

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

NORTHWEST TERRITORIES BUSINESS DEVELOPMENT
AND INVESTMENT CORPORATION

Plaintiff

- and -

892622 NWT LTD., CLAYTON JAMES BURKE and
ANNIE MARY JANE BURKE

Defendants

MEMORANDUM OF JUDGMENT

[1] In this case, the Plaintiff, BDIC, seeks rectification of two Mortgages of Lease taken as security from the personal defendants, Clayton and Annie Burke, relating to Crown land at Disappointment and Large Pike Lakes in the Northwest Territories. This it does in furtherance of its action for foreclosure.

[2] As well, the Plaintiff asks for an Order allowing it to file an Amended Amended Statement of Claim to clarify precisely what passages it seeks to have rectified and also seeks an Order Nisi for Foreclosure. I will deal with the rectification and foreclosure issues in separate orders.

[3] The defendant company is the owner of an ecotourism business in Fort Smith that has been operating since the 1990s. In 2002, BDIC loaned the company \$200,000.00 on terms that required it and the personal defendants to provide security in the form of mortgages on two lots in Fort Smith owned in fee simple and two Mortgages of Lease on Crown land leased to the personal defendants. The

mortgages have been in default virtually from the time funds were advanced (the total amount paid on the loan is \$2,289.04) and there is now in excess of \$272,000.00 outstanding as well as significant tax arrears on two of the properties and a significant claim for solicitor/client costs. In 2007, the Plaintiff commenced an action for foreclosure. The matter has proceeded slowly owing in part to deficiencies in the security documentation which require rectification if the Plaintiff is to realize on its security.

[4] The defendants have been substantially cooperative with the Plaintiff and prior to coming to court Mr. Burke executed a transfer of land of Lot 668, Plan 342, Fort Smith, which forms part of the parcel on which the company's bed and breakfast business is located, from himself to the corporate defendant; and the company then executed a mortgage in favour of the Plaintiff. Both documents have now been registered. The corporate defendant is in default under a Mortgage registered as #123,042 on January 17, 2002, relating to Lot E-1, Plan 342, Fort Smith, and Lot 543, Plan 272, Fort Smith. The personal defendants are in default on Mortgages of Lease on Crown leases numbers 75D/1-1-5 and 75D/1-2-2.

[5] Specifically, the Mortgages of Lease were executed as collateral to personal guarantees for the loan advanced to the corporate defendant in 2002. And Mortgage #123,042 was also taken out on two properties owned by the corporate defendant in fee simple in the Town of Fort Smith. The security documentation, which was prepared by previous solicitors for the Plaintiff, is replete with errors. The Defendants were self-represented at the time the loan was taken out and have not retained legal representation in this action. The Defendant, Clayton Burke, appeared on behalf of himself and as agent for his wife at the return of the motion before the court. The Plaintiff consented to his representing the corporate defendant and, in the circumstances, I considered it appropriate and in the interests of justice to allow Mr. Burke to represent the company and made an order to this effect pursuant to Rule 7 of the *Rules of Court* as reflected in paragraph 1 of the draft order attached as Schedule "A".

[6] It is unfortunate that the defendants, at no time, have had the benefit of receiving independent legal advice from their standpoint and that of the Plaintiff. Had they had independent advice, they may have declined to agree to provide some of the security they did; their lawyer may have discovered all or some of the many deficiencies in the documentation; and the defendants would have had a clearer understanding of the implications of entering into this transaction. As well, the Defendants' position respecting the issue of rectification would likely have been more focussed. Mr. Burke advised the court that the Defendants did not retain counsel because they could not afford to do so. The Plaintiff, in future, may

wish to consider making the consulting of independent counsel by prospective borrowers a condition of the loan agreement and, in cases where there is an inability to pay, adding the solicitor's costs to the loan.

[7] With respect to the main issue before the court, the Defendants took the position that they opposed rectification of the Mortgages of Lease arguing that they never wanted to provide this security and risk losing their leases. This position speaks to a level of unhappiness about having to provide this security but does not address the issue of whether they agreed to sign the Mortgages of Lease, fully understanding that the agreement with BDIC required them to do so. Before the Plaintiff can begin to realize upon all of its security, it must obtain an order allowing it to rectify its Mortgages of Lease.

[8] The main issue to be decided then is:

Whether it is appropriate to rectify the leasehold mortgages in question to allow a change of wording to reflect that the personal defendants are not "registered owners[s] in fee simple..." of the two parcels of leased land; and whether it is appropriate to allow a change in wording to substitute all references to "Borrower" to "Mortgagor"?

