

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE CITY OF YELLOWKNIFE

Applicant
(Respondent)

- and -

CURRY CONSTRUCTION 1979 LTD.

Respondent
(Applicant)

REASONS FOR JUDGMENT

1 Do municipalities in the Northwest Territories have authority to impose punitive rates of interest upon defaulting property-taxpayers? If so, what limits are there, if any, on the exercise of that authority?

2 These questions arise on the application made on behalf of The City of Yellowknife ("the municipality") for an order declaring that its certificate of tax arrears, due by Curry Construction 1979 Ltd. ("the taxpayer") in the amount of \$105,767.41, shall be filed as a judgment of this Court pursuant to s.96 of the *Property Assessment and Taxation Act*, R.S.N.W.T. 1988, c. P-10. The taxpayer makes a cross-application for an order quashing those provisions of the several applicable by-laws of the municipality under which amounts of interest have been calculated and included in the tax arrears declared in the certificate. This cross-application is brought pursuant to s.68 of the *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8.

I. Issues

3 At issue then, ultimately, is the amount of interest, if any, which may properly be included as tax arrears in the municipality's certificate. As will appear, the amount in question is a fairly significant one. And the questions which have been raised, as stated at the outset, have much wider implications.

4 If the taxpayer succeeds on its cross-application, an issue will arise as to whether any interest is to be included in the amount of the tax arrears and, if so, at what rate and on what basis it is to be calculated. The taxpayer's position is that any certificate of tax arrears to be filed against it pursuant to s.96 of the *Property Assessment and Taxation Act* should include only such interest as the law properly allows.

II. Procedural Background

5 The time in which the taxpayer may apply for an order setting aside the *ex parte* Chambers order made on April 13th 1993 is extended to include February 3rd 1995, the date on which this matter was heard by agreement of the parties. The taxpayer seeks such an order in its cross-application. The *ex parte* order authorized the filing of the certificate of tax arrears as a judgment of this Court, subject always to any further order made on application by the taxpayer within 30 days of service of the *ex parte* order upon the taxpayer. Although no mention of an extension of that period is made in the *ex parte* order, I have granted the extension on the basis of the affidavit material filed on behalf of the taxpayer; and I note that the extension is not opposed. It is of course one of the

frailties of any *ex parte* order that anyone adversely affected by it may subsequently apply to the Court to have it set aside.

6 When the *ex parte* order was entered on April 13th 1993 the solicitor for the municipality also obtained a default judgment in the amount of the tax arrears stated in the certificate filed as an exhibit to the affidavit of Grant Lloyd, sworn on April 2nd 1993 and filed on behalf of the municipality in support of its application for the *ex parte* order. This default judgment should not have issued. Section 96 of the *Property Assessment and Taxation Act* provides for the filing of a certificate of tax arrears as a judgment of this Court, where so ordered by a judge of the Court; it is silent as to the entry of any other judgment. There is no basis in the Act or in the *Rules of Court* for the additional entry of a default judgment upon the filing of a certificate of tax arrears pursuant to s.96 of the Act. The default judgment must therefore be set aside.

III. Factual Background

7 The certificate of tax arrears states on its face:

PROPERTY ASSESSMENT AND TAXATION ACT (Section 96)
CERTIFICATE OF TAX ARREARS

Account number: 975002400

Assessed Owner: Name: Curry Construction 1979 Ltd.
 Mailing address: Box 1760 Yellowknife. NT X1A 2P3

Date of sending this certificate to the assessed owner:
December 3 1992

Taxable property: This property is in the
general taxation area
municipal taxation area of
Yellowknife NT

Description: Lot 24
Block Subdiv. 1
Plan 515

Property Taxes and Arrears for 1985-1991 Calendar Year(s)

(a)	property taxes:	<u>\$41,546.33</u>
(b)	other taxes, levies, expenses or charges applicable to the taxable property that are entitled to be recovered as if they were a tax or property or a property tax:	<u>\$455.26</u>
(c)	interest payable on amounts in (a) and (b) calculated to <u>Dec 31/91</u> :	<u>63,765.82</u>
TOTAL PROPERTY TAXES AND ARREARS:		<u>\$105,767.41</u>

8

The certificate is endorsed with a statement which reads as follows:

(Where a collecting authority prepares a certificate of tax arrears for taxable property in which property taxes have not been paid for two or more years, the collecting authority shall attach to the certificate a document showing the calculation of the property taxes and arrears for each of those years.)

