

**SUMMARY OF CURRENT DOCUMENT**

**NAME OF ISSUING PARTY OR PERSON:**

**CATERPILLAR FINANCIAL  
SERVICES LIMITED  
("CATERPILLAR")**

**DATE OF DOCUMENT:**

**7<sup>th</sup> FEBRUARY 2003**

**SUMMARY OF ORDER/RELIEF SOUGHT:**

**NOTICE OF OBJECTION**

**COURT SUB-FILE NO.:**

**7:29**

**2002 01T 0352**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION**

**IN THE MATTER of a Court ordered Receivership  
of Hickman Equipment (1985) Limited  
("Hickman Equipment") pursuant to Rule 25 of  
the Rules of Supreme Court, 1986 under the  
Judicature Act, R.S.N.L. 1990, c. J-4, as amended**

**AND IN THE MATTER of the Bankruptcy  
and Insolvency Act R.S.C. 1985, c.B-3, as  
amended ("the BIA")**

**-AND-**

District of Newfoundland and Labrador  
Court No. 9733  
Estate No. 100813

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
IN BANKRUPTCY AND INSOLVENCY**

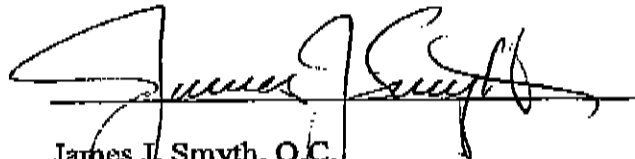
**IN THE MATTER of the Bankruptcy of  
Hickman Equipment (1985) Limited  
("Hickman Equipment"), carrying on business  
at 1269 Topsail Road, in the City of Mt. Pearl,  
in the Province of Newfoundland and Labrador**

### **NOTICE OF OBJECTION**

**TAKE NOTICE** that pursuant to clause 2 of the Order of Mr. Justice Hall dated December 30<sup>th</sup>, 2002 Caterpillar Financial Services Limited ("CFSL") states as follows:

1. **THAT** CFSL claims to be exclusively and in priority to all others entitled to the proceeds of sale of the Timberjack Model 610 Forwarder Serial Number 993395.
2. **THAT** CFSL has appealed the final determination of the Trustee.
3. **THAT** CFSL has applied to this Honourable Court to lift the stay and allow CFSL to file a financing change statement at the Personal Property Security Registry, Government of Newfoundland and Labrador, St. John's, Newfoundland and Labrador.
4. **THAT** CFSL objects to the claim by any of the parties in the within matter to the aforesaid proceeds of funds until such time as the aforesaid Appeal, Application for lifting of stay, and final adjudication on the merits of the claim of CFSL has been determined by this Honourable Court.

Dated at St. John's in the Province of Newfoundland and Labrador, this 7<sup>th</sup> day of February, 2003.



James J. Smyth, Q.C.  
SMYTH WOODLAND & DEL RIZZO  
Solicitors for the Applicant  
Whose address for service is:  
Suite 100, 16 Forest Road  
St. John's, Newfoundland  
A1C 2B9

**SUMMARY OF CURRENT DOCUMENT**

**NAME OF ISSUING PARTY OR PERSON:**

**CATERPILLAR  
FINANCIAL SERVICES  
LIMITED**

**DATE OF DOCUMENT:**

**("CATERPILLAR")**

**SUMMARY OF ORDER/RELIEF SOUGHT:**

**24th FEBRUARY 2003  
ORDER LIFTING STAY  
OF PROCEEDINGS AND  
PERMITTING  
CATERPILLAR TO  
ISSUE A FINANCING  
CHANGE STATEMENT  
AT THE PERSONAL  
PROPERTY SECURITY  
REGISTRY**

**COURT SUB-FILE NO.:**

**7:29**

**2002 01T 0352**

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**IN THE MATTER of the Bankruptcy of  
Hickman Equipment (1985) Limited  
("Hickman Equipment"), carrying on business  
at 1269 Topsail Road, in the City of Mt. Pearl,  
in the Province of Newfoundland and Labrador**