Analysis:

[9] Rectification is an equitable remedy that is to be approached with caution and should only be granted upon proof that is "convincing".

[10] It is available where the parties have entered into a written agreement that fails to accurately reflect the shared common intention of the parties up to the time the agreement was made. [See *Re: Aboriginal Diamonds Group et al* 2007 NWTSC 37; Also *The Law of Contracts*, S.M. Waddams, 5th Ed. at pp. 232-239]

[11] A Letter of Offer prepared by the Plaintiff setting out the terms and conditions upon which a loan to the company would be granted was signed and accepted by Clayton Burke on January 11, 2002. The corporate seal is absent as is the signature of Annie Burke. There is no corporate resolution to specifically authorize the entering into of the agreement. Mr. Burke owns 49% of the company and Mrs. Burke 51% and it cannot therefore be inferred on the face of the document that he had authority to enter into the agreement on behalf of his wife or the company. However, based on the subsequent actions of the personal defendants, the evidence of Mr. Burke given at his examination for discovery and his submissions before the court, I am satisfied that at the time he signed the Letter of Offer, he was the authorized agent of both his wife and the corporate defendant.

[12] Mr. and Mrs. Burke did execute all of the security documentation stipulated in the Letter of Offer. At his examination for discovery, Mr. Burke maintained that he did not feel the security on the family home and leases was warranted and was “overkill” on the part of the lender but candidly conceded that he understood he and Annie Burke were required to sign the Mortgages of Lease if they were to obtain the loan. In his submissions before the court, Mr. Burke again conceded that he understood he and his wife were required to sign the Mortgages of Lease as guarantors and not as “borrowers” since the company was obtaining the loan and he was well aware that since these were leases, he and Annie Burke did not own the subject property in fee simple. [See also transcript, page 71, line 6 to page 72, line 23; page 61, lines 11-13]

[13] In the circumstances, I will grant rectification of the Mortgages of Lease.

[14] The Plaintiff applied on July 13, 2009, for an order to allow the Plaintiff to file an Amended Amended Statement of Claim, in the form attached as Schedule “B”. The Defendants did not oppose the application. The latest amendments were intended to make it clear precisely what wording is to be substituted for that which is contained in the Mortgages of Lease and which requires rectification.

[15] There are, however, some glaring and critical errors in the draft Amended Amended Statement of Claim and these have been reproduced in the draft order submitted by the Plaintiff.

[16] First, one of the mortgaged leases is numbered “**75 D/1-2-2**”. In paragraph 8(d)(ii) of Schedule “B”, the lease number is shown correctly but is described in paragraphs 14 and 14 b as “**75 D/1-1-2**”. In paragraphs 5 and 6 of Schedule “A”, the number of the lease is shown as “**75 D/1-1-2**”. The correct number for the lease appears in paragraph 10 d. [emphasis mine]

[17] Second, the number of the company is “**892622**” but is shown on the second to last line of the first subparagraph in paragraphs 14(b) and 15(b) of Schedule “B” and in paragraphs 5 and 7 of Schedule “A” as “**882622**”.

[18] Needless to say, where a party is applying to file a pleading that has already been amended once and is seeking rectification of an agreement and specifically mortgages of lease (as here), it is ironic and disappointing to see clerical errors of this nature in the documentation. This is especially true when some or all of the errors could be fatal to successful registration and enforcement of process. If these errors are not addressed, there would inevitably be delays and further applications to the court to perfect the documentation.

[19] There are other clerical errors in court documents which are not critical to this application and which I will not enumerate.

[20] The nature of solicitor's work calls for meticulous attention to detail and this has been regrettably absent in this matter. While perfection is not always expected or possible in all cases, a practice of careful proofreading could go a long way towards eliminating most errors.

[21] Despite my concerns with the documentation in this case, in the interests of having this matter resolved after much delay, I will grant the order to allow the Plaintiff to amend its Amended Statement of Claim in the form which is attached hereto as Schedule "B" with the following changes:

(1) In the first line of paragraph 14 of the amended claim "**75 D/1-2-2**" is substituted for "**75 D/1-1-2**".

