

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CIBC MORTGAGES INC.

Plaintiff

-and-

DOUGLAS R. MCLEOD

Defendant

MEMORANDUM OF JUDGMENT

[1] On June 10, 2014, the Plaintiff submitted this application *ex parte* for an order appointing the Public Trustee for the Northwest Territories as the personal representative of the Defendant's estate for the purposes of this action and allowing it to serve documents on the personal representative substitutionally by electronic mail, rather than personally.

[2] The Plaintiff filed a foreclosure action against the Defendant on November 29, 2013. The Defendant was subsequently served with notice of the action on January 10, 2014.

[3] In the affidavit sworn May 30, 2014 and relied upon by the Plaintiff in this application, the deponent, Kristen Wiens, states the Defendant passed away on February 4, 2014. She learned this from correspondence sent to the Plaintiff's solicitors from the Public Trustee of the Northwest Territories on April 16, 2014. In that same correspondence, the Public Trustee confirmed that it would administer the Defendant's estate.

[4] Ms. Wiens also deposes that on March 25, 2014, the Plaintiff's agent conducted a search at the Supreme Court Registry and determined that neither letters probate, nor letters of administration had issued for the estate. This search

was conducted prior to the Public Trustee's letter to the Plaintiff's solicitors and no further search was conducted. Since that time, however, letters of administration have been issued to the Public Trustee by this Court. This occurred on May 26, 2014. (Supreme Court File S-1-ES 2014 000 024). It is a matter of public record.

[5] The Plaintiff provided no legal authority in support of its request for the appointment of a personal representative for the Defendant's estate. There is, however, authority for doing so pursuant to Rule 70 of the *Rules of the Supreme Court of the Northwest Territories*.

[6] Rule 70 allows for the appointment of a personal representative "where it appears that a deceased person who was interested in the matters in question in the action or proceeding has no personal representative." That is not the case here. The Defendant's estate is now being administered by the Public Trustee, obviating the need for an order under Rule 70.

[7] Accordingly, the Plaintiff's application for appointment of a personal representative of the Defendant's estate is dismissed.

[8] Ms. Wiens deposes at paragraph 7 of her affidavit that she believes "prompt personal service in this action upon the Defendant is unobtainable" and that the method of service most likely to bring the action to the attention of the Defendant's estate is to serve them by electronic mail upon the Public Trustee.

[9] Rule 38 of the *Rules of the Supreme Court of the Northwest Territories* permits the Court to order service by substitutional means or dispense with it entirely in certain circumstances. It provides:

38. (1) Where personal service of a document is required by these rules and it appears to the Court that it is impractical for any reason to effect prompt personal service of the document, the Court may make an order
  - (a) for substitutional service of it; or
  - (b) dispensing with service.
- (2) An application for an order for substitutional service must be supported by an affidavit setting out why prompt personal service is impractical and proposing an alternative mode of service which, in the opinion of the deponent, will or is likely to be effective.

[10] An applicant bears the onus of demonstrating the relief is necessary because prompt personal service is impractical. In this context, "impractical" means there is a "practical impossibility" of effecting prompt personal service.

[11] In this case there is an insufficient evidentiary basis for the Plaintiff's request for an order for substitutional service under Rule 38. The estate has an administrator and that administrator is a statutory appointee with an office and staff located in the courthouse in Yellowknife.

[12] The application for an order for substitutional service is dismissed. The parties are, of course, free to agree to serve and receive court documents by electronic means, pursuant to Rule 28.1.

[13] Although not requested in its *Ex Parte Memorandum*, the draft order submitted in support of this application suggests the Plaintiff is seeking an order allowing it to amend the Defendant's name in the style of cause to "The Estate of Douglas R. McLeod". This relief will be granted.

[14] The Plaintiff shall bear its own costs of this application.

DATED the 16th day of June, 2014

K. Shaner  
J.S.C.

To: Denise M. Hendrix  
Solicitor for the Plaintiff

Brian Asmundson  
Public Trustee for the Northwest Territories

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**MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE K. SHANER**

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