## **MEMORANDUM OF FACT AND LAW**

### **FACTS:**

1. The Applicant, Caterpillar Financial Services Limited, is a body corporate, duly incorporated and existing under the laws of the Province of Newfoundland and Labrador, having its head office in St. John's, Newfoundland and Labrador.
2. In February 2000 the Applicant provided financing to Noble's Lumber Yard Limited (Noble) in the amount of One hundred eight six thousand three hundred ninety five dollars (\$186,395.00) together with interest as set forth in a Promissory Note made between the Applicant and Noble.
3. As security for the said indebtedness the Applicant and Noble entered into a Chattel Mortgage wherein Noble was the Mortgagor and the Applicant was the Mortgagee and the Mortgagor assigned by way of Mortgage unto the Mortgagee certain goods and chattels including the following: one 1998 Timberjack, Model 610 Forwarder, Serial Number 993395 (hereinafter referred to as "the Chattel")
4. Noble took possession of the Chattel in or around February, 2000.
5. Pursuant to the provisions of the *Personal Property Security Act*, S.N. 1998, c. P. 7.1 ("PPSA") the Applicant caused to be registered a serial number financing

statement at the Personal Property Security Registry on the 17<sup>th</sup> day of February, 2000.

6. On February 8<sup>th</sup>, 2002 this Honourable Court granted an Order made under an Application by Hickman Equipment (1985) Limited ("Hickman") and Wells Fargo under the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 (the "Initial Order") and that this Initial Order *inter alia* appointed Deloitte and Touche Inc., Monitor of Hickman and stayed ( the "Stay") the right of any creditor to perfect or register a security interest in Hickman's property for a period of thirty (30) days.
7. In an Order of this Honourable Court dated February 22<sup>nd</sup>, 2002 the Initial Order and the Stay referred to therein were extended until April 17<sup>th</sup>, 2002.
8. In a Receivership Order by this Honourable Court dated March 13<sup>th</sup>, 2002 under the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 ("BIA") it was ordered that PricewaterhouseCoopers Inc. ("PWC") be appointed the Receiver of the assets of Hickman Equipment. ("the Receiving Order") and it was further Ordered that the Initial Order and the Stay referred to therein were extended indefinitely.
9. By further Order of this Court dated May 14<sup>th</sup>, 2002 and filed May 17<sup>th</sup>, 2002 PWC's plan for realization of the assets of Hickman was approved (the Realization Plan Order").

10. The Realization Plan Order approved PWC's plan for determination of the rights and entitlements of creditors and claimants of the assets of Hickman (the "Claims Plan").
11. Under paragraph 5 and 7 of the Claims Plan, the determination of the rights and entitlement of creditors and claimants to the assets of Hickman involved:
  - (A) A determination of whether a claimant had a valid, perfected and enforceable ownership or security interest in the assets of Hickman or the proceeds arising therefrom;
  - (B) A determination of the priority of claimant's interest *vis-à-vis* other claimants.
12. Under paragraph 20 of the Claims Plan, PWC proposed that the order of priority of claims to an asset of Hickman or to the proceeds therefrom be determined using the priority rules established by the PPSA and other applicable law.
13. In or around the 22<sup>nd</sup> of February 2002, the Applicant became aware that, contrary to the terms of the above noted Chattel Mortgage, Noble had traded in the Chattel to Hickman on the understanding that Hickman would pay out the debt outstanding to the Applicant.
14. In June, 2002 the Applicant made application to this Honourable Court seeking a determination on whether or not it was appropriate to exempt the Chattel from the provisions of the Initial Order and subsequent Receiving Order.

15. In an Order of this Honourable Court dated June 21<sup>st</sup>, 2002, this Honourable Court denied the Applicant's Application and authorized the Receiver to dispose of the Chattel in accordance with the Realization Plan and the proceeds thereof were to be subject to the Costs Allocation Plan and the Claims Plan.
16. On the 15<sup>th</sup> day of October, 2002 the Applicant made a claim to PWC for proceeds from the Chattel in the amount of \$150,436.69.
17. In accordance with the terms of said Claims Plan, on the 28<sup>th</sup> day of November, 2002, the Receiver presented its Final Determination (Tab 1) to the Applicant with respect to the claim on proceeds by the Applicant.
18. In said Final Determination of the Receiver it was their opinion that the Applicant at one time held a valid perfected priority security interest in the Timberjack but that this interest had expired. Specifically, the Receiver stated that s. 52 (2) of the PPSA applied and that the Applicant failed to register a financing change statement within 15 days of becoming aware that Noble had transferred the Timberjack to Hickman. The Receiver also stated:

...while CFSL was stayed from amending its financing statement with respect to the Timberjack by virtue of the Stay, it does not alleviate the need for CFSL to make such an amendment to perfect its security interest in the Timberjack...Therefore, if CFSL did not discover the disposition of the Timberjack until March 13<sup>th</sup>, 2002...the 15 day period in which it had to register the change in debtor is still running...and should CFSL receive permission from the Court to amend its financing statement to reflect the disposition of the Timberjack by Noble to Hel, CFSL's security interest will be perfected.