(2) In the first line of paragraph 14 (b) of the amended claim "**75 D/1-2-2**" is substituted for "**75 D/1-1-2.**"

(3) In the second to last line of the first subparagraphs of 14(b) and 15(b), "**892622**" is substituted for "**882622.**"

[22] Paragraphs 5, 6 and 7 of Schedule "A" shall be modified to reflect the changes made as described in paragraph 21(1), (2) and (3) above.

[23] Further, it is ordered that the wording of the Mortgages of Lease shall be rectified in accordance with the wording contained in paragraphs 5, 6 and 7 of Schedule "A" as amended pursuant to paragraph 22 herein.

[24] Also, it is ordered that the Mortgages of Lease be rectified to change references to "Borrower" to "Mortgagors" in accordance with relief sought in paragraphs 6 and 8 of Schedule "A".

[25] Accordingly, in the first formal order, I grant the relief set out in paragraphs 5, 21, 22, 23 and 24 of this Memorandum.

Amount Owning to Plaintiff:

[26] The Plaintiff seeks a declaration that the amount due to it under its security is \$312,179.69. This is comprised of:

Principal -	197,710.96
Interest -	59,540.04
NSF charges -	144.00
Taxes -	15,009.96
Total -	\$272,404.96

[27] In addition, the Plaintiff seeks solicitor/client costs incurred over the past 30 months in the sum of \$39,774.73.

[28] The mortgages in question all stipulate that a defaulting Mortgagor shall be responsible for all legal costs on a solicitor/client basis. While this is true, I do not interpret that to mean that the discretion of the court in awarding costs as set out in Rule 643 is substantially fettered. I perceive that in considering costs in this case, the appropriate amount to award would be those solicitor/client costs that would have been reasonably incurred had the Plaintiff not had to seek rectification of its security documentation – a problem of its own making. Counsel for the Plaintiff did not dispute that much of the work on this matter over the past three years could be attributed to the fact that the security documentation was defective and resulted in repeated attempts to negotiate settlements, and the drafting of affidavits and other material that would otherwise have been unnecessary. While making that concession, however, counsel suggested that repeated and improper attempts by Mr. Burke to resolve this matter at the political level resulted in delays in the prosecution of the action and his having to attend numerous meetings with bureaucrats and prepare ministerial briefing material. He says that the Defendants should bear the cost of these activities.

[29] While I have little doubt that counsel was required to perform many services that would not be necessary where the lender was a commercial bank, I fail to see why the borrower should be saddled with these costs when it is open to elected officials to decline to engage or become involved in the day to day business of the Plaintiff. Furthermore, this is a legal proceeding divorced from political imperatives or considerations and it would be inappropriate for a court to award costs for what is essentially political activity.

[30] Counsel for the Plaintiff has fairly conceded that the costs should perhaps be halved considering that approximately \$8000.00 was disbursed for appraisals of the Fort Smith properties. Taking all of the circumstances into account, I will award the Plaintiff solicitor/client costs of \$16,000.00.

[31] Accordingly, I issue a declaration that there is due and owing under the subject loan the sum of \$288,404.96, and that the said amount shall be realized by sale of the subject mortgaged lands, in default of which foreclosure may be ordered as herein provided.

[32] Paragraph 9 of Schedule "A" is incorporated herein subject to changing the sum of \$292,404.96 to \$288,404.96.

[33] The provisions of paragraphs 10, 11, 12, 13, 14, and 15 of Schedule "A" are incorporated into this order.

[34] The Plaintiff shall be entitled to its solicitor/client costs from the commencement of this action to today's date which I fix at the sum of \$16,000.00 inclusive of disbursements and to future solicitor/client costs.

[35] Counsel for the Plaintiff shall submit draft orders for the approval of the court.

[36] Either party shall be at liberty to apply to the court for further relief or direction upon notice to the other party or parties.

D.M. Cooper
J.S.C.

Dated at Yellowknife this
23rd day of July, 2009.

Counsel for the Plaintiff: Douglas McNiven.