I, Grant C. Lloyd, collecting authority in respect of the taxable property set out above, certify that:

1. the assessed owner set out above has not paid the total property taxes and arrears set out above in respect of the taxable property for the 1985-1991 calendar year(s);

2. the assessed owner is liable to pay the total property taxes and arrears within 30 days of the mailing of this notice;
3. the total property taxes and arrears must be paid in cash or by cheque or money order payable to The City of Yellowknife at Box 580, Yellowknife NT X1A 2N4;
4. if the total property taxes and arrears are not received within 30 days of the mailing of this notice, a copy of this certificate may be filed with the Clerk of the Supreme Court or, subject to the provisions of the *Territorial Court Act*, with the Clerk of the Territorial Court;
5. after this certificate has been filed in Court, the judge of the Supreme Court or Territorial Court may conduct a hearing and may make an order for payment and costs that the judge considers appropriate and may order that this certificate be filed as an order or judgment of the Court; and
6. the judge of the Supreme Court or Territorial Court may make an order referred to in paragraph 5 without the assessed owner being present, if the judge is satisfied that the assessed owner was served with the certificate.

"signature"
Signature of Collecting Authority

CITY OF YELLOWKNIFE
CALCULATION OF PROPERTY TAXES

Account Number: 975002400

Assessed Owner: Curry Construction 1979 Ltd.
Box 1740
Yellowknife, NT X1A 2P3

<u>YEAR</u>	<u>(a) PROPERTY TAXES</u>	<u>(b) OTHER LEVIES</u>	<u>(c) INTEREST</u>	<u>TOTAL YEAR</u>
<u>1985</u>	<u>2,874.86</u>		<u>1,710.34</u>	<u>4,585.20</u>
<u>1986</u>	<u>5,946.77</u>		<u>3,914.90</u>	<u>9,861.67</u>
<u>1987</u>	<u>6,025.93</u>		<u>4,838.24</u>	<u>10,864.17</u>
<u>1988</u>	<u>6,649.06</u>		<u>6,279.01</u>	<u>12,928.07</u>
<u>1989</u>	<u>7,415.35</u>		<u>11,184.25</u>	<u>18,599.60</u>
<u>1990</u>	<u>6,124.20</u>		<u>13,108.86</u>	<u>19,233.06</u>
<u>1991</u>	<u>6,510.16</u>	<u>455.26</u>	<u>22,730.22</u>	<u>29,695.64</u>

TOTAL PROPERTY TAXES AND ARREARS: \$105,767.41

Dated at Yellowknife NT
December 3 1992

"Signature"
Collecting Authority

9 No issue exists as to the amount of the property taxes (excluding interest) and other levies mentioned in this document. The sole issue is as to the interest charged, which amounts in total to \$63,765.82.

IV. The Legislation

1. The Cities, Towns and Villages Act:

10 The taxpayer relies upon s.68 of this Act, which states:

68. (1) Any person

- (a) resident in the municipality, or
- (b) adversely affected by a resolution or by-law,

may apply, by way of originating notice, to a judge of the Supreme Court for an order quashing a resolution or by-law of the municipal corporation.

(2) The application must be in accordance with the Rules of the Supreme Court.

11 The taxpayer has not made its cross-application by way of originating notice, as expressly provided for in s.68(1) of this Act. Instead, it has sought to do so by simple notice of motion with the filing of an affidavit in support. No objection is taken, however, to this departure from the strict letter of s.68(1). It is open to me, under the

Rules of Court, to regard this as a mere procedural lapse which need not bar the taxpayer from making its cross-application. Given the lack of objection, I so regard it.

12 With reference to the impugned by-laws, it may be noticed that s.10 of the Act States:

10. (1) Every council shall exercise its powers and perform its duties by resolution or by by-law.

(2) Where this Act or any other enactment requires it, a council shall exercise its powers and perform its duties only by by-law.

13 Furthermore, s.54 of the Act reads:

54. (1) The power of a council to make by-laws is subject to all Acts and regulations of the Territories and Canada unless an Act or regulation expressly states otherwise.

(2) Where a by-law is inconsistent with an Act or regulation, the by-law is of no effect to the extent of the inconsistency.

14 Finally, the Act prohibits the forgiveness of property tax arrears, as appears from sections 163 and 164, the pertinent provisions of which are as follows:

163. No municipal corporation shall forgive a debt owed to it except in accordance with section 164.

164. (1) A council may, by by-law, approved by the Minister, forgive a debt owed to the municipal corporation in whole or in part, if

(a) the debt is not in respect of property taxes; ...

2. The *Property Assessment and Taxation Act*:

15 The expression "property tax" is defined by s.1 of the Act in the terms
following:

1. In this Act, ...

"property tax" means a tax payable under Part III and any
interest on that tax; ...

16 Part III of the Act concerns taxation. Among other provisions which I shall
mention it contains s.83, which reads in part:

83. Subject to this Act, the council of a municipal taxing
authority may make by-laws ...

(c) respecting the imposition of interest on amounts
outstanding, but the rate of interest must not exceed
24% per year; ...