**ISSUE 1:**

Should this Honourable Court grant an Order permitting the Applicant to file a financing change statement at the Personal Property Security Registry, Government of Newfoundland and Labrador, St. John's?

19. The Applicant submits that it was, and is, barred from registering a financing change statement at the PPR and requires leave from this Honourable Court to do same.
20. As was stated above, the Trustee in its Final Determination agrees with this position when it stated "the Trustee is of the opinion that the Initial Order stated that the right of any creditor to perfect or register a security interest in HBL's property was stayed..."
21. It should be noted that in another Application before this Honourable Court, the Applicant has appealed the Final Determination of the Trustee (the "Appeal Application") and the grounds for this Appeal include, *inter alia*, that the Trustee incorrectly noted the date of the granting of the Stay and that the correct date is February 8<sup>th</sup>, 2002, the date of the Initial Order, and that the transfer of the Chattel from Noble to Hickman occurred without the consent of the secured party and therefore s. 52 (4) of the PPSA applies.
22. The Applicant submits that the relevant sections of the PPSA for this Honourable Court to consider in this Application include *inter alia*, the following:
  21. (1) An unperfected security interest in collateral is not effective against



(a) a trustee in bankruptcy if the security interest is unperfected at the time of the bankruptcy;

34. (1) In this section, "transfer" includes a sale, the creation of a security interest or a transfer under judgment enforcement proceedings.

(2) The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer by the debtor does not prejudice the rights of the secured party under the agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

s. 36(8) (8) Where a debtor transfers an interest in collateral that, at the time of the transfer, is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee before the transfer except to the extent that the security interest granted by the transferee secures advances made or contracted for

(a) after the expiry of 15 days from when the secured party who holds the security interest in the transferred collateral has knowledge of the information required to register a financing change statement in accordance with section 52 disclosing the transferee as the new debtor; and

(b) before the secured party referred to in paragraph (a) takes possession of the collateral or registers a financing change statement in accordance with section 52 disclosing the transferee as the new debtor.

s. 52 (4) Where the debtor's interest in part or all of the collateral is transferred by the debtor without the consent of the secured party and there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party acquires knowledge of the name of the most recent transferee of the collateral, the secured party is considered to have complied with subsection (2) if the secured party registers a financing statement not later than 15 days after acquiring knowledge of

(a) the name of the most recent transferee of the collateral; and

(b) the information required to register a financing change statement,

and the secured party need not register financing change statements with respect to any intermediate transferee.

s. 3 (c) a corporation knows or has knowledge when information, in writing, has been delivered to the corporation's registered office or attorney for service, or when information has come to the attention of

(i) a managing director or officer of the corporation, or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates, under circumstances in which a reasonable person would take cognizance of it;

23. This Court has already had the opportunity to consider many of the above noted sections in a prior Application by CIBC Equipment Finance Ltd (the "CEFL" Decision, Tab 2), where in that decision this Court stated that:

Section 36 (8) and s. 52 (2) of the PPSA clearly reserve to creditors who "appear" to be in the same position as CEFL in this present matter, 15 days after they become aware of the transfer of their collateral, to

effect the registration of a Financing Change Statement indicating the name of the new debtor. I am not satisfied that the general provisions of s. 21(1) (a) of the Newfoundland PPSA is intended to apply where later provisions of the Act, namely s. 36(8) and s. 52 (2) specifically authorize the registration of a Financing Change Statement within 15 days of becoming aware of the transfer of the collateral to another debtor. A general provision such as s. 21(1) (a) should not, despite the absolute nature of its wording, be interpreted so as to overrule the specific intended fifteen day perfection period established by s. 36 (8) and 52 (2) of the PPSA.

24. Therefore, it is the Applicant's position that the CEFL Decision clearly allows the Applicant to register a financing change statement at the PPR even in the event where the new debtor is the estate of a bankrupt.
25. It is further the Applicant's position that, as in the CEFL decision, it only became aware of the transfer of the Chattel from Noble to Hickman on or about the 22<sup>nd</sup> day of February, 2002, which was after the Initial Order of this Honourable Court dated February 8th, 2002, and therefore, as above, the Stay was already in place.
26. Furthermore, the Applicant also states that the only difference between the circumstances of its case and those in the CEFL decision were that CEFL had registered a financing change statement at the PPR after the Stay was in place while the Applicant has obeyed the provisions of the Stay and is now seeking leave from this Honourable Court to do same.
27. The Applicant submits that the ability of this Court to grant liberty to the Applicant to registering a financing change statement at the PPR after the Stay is in place was also addressed in the CEFL Decision when it was stated that:

...if it is appropriate, I have the jurisdiction to either recognize the registration of the Financing Change Statement *nunc pro tunc* effective March 13<sup>th</sup>, 2002, or while not recognizing the registration as of that date, permit the registration of a new Financing Change Statement indicating Hickman Equipment as debtor....