The Defendants were represented by Clayton James Burke.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

Northwest Territories Business Development and Investment Corporation

Plaintiff

and

892622 NWT Ltd., Clayton James Burke and Annie Mary Jane Burke

Defendants

BEFORE THE HONOURABLE)	At the Courthouse, in the City of
JUSTICE)	Yellowknife, Northwest Territories
)	this ___ day of July, 2009
IN CHAMBERS)	

ORDER

UPON hearing from Douglas G. McNiven as counsel for the Plaintiff, Northwest Territories Business Development and Investment Corporation; AND UPON hearing from Clayton Burke; AND UPON reading the Affidavit of Default sworn by Afzal Currimbhoy filed June 28, 2007, the affidavit of Paul Wiedrick filed February 25th 2009, the Affidavit of Lloyd Jones sworn October 30, 2008 filed by undertaking of Douglas McNiven on March 11, 2009 and the Affidavit of Value sworn by Gardiner McCarthy filed July 16, 2008, the discovery transcript filed June 10, 2009; the Affidavits of Value sworn by Gardiner McCarthy filed July 8, 2009; the Affidavit of Paul Folkes filed July 13, 2009; and the Affidavit of Leonard Kwong filed in Chambers on July 15, 2009;

IT IS HEREBY DECLARED, DIRECTED AND ORDERED THAT:

1. Clayton James Burke is granted leave to represent 892622 NWT Ltd. and Annie Mary Jane Burke.
2. The Plaintiff shall amend its statement of claim in the form attached to this Order.

3. The Defendant Clayton James Burke shall transfer title to Lot 668, Plan 342 Fort Smith to the Defendant 892622 NWT Ltd. complete with the signed replacement mortgage dated June 26, 2009 to be registered at the Land Titles office for the Northwest Territories Land Registration District. Should difficulties arise respecting the said registration either party is free to apply to the Court for directions.
4. There is due and owing under the within Mortgage as at July 14, 2009, the sum of \$292,404.96 inclusive of interest and all costs, and that the said amount shall be realized by a sale of the subject mortgaged lands, in default of which foreclosure may be ordered as herein provided.
5. The Manager of Land Administration for the Department of Indian and Northern Affairs Canada is directed that the mortgage as registered against lease number 75D/1-1-2 is to be changed so the first paragraph reads: "Whereas Clayton James Burke, Self employed, and Annie Mary Jane Burke, Self employed, both of the Town of Fort Smith in the Northwest Territories as joint tenants and not as tenants in common, being registered owners of interest in that piece of land which is described below under "DESCRIPTION OF YOUR PROPERTY COVERED BY THIS MORTGAGE" (collectively the "Mortgagors") have provided a guarantee of the debts and obligations of 892622 NWT Ltd. owing to Northwest Territories Business Credit Corporation ("BCC") which is dated January 12, 2002 (the "Guarantee") it being agreed at the time of delivery of the Guarantee that the guarantor would execute and deliver this mortgage to the lender to secure payment of the principal amount of \$200,000.00 loaned to 892622 NWT Ltd. by BCC in accordance with the Loan Agreement accepted in writing by 882622 NWT Ltd. dated January 14, 2002."
6. The said Mortgage of Lease number 75D/1-1-2 is rectified to show change references from Borrower to Mortgagor.
7. The Manager of Land Administration for the Department of Indian and Northern Affairs Canada is directed that the mortgage as registered against lease #75D/1-1-5 Indian and North Affairs Canada is changed so the first paragraph reads: "Clayton James Burke, Self employed, and Annie Mary Jane Burke, Self employed, both of the Town of Fort Smith in the Northwest Territories as joint tenants and not as tenants in common, being registered owners of an

interest in that piece of land which is described below under “DESCRIPTION OF YOUR PROPERTY COVERED BY THIS MORTGAGE” (collectively the “Mortgagors”) have provided a guarantee of the debts and obligations of 892622 NWT Ltd. owing to Northwest Territories Business Credit Corporation (“BCC”) which is dated January 12, 2002 (the “Guarantee”) it being agreed at the time of delivery of the Guarantee that the guarantor would execute and deliver this mortgage to the lender to secure payment of the principal amount of \$200,000.00 loaned to 892622 NWT Ltd. by BCC in accordance with the Loan Agreement accepted in writing by 882622 NWT Ltd. dated January 14, 2002.”

8. Directing that the said Mortgage of Lease number 75D/1-1-5 is rectified to show change references from Borrower to Mortgagors.

9. UPON the Defendants 892622 NWT Ltd. and Clayton and Annie Mary Jane Burke or anyone entitled to do so, paying to the Plaintiff or into Court to the credit of this cause within 120 days from the date of service of this Order upon the Defendants and other persons required to be served, or after said date and before the Plaintiff obtains a Final Order for Foreclosure or an Order Confirming Sale and Vesting Order, the said sum of \$292,404.96 and the Plaintiff's further costs, together with any other sums which the Plaintiff shall pay to protect its security, with interest on all such sums from the date of payment and on said Mortgage, at the rate set out therein.

