CV 04509 and CV 05908

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

AND IN THE MATTER OF THE PROPERTY
ASSESSMENT AND TAXATION ACT,
R.S.N.W.T. 1988, c.P-10

BETWEEN:

**THE MUNICIPAL CORPORATION OF
THE TOWN OF FORT SMITH**

Applicant

and

NERINA BERTON also known as **NERINA TASINATO-BERTON**

Respondents

Application for an Order confirming sale of Respondent's property to satisfy outstanding property taxes. Cross-application by Respondent to vary amounts of judgments obtained in 1993 and 1995 for property tax arrears. Town's application granted. Respondents' application dismissed.

Application heard: October 18,1996

Filed: January 7, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Applicant:	Scott D. Duke
Counsel for the Respondent:	Michael D. Triggs
Counsel for Revenue Canada:	Alan R. Regel

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REASONS FOR JUDGMENT

1 These chambers motions concern the town's efforts to collect, from the Respondent, municipal tax arrears for which she is liable as the assessed owner of certain properties in Fort Smith.

2 The town has pursued remedies available to it under the *Property Assessment and Taxation Act*, R.S.N.W.T. 1988, c.P-10 and the *Land Titles Act*, R.S.N.W.T. 1988 (supp) c.8. Relevant provisions of the former statute are as follows:

> s.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.

97. For all purposes in a municipal taxation area,

(a) property taxes,

(b) local improvement charges,

(c) other taxes, levies, expenses or charges that may be recovered as a tax on property, property tax or arrears of property tax, and

(d) interest payable on any taxes, charges, levies or expenses,

shall be deemed to be municipal taxes.

3 To place the present chambers motions in context, a chronology is

necessary.

1. On March 15, 1993, *ex parte* judgment was granted to the town pursuant to s.96 of the Act in the amount of $66,325.91 and costs (CV 04509). This sum represented outstanding tax arrears on six lots in Fort Smith for which the respondent was the assessed owner. The tax arrears accumulated in the years 1988-1992 inclusive. A copy of the Court's order was served on the Respondent on March 16, 1993.

2. On July 14, 1995, a further *ex parte* judgment was granted to the town pursuant to s.96 in the further amount of $45,623.70 and costs (CV 05908). This sum represented outstanding tax arrears for the years 1993 and 1994 on five of the six lots referred in the 1993 judgment. A copy of the Court's order was served on the Respondent on July 18, 1995.

3. The town filed writs of execution with the Sheriff's office and Land Titles registry with respect to the two judgments. The Sheriff's office returned the executions *nulla bona* to the town on September 29, 1995.

4. On November 14, 1995, on notice to the Respondent, the town obtained an Order of this Court directing the Sheriff to effect a sale of the five lots. The Respondent was represented by counsel at the hearing of the motion.

5. The Sheriff received one bid (that of the town). The town served notice on the Respondent, returnable February 12, 1996, of its application for an Order accepting the one bid and confirming the sale of the five lots. On February 12, 1996, the chambers judge was apparently advised that the Respondent had, at the last minute, paid the outstanding taxes on three of the lots. The chambers judge thereupon made an Order (a) directing that the writs of execution be discharged with respect to those three lots and (b) directing the Sheriff to conduct a fresh sale of the two remaining lots (Lot 531 and Lot 533), again permitting the town itself to submit a bid. The Respondent was represented in chambers on February 12, 1996.

6. Two bids were received, the town's bid ($50,000) being

> substantially higher than the second bid. The town seeks an Order accepting its bid and confirming sale of Lots 531 and 533. In affidavit evidence filed in support of its motion, the town indicates that the outstanding taxes for the two lots, as at September 6, 1996, are $90,437.42.

4 The hearing of the town's motion was adjourned twice at the request of the Respondent, being finally scheduled for October 18, 1996. On October 11, 1996, the Respondent filed a Notice of Motion, returnable at the same date, i.e., October 18, 1996, in which she seeks an Order:

> "That the judgments entered in Supreme Court files CV 04509 and CV 05908 be varied to account for the correct determination of prejudgment and post-judgment interest."

5 The Notice of Motion further states:

> "The Respondent relies upon Rules 170 and 421 of the Rules of Court.
>
> The Applicant on *ex parte* application obtain a default judgment against the Respondent for prejudgment and post-judgment interest in excess of that prescribed by law."

