not explicit, reasonable uncertainty or lack of explicitness in the statute should be resolved in favour of the taxpayer.

11 Counsel on behalf of The City and M.A.C.A. rely on the Golden Rule enunciated in **Grey v. Pearson** (1857), 6 H.L.C. 61 that

> ... in construing ... statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified, so as to avoid absurdity and inconsistency, but no further.

12 These submissions are in harmony with what was said in the **Canada Tungsten** case in more general terms. It was not intended there to exclude what counsel have now mentioned.

2. Property Classification for assessment purposes

13 As counsel for The City and M.A.C.A. remind the Court, the **Canada Tungsten** case concerned an assessment of property in the general taxation area, outside the jurisdiction of any municipal taxing authority such as The City; whereas the property under consideration in the present case lies within The City's taxing jurisdiction for purposes of the **Property Assessment and Taxation Act**. The same general principles of interpretation apply; but there are specific provisions of the Act (and there is the By-law) which apply in the present case and which did not apply in that case. Equally, certain of the specific provisions which applied in that case do not apply in the present case.

14 In addition to s.15(1) of the Act, quoted above, counsel for Polar invites the Court to consider s.15(2):

> (2) Where no by-law is passed under subsection (1), the assessed property in the municipal taxation area shall be deemed to comprise one property class.

15 If I correctly understand counsel's submission, this is to be taken as indicating that "the basic unit of property" which is to be classified is "assessed property", as defined by the Act. But neither s.15(2) nor the definition of "assessed property" speaks of any such "basic unit". What s.15(2) does speak of is the **kind** of property which is to be deemed to comprise one property class; and what is clearly intended is that a property classification subsect to s.15(2) shall take place only where no by-law has been enacted under s.15(1). It is apparent that s.15(2) is merely a stop-gap provision to govern cases not covered by s.15(1).

16 The By-law was enacted as provided in s.15(1) of the Act. Its legal validity

has not been challenged in court proceedings appropriate to that purpose. It came into force on January 1st 1990 pursuant to s.16.1(2), which states:

> 16.1 (2) Where the council of a municipal taxing authority makes a by-law under section 16 in the year immediately after a general assessment is conducted, the council may provide in the by-law that the by-law is effective from January 1 of the year in which it is made.

17 The reference to "section 16" is, of course, a reference to s.15 in the Revised Statutes of 1988, from which I have been quoting. Subsection 16.1(2) was added to the Act by S.N.W.T. 1990, c.5, s.3, which employs section numbers which are one digit higher than those used in the Revised Statutes.

18 The foregoing becomes relevant when consideration is given to s.16 of the Act as amended in 1990 (the 1990 amendment refers to it as s.17). By that amendment, s.16(3) was added in order to make specific provision for situations covered by s.16.1(2). Section 16, as thus amended, reads as follows:

> 16. (1) After an assessment, the assessor shall assign to the assessed property the property class that most appropriately describes the assessed property.
>
> (2) Subject to the regulations, where two or more uses are being made or are proposed to be made of assessed property, the assessor shall assign a property class to the assessed property based on the predominant use being made or proposed to be made of the assessed property.
>
> (3) Where a by-law is made in accordance with subsection 16.1(2), an assessor shall assign to the assessed property affected by the by-law, the property class that most appropriately describes the assessed property.

19 Counsel for the City, with whom counsel for M.A.C.A. agrees, takes the position that s.16(2) only applies where the assessed property is in the general taxation area, not in a municipal taxation area. As I understand the submission, that is because s.16(3) applies only in a municipal taxation area and not in the general taxation area. Furthermore, "the regulations" to which s.16(2) is subject, are inapplicable in a municipal taxation area.

20 If s.16(2) applies only in the general taxation area, as contended for by the respondents, then there is no equivalent provision in the Act respecting the property classification of multi-use properties in a municipal taxation area. There is nothing in the Act to indicate why this should be so. The facts of the present case illustrate the need for some provision governing such properties within a municipal taxation area. And the legislature is not to be presumed to have overlooked that need; it is more reasonable to presume the contrary.

21 On closer examination, it is apparent that s.16(3) was not intended as an alternative to s.16(2); it is an alternative only to s.16(1). The section is to be read so that either s.16(1) or s.16(3) applies, along with s.16(2) where the last mentioned provision is applicable. The words "Subject to the regulations" in s.16(2) are to be understood in the sense "(where the regulations apply)". Read in that way, s.16(2) is applicable both in the general taxation area and in a municipal taxation area. See also the definition of "property class" in s.1 of the Act, which refers expressly to property in a municipal taxation area. In the present instance, therefore, both s.16(2) and s.16(3) may apply. It only remains to determine if they both apply, and then how they (or s.16(3)

alone) should apply.