10. The Plaintiff shall execute and deliver to the person so paying or from whom the said monies shall have been received at the expense of the said person, a discharge or transfer as the case shall require of the said Mortgage security related to the said mortgaged lands namely:
 - a. Lots E-1, Plan 342, and Lot 668 Plan 342 Fort Smith;

 - b. Lot 543, Plan 272 Fort Smith;

 - c. Lot numbered 1, Group 766, in Quad 75 D/1, on the South Shore of Disappointment Lake, in the Northwest Territories, as said Lot is shown on a plan of survey of Record Number 60115, in the Canada Lands Surveys Records at Ottawa, a copy of which is filed

in the Land Titles Office for the Northwest Territories Land Registration District, at Yellowknife, under number 1133, as more particularly described in Lease # 75D/1-1-5; and

- d. All that certain parcel or tract of land situate, lying and being composed of that parcel of land located on the North shore of Large Pike Lake in QUAD 75 D/1, located at approximately 60°10'15" North Latitude and 110°08'30" West Longitude, in the Northwest Territories, as said parcel is shown outlined in red on the sketch annexed to Lease #75D/1-2-2" (collectively referred to herein as the "Mortgaged Lands" and the said lands subject to the leasehold mortgages are referred to as the "Leasehold Mortgage Lands")
11.
 - (a) In default of said payment, the Mortgaged Lands shall be offered for sale by tender;
 - (b) Any licensed real estate agent who introduces a party to the Mortgaged Lands whose tender is subsequently approved by the Court shall be entitled to a proper commission in such amount and payable in such manner as the Court shall determine;
 - (c) The Defendants and any person in possession of the Mortgaged Lands shall cooperate with any listing agent; and
 - (d) The property will be listed for sale at a price to be set by the Court, being the agreed market value to be obtained from an appraisal to be provided on behalf of the Plaintiff; and
 - (e) The Plaintiff may apply for Directions for advertising.
 12. All subsequent encumbrancers shall be served with a copy of this Order, and subsequent notices and documents filed in this action, by way of single registered mail or leaving the same at the address shown on the encumbrance or other documents filed at the Land Titles Office or the office of Land Administration for Indian and Northern Affairs Canada.

13. Service of any document by registered mail shall be deemed effected at the time at which the document would have been delivered in the ordinary course of mail, unless the contrary is proved.
14. The Notice of Intention to advertise is hereby dispensed with.
15. The requirement of filing an Affidavit of Value appraisal respecting the Leasehold Mortgage Lands is adjourned without a date.
16. Execution of this order is stayed until such time as the parties provide proof that title to Lot 668, Plan 342 Fort Smith has been registered in the name of the Defendant, 892622 NWT Ltd. complete with the subject mortgage.

Clerk of the Supreme Court

ENTERED this ____ day of July, 2009

Clerk of the Supreme Court

**NOTICE TO SUBSEQUENT
ENCUMBRANCERS**

TAKE NOTICE first that from the time of service of this Order, you will be bound by the proceedings in this action in the same manner as if you had been originally made a party unless within ___ days after the service of this Order, you apply to the Supreme Court of the Northwest Territories to discharge, vary or add to the Order; and you may, on service on the Plaintiff of a notice of your desire to do so, attend the proceedings to which the Order relates.

S-0001-CV200700007

**IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES**

**Northwest Territories Business Development and
Investment Corporation**

Plaintiff

and

**892622 NWT Ltd., Clayton James Burke and
Annie Mary Jane Burke**

Defendants

ORDER

Filed by:

Douglas G. McNiven

Whose address for service is:

McNiven Law Office
202, 4817 – 49th Street
YELLOWKNIFE, NT X1A 3S7

Phone: 867-873-3797

Fax: 867-873-3064

File: B151/DGM

"Schedule B"

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

Northwest Territories Business Development and Investment Corporation

Plaintiff

- and -

892622 NWT Ltd., Clayton James Burke and Annie Mary Jane Burke

Defendants

AMENDED AMENDED NOTICE TO THE DEFENDANTS

1. You are hereby notified that the Plaintiff may enter judgment against you in accordance with the attached Statement of Claim, or such judgment as may be granted under the *Rules of the Supreme Court of the Northwest Territories*, without further notice to you unless within twenty-five (25) days after service of the Statement of Claim on you, or within 30 days if you are served outside of the Northwest Territories, you cause to be filed in the office of the Clerk of the Supreme Court of the Northwest Territories either:
 - a. a Statement of Defence, or
 - b. An Appearance,And unless within the same time you serve a copy of the Statement of Defence or Appearance on the Plaintiff or the Plaintiff's lawyer.
2. The attached Statement of Claim is to be served within 12 months from the day on which it is issued
3. Every Defendant should consult his or her lawyer, or refer to the *Rules of the Supreme Court of the Northwest Territories*, to determine his or her rights.