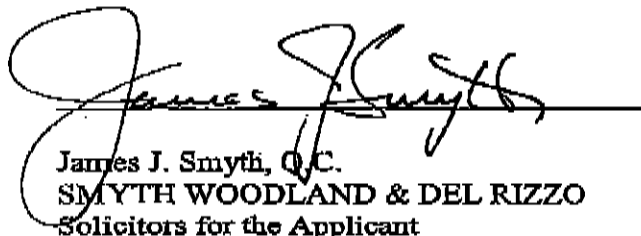
28. The Applicant also notes that within reasoning of the CEFL decision this Honourable Court included the caveat of "Additional Considerations" whereby it was recognized that "other issues remain to be resolved in order to determine whether CEFL has a first security position".

29. Similarly, the Applicant acknowledges that there may very well be "Additional Considerations" applicable to its case and therefore states that it is not seeking a determination of a priority to proceeds (or like issues) in this Application.

30. The Applicant therefore requests an Order from this Honourable Court lifting the Stay such that it will have the opportunity to register a financing change statement at the PPR.

Dated at St. John's in the Province of Newfoundland and Labrador, this 24<sup>th</sup> day of

FEBRUARY, A.D., 2003.



James J. Smyth, Q.C.  
SMYTH WOODLAND & DEL RIZZO  
Solicitors for the Applicant  
Whose address for service is:  
Suite 100, 16 Forest Road  
St. John's, Newfoundland  
A1C 2B9

## TAB 1

PricewaterhouseCoopers Inc.  
Atlantic Place, Box 75,  
215 Water Street, Suite 802  
St. John's, NL  
Canada A1C 6C9  
Telephone +1 (709) 722 3883  
Facsimile +1 (709) 722 1428

## **REGISTERED MAIL**

Mr. Jim Smythe  
Smythe Woodland & Del Rizzo  
16 Forest Road  
Suite 100  
St. John's, NL  
A1C 2B9

November 28, 2002

Dear Sir/Madame:

**Re: Hickman Equipment (1985) Ltd. - In Receivership**  
**Re: Caterpillar Financial Services**

PricewaterhouseCoopers Inc. acts as Court Appointed Receiver of Hickman Equipment (1985) Limited pursuant to a court order dated March 13, 2002. Hickman Equipment (1985) Limited was placed into bankruptcy by way of the Receiving Order also issued on March 13, 2002. Copies of the Court Orders and other related information may be obtained from our website at [www.pwcglobal.com/brs-hel](http://www.pwcglobal.com/brs-hel).

By Court Order dated May 14, 2002 a Claims Plan was approved. A copy of this plan can also be found on the above website.

Paragraph 14 of the Claims Plan provided as follows "...the Trustee will issue the Final Determination of the Claim in question, either allowing it as a valid secured claim under Section 135(4) of the *Bankruptcy and Insolvency Act* or disallowing it as a valid secured claim...". Paragraphs 15 and 16 of the Claims Plan provide the details of appeal rights both from rejected claims or those that may be accepted for other creditors. Paragraph 17 of the Claims Plan provides other options where the Trustee believes determination of the claims requires a trial or other legal process.


Attached is our notice of rejection of your security together with the final determination.



Pursuant to Paragraph 16 of the Claims Plan where the Trustee has allowed a claim as a valid secured claim, the Court will be asked to confirm this determination after which the Trustee's final determination will be final and binding on all claimants. Notice of the court hearing for confirmation of the Trustee's final determination will be forwarded to all known secured creditors at least five (5) days prior to the court hearing.

Yours very truly,  
PricewaterhouseCoopers Inc.

Per:

  
James A. Kirby, C.A., C.I.P.  
Senior Vice-President

JAK/cmc

Encl

FinalDeterminationReject-Campillar-Nov28.doc

District of Newfoundland  
Division No. 01  
Court No. NF9733  
Estate No. 100985

**NOTICE OF DISALLOWANCE OF SECURITY**  
(subsection 135)

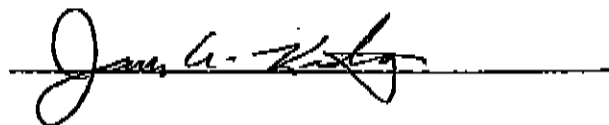
**IN THE MATTER OF THE BANKRUPTCY OF  
HICKMAN EQUIPMENT (1985) LIMITED**

Take notice that as trustee acting in the matter of the bankruptcy of Hickman Equipment (1985) Limited, pursuant to subsection 135(2) of the Act, we have disallowed your security on the property in whole for the reasons in the attached Schedule "A" (Final Determination).