3. The By-law

22 By-law No. 3453, the **Property Classification By-law**, is more fully captioned "A by-law of the Corporation of the City of Yellowknife in the Northwest Territories to establish classes of property for the purposes of property assessment and to describe the kind of assessed property that is to comprise each class". And the preamble to the By-law states that it is enacted pursuant to s.16 (now s.15) and s.16.1 of the **Property Assessment and Taxation Act**.

23 The By-law provides, in part:

1. The classification of property for taxation purposes shall be as follows:

* * *

Class 6 Commercial - Low Rise

comprised of property with single storey improvements, principally used for the sale or provision of goods or services.

Class 7 Commercial - Medium Rise

comprised of property with two and three storey improvements, principally used for the sale or provision of goods or services.

Class 8 Commercial - High Rise

comprised of property that are greater than three storeys, principally used for the sale or provision of goods or services.

24 In all, there are sixteen property classes described in the by-law. There are also certain definitions. Those with which we are here concerned are discussed together with the definitions in the Act in the paragraphs which follow.

4. Definitions

25 The By-law specifically defines "property" to mean "a parcel of land on which is located an improvement or mobile unit". It also specifically defines "land" to mean "physical land, whether or not covered by water or ice". And it states that the terms "improvement" and "parcel" have their meanings as defined in the Act.

26 The term "property" is not specifically defined in the Act. Its meaning in the Act is to be determined from the context in which it is there used. For our purposes, the immediate context which must govern is that of s.15(1) of the Act, quoted above, under which the By-law was passed. Generally, as held in the **Canada Tungsten** case, the term "property" is used in the Act to connote either or both land and improvements. There is nothing in s.15(1), or elsewhere in the Act, to suggest any other meaning of the term as found in s.15(1). That, then, must be its meaning.

27 The By-law however purports to give a specific meaning to the term "property". The apparent meaning of the By-law definition is, quite clearly, that "property" in the By-law does not include any improvements. The term "parcel", as specifically defined in detail by the Act, applies only to land and does not apply to improvements. The term "land" is given a somewhat more extensive definition in the Act

than in the By-law; but, for present purposes, I assume that there is no difference in meaning. On that basis, "property" is specifically defined by the By-law to mean "a parcel of land", which description is then qualified by the expression "on which is located an improvement or mobile unit". The last quoted words merely describe the kind of parcel of land which is intended by the word "property", and do not extend the scope of the definition to include the improvements so located. If that is so, the By-law appears therefore to provide only for property classification of land, and not for any such classification of improvements. But surely that was not intended.

28 For convenience of reference, the following is the definition of "parcel" in the Act:

1. In this Act:

"parcel" means

(a) a section of land according to the system of surveys under the *Canada Lands Surveys Act* or any lesser area the description of which has been approved by the Registrar under the *Land Titles Act* (Canada).

(b) if land has been subdivided and the subdivision registered under the *Land Titles Act* (Canada),

(i) each lot, block or tract of land described in a certificate of title, or described in a certificate of title by reference to a plan filed or registered in the land titles office, or

(ii) each lot, block or tract of land otherwise described or identified in the land titles office that is capable of being the subject of a disposition,

(c) if an improvement that is affixed to land would, without special mention, be conveyed by a sale of the land and the improvement is located on two or more lots, blocks or tracts described in paragraph (b), all those lots, blocks or tracts,

(d) if a section or a lot, block or tract described in paragraph (b) or (c), is situated partly in a municipal taxation area and partly in the general taxation area, each part of that section, lot, block or tract,

(e) if the land is not registered under the *Land Titles Act* (Canada), each area of land described in a lease or other disposition issued under

(i) the *Territorial Lands Act* (Canada) or any regulations made under that Act,

(ii) the *Public Lands Grants Act* (Canada), or

(iii) the *Commissioner's Land Act* or the regulations made under that Act,

(f) if the land is not registered under the *Land Titles Act* (Canada) and is occupied or used without a disposition described in paragraph (e), the area of the land that is, in the opinion of an assessor, occupied or used, or

(g) that portion of land that relates to a unit owned by the owner of a unit under the *Condominium Act*.