The attached Statement of Claim is hereby issued out of the office of the Clerk of the Supreme Court of the Northwest Territories at Yellowknife, Northwest Territories, on the

"11th" day of January 2007.

"J. Maguire"

"D/" Clerk of the Court

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

Northwest Territories Business Development and Investment Corporation

Plaintiff

- and -

892622 NWT Ltd., Clayton James Burke and Annie Mary Jane Burke

Defendants

AMENDED AMENDED STATEMENT OF CLAIM

1. The Plaintiff, Northwest Territories Business Development and Investment Corporation, is a statutory corporation created pursuant to the *Northwest Territories Business Development and Investment Corporation Act*, (“BDIC”). BDIC is statutory successor to, and was formerly known as, Northwest Territories Business Credit Corporation (“BCC”).
2. The Defendant, 892622 NWT Ltd. is a corporation pursuant to the laws of the Northwest Territories with a registered office in Fort Smith (“892622”).
3. The Defendants Clayton James Burke (“Mr. Burke”) and Annie Mary Jane Burke (“Mrs. Burke”) are business persons and reside in Fort Smith (collectively, the “Burkes”). The Burkes operate a business through 892622 NWT Ltd. using the name Taiga Tour Company.
4. BCC advanced the sum of \$200,000.00 to 892622 by way of loan account number 20-1552 (the “Loan”). The Loan is now owing to BDIC in its capacity as statutory successor to BCC.
5. An agreement of offer and acceptance for the Loan was signed as accepted by Mr. Burke on behalf of 892622, on January 11, 2002 (the “Loan Agreement”).
6. 892622 agreed to repay the Loan together with 7% interest per annum, and provided a signed Promissory Note dated January 14, 2002 containing the said repayment terms (the “Note”).
7. The Loan was advanced to 892622 in or about January 18, 2002.
8. In accordance with the Loan Agreement and as collateral to the Note:
 - (a) 892622 provided a General Security Agreement dated January 14, 2002 which was registered under the Northwest Territories *Personal Property Security Act*.

- (b) 892622 provided a mortgage to BCC and registered it in the Land Titles Office for the Northwest Territories Land Registration District under Number 123042 on January 17, 2002 against the following property:

Lot E-1
Plan 342
Fort Smith (the 53 Portage Avenue Property)

and

Lot 543,
Plan 272
Fort Smith (the 111 Woodbison Avenue Property)

(herein referred to as the "Mortgage")

- (c) The Burkes provided a continuing written joint and several Guarantee of the Loan, in favour of the BCC, which is dated January 14, 2002 (the "Guarantee").

- (d) The Burkes provided leasehold mortgages both registered at Indian and Northern Affairs Canada Land Administration on January 23, 2002 against the following leasehold properties:

- i) Lease number 75D/1-1-5

Lot numbered 1, Group 766, in Quad 75 D/1, on the South Shore of Disappointment Lake, in the Northwest Territories, as said lot is shown on a plan of survey of Record Number 60115, in the Canada Lands Survey records at Ottawa, a copy of which is filed in the Land Titles Office for the Northwest Territories Land Registration district at Yellowknife under number 1133 as more particularly described in Lease #75D/1-1-5

- ii) Lease number 75D/1-2-2

All that certain parcel or tract of land situate, lying and being composed of that parcel of land located on the North shore of Large Pike Lake in QUAD 75 D/1 located at approximately 60 degrees 10' 15" North Latitude and 110 degrees 08' 30" West Longitude, in the Northwest Territories, as said parcel is shown in red on the sketch annexed to Lease # 75D/1-2-2

(collectively the said leasehold mortgages are referred to herein as the ("Leasehold Mortgages").