17 The word "interest" is not specifically defined by the Act. That word is used
in the definition of "property tax" quoted above. It follows that the imposition of interest
under a by-law enacted pursuant to s.83(c) of the Act is the imposition of a property tax.
This is confirmed by s.97(d) of the Act, as follows:

97. For all purposes in a municipal taxation area, ...

(d) interest payable on any taxes, charges, levies or expenses,
shall be deemed to be municipal taxes.

18 Although s.97(d) speaks of "municipal taxes" rather than property tax or
taxes, it is apparent that this expression includes property tax or taxes. Furthermore,
s.84(1) of the Act reinforces this conclusion. It states:

84. (1) Interest that becomes payable on property taxes or supplementary property taxes shall be considered to be part of the property tax or supplementary property tax payable in respect of taxable property.

19 The position of the municipality in the matter is also governed by s.84(2):

84. (2) No discount shall be provided for payment of arrears of property taxes or arrears of moneys collected as property taxes.

20 Counsel have also referred to s.81(2) and s.83(h) of the Act. I mention these provisions only to indicate why I do not take either to be applicable to the matter at hand.

21 It is true that s.81(2) constitutes all property taxes as debts. Interest imposed under a by-law enacted pursuant to s.83(c), being a property tax under the Act, is thus also a debt pursuant to s.81(2). But there is nothing in s.81(2), or elsewhere in the Act, which thereby reduces such interest to a simple debt devoid of its character as a property tax. That the interest is imposed and calculated with reference to a principal amount which is itself the amount of a property tax, and thus also a debt under the Act, does not in any way alter the character of such interest as a property tax. It is abundantly clear that the Act treats such interest as more than a simple debt; and that such interest is imposed and calculated with reference to an amount which is itself more than a simple debt.

22 As for s.83(h), that provision empowers a "municipal taxing authority" (which includes the municipality in the matter at hand) to enact by-laws respecting "the manner or means by which property taxes ... and other moneys owing as property taxes

are to be collected". If anything, this may imply that it is open to a municipal taxing authority to pass a by-law providing for penalties to be imposed on property tax defaulters. I prefer however not to rely upon any such implication in this instance, since it does not seem to me to be necessary to do so.

23 For the sake of completeness and convenience of reference, s.95 and s.96 of the Act are as follows:

95. (1) Where a person liable to pay property taxes fails or refuses to do so by December 31 in any year, the collecting authority may prepare a certificate of tax arrears in the prescribed form, unless an appeal is pending under section 69 in respect of those taxes.

(2) A certificate of tax arrears must be sent to the assessed owner liable to pay property taxes.

96. (1) If property taxes and arrears specified in the certificate of tax arrears are not paid within 30 days after the date the certificate is sent to the assessed owner, the collecting authority may file a copy of the certificate and an affidavit of service of it with the Clerk of the Supreme Court or, subject to the provisions of the *Territorial Court Act*, the Clerk of the Territorial Court, who shall enter the matter for hearing as soon as possible.

(2) At a hearing referred to in subsection (1), the judge of the Supreme Court or territorial judge may hear any of the parties and

- (a) make an order for payment and costs that is considered appropriate;
- (b) order that the certificate of tax arrears be filed as an order or judgment of the court; and
- (c) make any further or other order that is considered necessary in all the circumstances.

(3) An order may be made *ex parte* under subsection (2) where the judge of the Supreme Court or territorial judge, as the case may be, is satisfied that the assessed owner liable to pay the property taxes was served with the certificate of tax arrears, otherwise reasonable notice of the hearing must be given to the assessed owner.

3. The by-laws:

24 There are fourteen by-laws, two for each year in the period 1985-1991 (inclusive), in each of which provision is made as follows, except in 1991 for which the rate of interest was fixed at 1.8% per month:

Interest on all taxes levied under this By-law and other charges such as local improvements and frontage tax remaining unpaid after the (date, month and year) shall be paid in an amount equal to two percent (2%) of the unpaid balance of such taxes on the first day of default and two percent (2%) of the unpaid taxes on the first day of each calendar month thereafter until all sums due under this By-law in respect of such interest and taxes shall have been paid. Payments shall be considered received when they are physically received at City Hall.

25 In each year of the period, one such by-law was enacted in February and the other followed in June. It is not in dispute between the parties that even though the by-laws prior to 1991 provided for an annual cumulative interest rate in excess of the 24% maximum authorized by s.83(c) of the *Property Assessment and Taxation Act*, those by-laws are nevertheless not completely void of legal effect, being saved by s.54(2) of the *Cities, Towns and Villages Act* to the extent that they can be applied consistently with that maximum, as held in *Cunningham v. Fort Smith (Town)* (1990) N.W.T.R. 158 (S.C.).

V. Discussion

1. Do municipalities in the Northwest Territories have authority to impose punitive rates of interest upon defaulting property-taxpayers?