29 The term "improvement" is defined in s.2 of the Act, as follows:

2. (1) Subject to this section, an "improvement" is

(a) everything that, without special reference, would be conveyed if real property were sold,

(b) everything fixed to land, even slightly, unless there is evidence showing that it was intended that the thing was to remain separate from the land,

(c) any machinery, equipment, appliance or other thing forming an integral part of any activity on or use of land, other than a residential use or activity, whether or not that thing is mobile, or

(d) anything forming an integral part of the things referred to in paragraphs (a) to (c), unless there

(d) anything forming an integral part of the things referred to in paragraphs (a) to (c), unless there is evidence showing that it was intended that the thing was to remain separate from the improvement,

whether or not it is in, on, over or under land.

IV. The Tribunal's Decision

30 By letter dated August 9th 1990, The City's Board of Revision notified Polar that the assessment of Lots 7 to 12 (above mentioned) had been made separately from that of certain other property together with which the Lots had previously been assessed. And the assessment was there shown as being made on the basis that Lots 7 to 12 were in the "commercial high rise" property class. This classification was unchanged by the Tribunal when it confirmed the assessment in a written decision dated May 28th 1991.

31 The gist of the Tribunal's decision is stated as follows:

> The Tribunal denied the appeal of the appellant to have the property class changed from 137 (commercial high rise) to 131 (commercial low rise) based on predominant use. The Tribunal also denied the request of the appellant to have the property class under the by-law changed from class 8 to class 6 because the by-law does not distinguish between classes 6 and 8 on the basis of the use of the building. In fact, under both classes the use envisioned is identical. The only distinction between the two classes is on the basis of height. Class 6 is clearly applicable to a single storey building, whereas class 8 is applicable to a building exceeding three stories. The building under appeal clearly falls into class 8.

V. Discussion

1. Subsection 16(2)

32 Acting on the Assessor's advice that the use of the above ground tower levels for office purposes is, in terms of the By-law, indistinguishable from the use of the rest of the property for retail sales purposes, since both uses are comprised in "the sale or provision of goods or services", as mentioned in the By-law, the Tribunal held that s.16(2) of the Act is inapplicable, with the result that no question of "predominant use" arises. Given the language of s.15(1) of the Act and the property classes set out in the By-law, it is plain that no other meaning can sensibly be given to s.16(2) of the Act. I must in consequence agree that s.16(2) is inapplicable to the property assessment under appeal.

33 There is a further reason to rule out s.16(2) as being applicable if, as noted above, the By-law applies only to the classification of land and not to the classification of improvements. As noted in the **Canada Tungsten** case, sections 6 and 7 of the Act require the assessor to assess lands separately from improvements and, in the same manner, all improvements separately from the land on which they are located. Once again, the reference in these sections to "the regulations" is to be read in the sense "(where the regulations apply)", as is necessary in construing s.16(2) of the Act. This means that sections 6 and 7 apply within a municipal taxation area, subject to that interpretation, as well as in the general taxation area. Section 11 of the Act clearly indicates this, providing expressly for situations where the regulations do not apply.

34 For more convenient reference, sections 6, 7 and 11 of the Act read as follows:

6. An assessor shall assess every parcel that is liable to assessment in accordance with the regulations separately from improvements, mobile units, pipelines, works and transmission lines, and railways.

7. An assessor shall assess all improvements that are liable to assessment in accordance with the regulations separately from the land on which they are located.

11. Where the regulations do not provide for the manner in which, or the method by which, an assessed value is to be given to

(a) a parcel, the assessor shall assess the parcel in a manner that to the assessor appears fair, having regard to any similar parcels in the same vicinity;

(b) an improvement, the assessor shall assess the improvement in a manner that to the assessor appears fair, having regard to any similar improvements in the same vicinity; and

(c) a mobile unit, the assessor shall assess the mobile unit in a manner that to the assessor appears fair, having regard to any similar mobile units in the same vicinity.

35 It therefore remains only to consider whether or not the property class "commercial high rise" most appropriately describes the assessed property, as required by s.16(3) of the Act.

2. Classification Methodology

36 On behalf of Polar it is contended that the building complex is to be regarded as a composite of several parts, some of which are clearly "high rise", and others "medium rise" and "low rise", with an average, based on floor area, which makes the property as a whole "low rise". On behalf of The City and M.A.C.A., it is contended that the building complex is to be regarded as a single unity which, since it rises to seven

storeys (plus the penthouse), must be classified as "high rise". Alternatively, if I understand the respondents' position correctly, they say that even if the approach advocated on behalf of Polar is acceptable in principle, it nevertheless results in an overall, or average, "high rise" rather than "low rise" classification.