9. The Loan Agreement is incorrect in that it does not reflect the true intent of the parties, and incorrectly documents the intentions of the parties respecting certain collateral security and the mortgage was only registered against one of 2 lots it was to have been registered against respecting the 53 Portage Avenue Property.
10. A section of the 53 Portage Avenue Property was to have been transferred to the Corporation and the mortgage was to have been registered against both lots. So, in addition to the lot it is registered against therefore, the mortgage should also be registered against Lot 668, Plan 342 Fort Smith.
11. The Loan Agreement requires that the Leasehold Mortgages are to be provided in support of the Guarantee.
12. The Leasehold Mortgages erroneously refer to a loan to the "Borrower" notwithstanding that the borrower is 892622 and that parties intended the Burkes were to provide the Leasehold Mortgages in support of the Guarantee.

RECTIFICATION OF LEASEHOLD MORTGAGES

13. The Plaintiff requires rectification of to clarify that the Leasehold Mortgages are provided in support of the Guarantee.
14. The first paragraph for the said Leasehold Mortgage of Lease number 75D/1-1-2 is to be changed.
 - a. It presently reads as follows:

"Clayton Burke and Annie Burke, Operators of a tourism operation, both of the Town of Fort Smith, in the Northwest Territories, (the "Borrower") being the registered owner of an estate in fee simple, subject, however, to such encumbrances, liens and interests , as are notified by memorandum underwritten, of that piece of land which is described below under "DESCRIPTION OF YOUR PROPERTY COVERED BY THIS MORTGAGE", in consideration of the sum of Two Hundred Thousand Dollars (\$200,000.00) loaned to the Borrower by the NORTHWEST TERRITORIES BUSINESS CREDIT CORPORATION (BCC), the receipt of which the Borrower does hereby acknowledge covenant with the BCC"

- b. The said Mortgage of Lease number 75D/1-1-2 is to be rectified so as to reflect the true intention of the parties, so that it reads as follows:

Whereas Clayton James Burke, Self employed, and Annie Mary Jane Burke, Self employed, both of the Town of Fort Smith in the Northwest Territories as joint tenants and not as tenants in common, being registered owners of interest in that piece of land which is described below under "DESCRIPTION OF YOUR PROPERTY COVERED BY THIS MORTGAGE" (collectively the "Mortgagors") have provided a guarantee of the debts and obligations of 892622 NWT Ltd. owing to Northwest Territories Business Credit Corporation ("BCC") which is dated January 12, 2002 (the "Guarantee") it being agreed at the time of delivery of the Guarantee that the guarantor would execute and deliver this mortgage to the lender to secure payment of the principal amount of \$200,000.00 loaned to 892622 NWT Ltd. by BCC in accordance with the Loan Agreement accepted in writing by 882622 NWT Ltd. dated January 14, 2002.

Furthermore all references to Borrower in the existing Leasehold Mortgage are to be changed from Borrower to Mortgagor

15. The first paragraph for the said Leasehold Mortgage of Lease number 75D/1-1-5 is to be changed, so as to reflect the actual intention of the parties.

- a. It presently reads as follows:

"Whereas Clayton James Burke, Self employed, and Annie Mary Jane Burke, Self employed, both of the Town of Fort Smith in the Northwest Territories, as joint tenants and not as tenants in common, (the "Borrower"), being the registered owner of an estate in fee simple, subject, however, to such encumbrances, liens and interests, as are notified by memorandum underwritten, of that piece of land which is described below under "DESCRIPTION OF YOUR PROPERTY COVERED BY THIS MORTGAGE", in consideration of the sum of Two Hundred Thousand Dollars (\$200,000.00) loaned to the Borrower by the NORTHWEST TERRITORIES BUSINESS CREDIT CORPORATION (BCC), the receipt of which the Borrower does hereby acknowledge covenant with the BCC"

b. The said Mortgage of Lease is to be rectified so as to reflect the true intention of the parties, so that it reads as follows:

“Whereas Clayton James Burke, Self employed, and Annie Mary Jane Burke, Self employed, both of the Town of Fort Smith in the Northwest Territories as joint tenants and not as tenants in common, being registered owners of interest in that piece of land which is described below under “DESCRIPTION OF YOUR PROPERTY COVERED BY THIS MORTGAGE” (collectively the “Mortgagors”) have provided a guarantee of the debts and obligations of 892622 NWT Ltd. owing to Northwest Territories Business Credit Corporation (“BCC”) which is dated January 12, 2002 (the “Guarantee”) it being agreed at the time of delivery of the Guarantee that the guarantor would execute and deliver this mortgage to the lender to secure payment of the principal amount of \$200,000.00 loaned to 892622 NWT Ltd. by BCC in accordance with the Loan Agreement accepted in writing by 882622 NWT Ltd. dated January 14, 2002.”