26 Nothing is expressly mentioned in the *Property Assessment and Taxation Act* with reference to any penalties. In saying this, I have noticed that s.83(h) does no more than perhaps imply the use of penalties for property tax collection purposes.

27 On behalf of the taxpayer it is submitted that the Act allows the municipality to generate income through taxes; and that the spirit and intent of the Act is not to penalise people who are unable to pay their taxes nor to allow the municipality to earn income under the guise of interest. It is the taxpayer's contention that when the Act speaks of interest in s.83(c) it means, in the context, a charge for "the time value of money" or the cost of borrowing money.

28 The parties agree that the rates of interest fixed under the by-laws (always allowing for what has been said about the maximum as set by s.83(c) of the Act) are punitive. It is the taxpayer's position that those rates were fixed at two to two-and-a half times "the time value of money" during the years in question. On behalf of the municipality, it is acknowledged that the interest imposed is nothing less than a statutory penalty. Counsel for the municipality submits that this is not only the effect of s.83(c) but that the effect is entirely permissible in law: *Lynch v. The Canadian North-West Land Company* (1891), 19 S.C.R. 204.

29 On behalf of the majority (4:1) in that case, Ritchie C.J. held at page 213:

In the present case the legislature was not dealing or professing to deal with the question of interest but was dealing exclusively with taxation under municipal institutions, and the extra tax which the court below has chosen to call interest the legislature has not so denominated, but which the legislature imposed, no doubt, as I said before, as a means of securing payment, ...

30 No argument was advanced on behalf of the taxpayer in this case to the effect that s.83(c) of the *Property Assessment and Taxation Act* is legislation in relation to interest within the exclusive legislative competence of the Parliament of Canada. That argument was rejected in *Lynch v. The Canadian North-West Land Company* and nothing has been brought to my attention to bring the authority of that decision into question here. It is conceded, for that matter, on behalf of the taxpayer, that the interest imposed under the impugned by-laws is to be distinguished from a contractually stipulated interest rate agreed to between two negotiating parties each considering factors relevant to their own interests. That concession was in my view properly made since s.83(c) provides for the municipal imposition of interest on property tax arrears, subject only to a cap of 24% per annum and the enactment of a by-law for that purpose.

31 The taxpayer's contention that the interest rate was set so high, in order to generate income for the municipality, fails in my respectful view since it must be apparent that taxpayers who fall into arrears in payment of their property taxes should easily be able to borrow on the security of their property at a more reasonable interest rate than one as high as the taxpayer says was the situation in this case, thus making the imposition of such a high rate generally futile for purposes of income generation. That the imposition

of a high rate proved futile, in this instance, in persuading the taxpayer to seek out a better rate and thus pay off the arrears, does not suffice to establish a general intention to create revenue for the municipality. The creation of eventual revenue, if and when the tax arrears are paid, is purely incidental.

32 In conclusion, I am driven to accept that municipalities in the Northwest Territories do have authority, by virtue of s.83(c) of the *Property Assessment and Taxation Act*, to impose punitive rates of interest upon defaulting property-taxpayers by way of penalty.

2. What limits, if any, are there on the exercise by municipalities of the powers under s.83(c) of the *Property Assessment and Taxation Act*?

33 The only limit set forth in the Act, on the by-law making power to exact interest as an additional property tax, is the annual 24% maximum rate provided by s.83(c).

34 Had the legislature intended that the rate to be imposed should be less, it could easily have said so. The provisions governing pre-judgment interest which are to be found in s.55 of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, indicate this clearly.

35 To the extent that the municipality had a legislative discretion to impose a lower rate of interest than it did in the impugned by-laws, it evidently chose not to do so. There is nothing in any applicable legislation which required it to impose any such lower rate of interest. And, in particular, there was nothing in law, in my respectful view, other

than the maximum rate per annum set by s.83(c), which required the municipality to do other than it did in fixing the rates of interest mentioned in the by-laws.

VI. Conclusion

36 It must be apparent that the Court does not have the necessary authority, in this case, to relieve against the statutory penalties which comprise the interest component of the taxpayer's property tax arrears: *R. v. C.N.R.*, [1923] A.C. 714 (P.C.).

37 The taxpayer's cross-application is therefore dismissed and the municipality's application is granted. The filing of the tax certificate as an exhibit to the affidavit of Grant Lloyd sworn on April 2nd 1993 shall be and is hereby declared to suffice as the filing of that certificate for the purposes of s.96 of the *Property Assessment and Taxation Act*. The default judgment is set aside.

38 Costs may be spoken to by appointment, if necessary.

M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
March 14th 1995

Counsel for the Applicant: Ms. Yvonne M. MacNeill

Counsel for the Respondent: Joe Miller, Esq.