37 In advancing these contentions, none of the parties has noticed the restrictive scope of the By-law definition of "property", as mentioned above. In effect, they rely instead on the implied meaning of that term in the Act itself, noted earlier, as including land and improvements so as to apply to either or both of these kinds of property. Counsel for Polar did submit that the City does not have the necessary legislative competence to amend or alter the Act, except as the Act expressly provides; and there is nothing in the Act so providing. If the By-law definition of "property" were to prevail, the City would in effect have legislated under s.15(1) with respect to land only, leaving s.15(2) to apply in respect of all improvements. The better view, I believe, is that the City could not define the term "property" to achieve that result, as a matter of law, so that the definition can properly be disregarded as the parties to this appeal have done.

38 Prior to this Court's decision in the **Canada Tungsten** case, M.A.C.A. evidently made general property classifications of improvements, together with the land on which they were located, without adhering to the express requirements for separate assessments under the Act. That was plainly the basis of the Tribunal's error in that case, in relation to the property class of certain improvements in the general taxation area. It is therefore necessary to consider the approach taken by M.A.C.A. and the Tribunal to the property classification made in the present instance, even if the

improvements in question here are within a municipal taxation area.

39 By treating the entire building complex as a single improvement located on a single parcel consisting of Lots 7 to 12 (both inclusive), the assessor and the Tribunal apparently sought to give effect to the definition of "property" in the By-law, that definition being restrictive in its terms, excluding improvements and confining "property" to that which is comprised in a "parcel" of land, as defined by the Act. But, in so doing, the assessor nevertheless made a joint property classification of the land with all the improvements located on it, without attempting to classify them separately as follows from sections 6, 7 and 16(3) of the Act.

40 In proceeding on this basis, the assessor and the Tribunal evidently assumed that the only "parcel" to be considered by them is one comprised of all six lots and that, in consequence, the only "improvement" to be assessed was the entire building complex in relation to all six of those lots. It is important to examine these assumptions, since if other alternatives are left open to the assessor and the Tribunal, under the legislation, which will allow for the assignment of a more appropriate property class pursuant to s.16 of the Act, then those alternatives are clearly to be preferred. See **Johns-Manville Canada Inc. v. The Queen.** (*supra*).

41 The term "parcel", as quoted above, is defined by the Act to mean, among other things, each lot of land described in a certificate of title by reference to a plan filed or registered in the land titles office. Each of Lots 7 to 12 (both inclusive) meets this part of the definition. Paragraph 1(c) of the Act goes on to say that "if an improvement that

is affixed to land would, without special mention, be conveyed by a sale of the land and the improvement is located on two or more lots", then the term "parcel" means "all those lots". Looking then at this definition of "improvement", it is abundantly obvious that a sale of Lots 7, 8 and 9 would not convey any legal or equitable interest in the improvements on Lots 10, 11 and 12. It follows that Lots 7, 8 and 9 lie outside the parcel comprised by Lots 10, 11 and 12, for purposes of a conveyance by sale of that parcel and the office tower and the shopping mall levels which are located on that parcel.

42 Equally, although the retail sales outlet on Lots 7, 8 and 9 adjoins the shopping mall at ground level on lot 10, a sale of Lots 10, 11 and 12 could lawfully take place without conveying any legal or equitable interest in the remaining and by far the greatest part of the retail sales outlet. It follows that Lots 7, 8 and 9 comprise a distinct and separate parcel from Lots 10, 11 and 12 for assessment and property classification purposes under the Act.

3. Most Appropriate Classification

43 It will be immediately apparent that the most appropriate classification of Lots 10, 11 and 12, and of the improvements on those lots, under the By-law, is "commercial high rise". The assessor and the Tribunal were correct in that part of their classification of the property.

44 It is equally obvious that the most appropriate classification of Lots 7, 8 and 9, and of the improvements on those lots, under the By-law, is not "commercial high rise"

but "commercial low rise", even when the second storey office extension on Lot 7 is taken into account. In reaching this conclusion, it is immaterial whether or not the basement level of the retail sales outlet is taken into consideration.

VI. Disposition

45 The appeal is therefore allowed in part, that is to say, as to Lots 7, 8 and 9 and the improvements located on the parcel which comprises those lots. In respect of them, the decision of the Tribunal is varied accordingly.

46 The matter is referred back to the Tribunal for assessment of the parcel comprising Lots 7, 8 and 9, and of the improvements located thereon, as being all within property class 6, "commercial low rise", under the By-law.

47 Costs may be spoken to by appointment, if necessary. Success being divided, I do not expect that these will be sought.

M.M. de Weerdt
J.S.C.

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REASONS FOR JUDGMENT OF THE
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