Furthermore all references to Borrower in the existing Leasehold Mortgage are to be changed from Borrower to Mortgagor

16. According to the said Loan documentation all reasonable costs of enforcement of the Loan on default including those of a solicitor and client and all protective disbursements are added to and form part of the indebtedness.
17. According to the Loan Agreement, Guarantee, GSA, Mortgage and Leasehold Mortgages it is provided that in the event of default being made in any of the covenants, expressed or implied, in any of the said documents, the entire Loan shall become due at the option of the Plaintiff.
18. A demand was made of each Defendant, the entire Loan is due and as of January 1, 2007 the Loan was in arrears, and \$239,707.86 was owing.
19. According to the Loan Agreement, GSA, Mortgage, and the Leasehold Mortgages the taking of a judgment or judgments under any of the covenants therein does not operate as a merger.
20. According to the Loan Agreement, GSA, and the Leasehold Mortgages, the Plaintiff's solicitor client costs of enforcement are to be added to the debt owing upon default.

21. All of the security documentation referred to herein, the Loan Agreement, Guarantee, and Note are binding upon the parties hereto and upon their respective successors and assigns.
22. For the Loan the Plaintiff states that the Defendants are wrongfully withholding payment of a just debt.
23. The Plaintiff proposes that this action be tried in the City of Yellowknife, in the Northwest Territories and it should take 3 days.

WHEREFORE THE PLAINTIFF CLAIMS:

- a) Rectification of the Leasehold Mortgages to clarify that they are each provided in support of the Guarantee in accordance with paragraph 14 (b) and 15 (b) herein;
- b) A direction to the Registrar of the Northwest Territories Land Registration District to transfer lot 668, Plan 342 Fort Smith, to 892622 NWT Ltd and to register the Mortgage as against the said corporation on the new title.
- c) A declaration as to the amount owing under the Mortgage and the Leasehold Mortgages with interest according to the terms thereof and, in default of payment, sale or foreclosure of the Defendant's interest in the said lands;
- d) In the alternative, immediate sale to the Plaintiff or immediate foreclosure of the Defendant's interest in the said lands;
- e) An Order for possession;
- f) An Order for the appointment of a Receiver;
- g) An Order establishing the period of redemption, at one day;
- h) A Preservation Order;
- i) A Certificate of Pending Litigation for the said lands;
- j) Judgment against the Defendant Clayton James Burke, pursuant to the Guarantee;
- k) Judgment against the Defendant Annie Mary Jane Burke, pursuant to the Guarantee;

- l) All legal costs and expenses incurred or allowed to the Plaintiff including those as between solicitor and his own client and costs of the Plaintiff in realising on the security action;
- m) Such other relief as the nature of this case may require and this Honourable Court may deem just.

DATED AT the City of Yellowknife, in the Northwest Territories this “9th” day of January 2007, and **DELIVERED BY** Douglas G. McNiven, Solicitor for the Plaintiff, whose address for service is in care of said solicitor at McNiven Law Office 202, 4817 - 49th Street, Yellowknife, Northwest Territories, X1A 3S7

“Douglas G. McNiven”
Douglas G. McNiven
Solicitor for the Plaintiff

S-0001-CV2007000

**IN THE SUPREME COURT OF THE NORTHWEST
TERRITORIES**

BETWEEN:

**Northwest Territories Business Development
and Investment Corporation**

Plaintiff

- and -

**892622 NWT Ltd., Clayton James Burke and
Annie Mary Jane Burke**

Defendants

AMENDED AMENDED STATEMENT OF CLAIM

Filed by:
Douglas G. McNiven
McNiven Law Office
Suite 202, 4817 – 49th Street
Yellowknife, NT X1A 3S7

Phone: (867) 873 - 3797

Fax: (867) 873 - 3064

Plaintiff's residence is Yellowknife NT.

Defendants last address as known to the
Plaintiff is Fort Smith, NT

Our file B151/DGM

S-1-CV-2007000007

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN

NORTHWEST TERRITORIES
BUSINESS DEVELOPMENT
AND INVESTMENT CORPORATION

Plaintiff

- and -

892622 NWT LTD.,
CLAYTON JAMES BURKE and
ANNIE MARY JANE BURKE

Defendants

MEMORANDUM OF JUDGMENT BY THE
HONOURABLE JUSTICE D.M. COOPER