6 Filed in support of the Respondent's application attacking the earlier judgments is an affidavit in the name of the Respondent but unsworn. An unsworn affidavit is equivalent to no affidavit. I am unable to give any consideration to the factual allegations contained in the draft, unsworn affidavit of the Respondent. In any event, the affidavit, in general, states:

> (a) the Respondent is unable to determine the rate of interest used by the town to calculate tax arrears in the two judgments.

(b) the interest rate used to calculate the tax arrears in the 1995 judgment "appears to be well in excess of the amount permitted by law", and that the Respondent was only recently advised of this.

(c) the Respondent, based on calculations done by her solicitor, believes that there is only $25,044.25 owing on the two judgments.

(d) the Respondent and her husband believe that the town has been unfair to them and that the town officials hold a personal grudge against them by virtue of numerous earlier disputes.

(e) the Respondent and her husband believe that the municipal assessments of Lots 531 and 533 have been excessive, but they have been unsuccessful in appealing those assessments.

The provisions of the Rules relied upon by the Respondent state:

R 170. On an application to set aside a judgment entered under this Part [Part II - Procedures on Default], the Court, if satisfied that the judgment was entered, by inadvertence, for an amount in excess of that to which the Plaintiff is entitled on his or her pleadings or by order of the Court, may direct that the judgment be amended as may be necessary and on terms as to costs or otherwise.

R 421(1). A judgment by default, whether by reason of non-appearance, non-delivery of defence or non-compliance with these rules on an order of the Court, may be set aside or varied by the Court on such terms as to costs or otherwise as the Court considers fit.

(2) An application to set aside or vary a judgment by default shall be made with reasonable diligence.

7 At the hearing of the Respondent's motion to vary the 1993 judgment and the 1995 judgment, oral submissions were made on her behalf, in three respects:

(a) The town's calculation of interest on the tax arrears is incorrect for the reason that the town's by-law, properly

> interpreted, imposes interest at 1.8% *per annum* rather than 1.8% per month.
>
> (b) The town's calculation of interest is incorrect, inasmuch as it includes interest at the prescribed rate on "outstanding taxes *plus previous unpaid interest*" rather than on outstanding taxes only.
> (c) The amount of the 1995 judgment is excessive, inasmuch as it includes (as part of the 1993 and 1994 arrears) interest charges on sums represented by the 1993 judgment, at an interest rate in excess of the rate permitted by the *Interest Act*, R.S.C. 1985, c.I-15,s.12.

8 Upon consideration, I find that there is no merit in these submissions. As to (a), I refer to the by-law dated March 20, 1990 and passed by town council as authorized by s.83(c) of the *Property Assessment and Taxation Act*. While there is no express statement that the interest rate is "per month", there is a necessary implication to that effect, as the by-law authorizes the imposition of interest *each month* in the amount of 1.8% of the amount of property taxes then remaining unpaid.

9 As to submission (b), this point has already been judicially determined by this Court. See *Cunningham v Town of Fort Smith* [1990] N.W.T.R. 158 and *City of Yellowknife v Curry Construction* [1995] N.W.T.R.16. The imposition of "interest on interest" (to use the Respondent's term) is authorized by statute.

10 Submission (c), in my opinion, fails by virtue of the same reasoning given by de Weerdt, J. in *Curry, supra*. The imposition of interest by the town's by-law is the imposition of a property tax. Thus any "interest charges" included in the 1995 judgment are not interest on the 1993 judgment amount, but rather represent the lawful imposition

of property taxes in the years 1993 and 1994.

11 In summary, then, the Respondent's motion to vary the 1993 and 1995 judgments cannot succeed, for three reasons: (i) no satisfactory explanation is given for the Respondent's lack of diligence in bringing the motion, (ii) no affidavit material is filed in support of the motion, and (iii) it is without merit, as presented, in any event. The motion is dismissed.

12 Turning to the town's application for an order confirming sale, I find there is no reason not to grant the relief requested. An order will issue accepting the town's bid of $50,000 for Lots 531 and 533, confirming sale of the lots to the town free of all liens, claims and encumbrances, and granting judgment against the Respondent for the deficiency owing to the town following distribution of the sale proceeds.

The town shall be entitled to one set of costs, in column 5.

If counsel are unable to reach agreement on the minutes of the Order, as to distribution of sale proceeds or otherwise, they may see me by appointment with the Clerk.

J.E. Richard
J.S.C.

Yellowknife, NT
7 January 1997

Counsel for the Applicant: Scott D. Duke
Counsel for the Respondent: Michael D. Triggs
Counsel for Revenue Canada: Alan R. Regel

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