And further take notice that if you are dissatisfied with our decision in disallowing your security in whole, you may appeal to the court within the 30-day period after the day on which this notice is served, or within such other period as the court may on application made within the same 30-day period allow.

Dated at St. John's, Newfoundland & Labrador, this 28<sup>th</sup> day of November, 2002.

PricewaterhouseCoopers Inc. – TRUSTEE  
Per:



TO:

Caterpillar Financial Services  
c/o Mr. Jim Smythe  
Smythe Woodland & Del Rizzo  
16 Forest Road  
Suite 100  
St. John's, NL A1C 2B9

**REGISTERED**

# **SCHEDULE A FINAL DETERMINATION**

(Issued in accordance with paragraph 14 of the Claims Plan)

Secured Party: **CATERPILLAR FINANCIAL SERVICES LIMITED**  
**("CFSL")**

## **1. Introduction**

PWC as Receiver continues to hold the Assets of HEL under the terms of the Receivership Order granted on March 13, 2002. The Claims Plan is intended to provide a mechanism by which Claimants assert Claims to these Assets.

Pursuant to paragraph 14 of the Claims Plan a Final Determination is to be made by the PWC as Trustee either allowing or disallowing a Claim as a valid secured claim under section 135(4) of the BIA. This is the Trustee's Final Determination in respect of CFSL.

Capitalized terms used in this Final Determination shall have the meaning ascribed to them in the Claims Plan unless otherwise defined herein.

## **2. Summary Final Determination**

CFSL did not perfect its security interest in the Asset. Therefore, CFSL's claim is disallowed as a valid secured claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

## **3. Defined Terms:**

For ease of Reference in this Final Determination, the Trustee has applied the following definitions/ abbreviations:

"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"Noble"	-	Noble's Lumber Yard
"PMSI"	-	Purchase Money Security Interest



"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	<i>Personal Property Security Act</i> , S.N.L. 1998, c.P - 7.1
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

#### **4. Assets**

- 1) 1998 Timberjack 610  
(993395)

#### **5. Assumptions**

In preparing this Final Determination, the Trustee has made the following assumptions:

- i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;
- ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;
- iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;
- iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and
- v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

#### **6. Qualifications**

Since there is no title registration system in the Province relating to personal property, any opinion respecting title is based solely upon the relevant Documentation.

For the purpose of determining the validity under prior law of security interests created and registered before the implementation of the PPSA and transitioned by registration in the PPR, the Trustee has only reviewed the security agreements and their registrations referenced in the PPR search report section entitled: "Pre-PPSA registration information

doing so, Noble has breached the terms of the Chattel Mortgage and that CFSL is entitled to seize the Asset.

CFSL brought an application before the Court on this matter and Mr. Justice Hall held that although CFSL had no direct dealings with HEL, it had nevertheless become a creditor of HEL and therefore CFSL's claim was subject to the provisions of the Realization Plan, Costs Allocation Plan and Claims Plan.

The Proof of Claim dated, 15 October 2002, indicates a total claim of \$150,436.69 comprised of an Unsecured Claim in the amount of \$0.00 and a Secured Claim in the amount of \$150,436.69.

## **8. Documentation**

In preparing this final determination, the Trustee has considered and relied upon only the following information provided to it from all sources:

- i. PPR search conducted in the name of the debtor on March 21, 2002.
- ii. Chattel Mortgage and Promissory Note between Nobel and CFSL both dated February 7, 2000 in the amount of \$186,395.00
- iii. Correspondence from CFSL dated June 21, 2001 to Nobel providing a buy-out quote for the Timberjack (s/n 993395)
- iv. Invoice from HEL to Nobel dated June 26, 2001 for the sale of a Timberjack 1110B Forwarder (s/n 10DH1023). Trade-in on this sale was the Timberjack (s/n 993395)
- v. Copy of a cheque from Nobel dated 28 June 2001 in the amount of \$37,728.00
- vi. Copy of a cheque from G.E. Capital Equipment Financing to HEL dated July 9, 2001 in the amount of \$379,463.99, pursuant to a Conditional Sales Agreement with Nobel
- vii. Correspondence from Nobel to Dave Bradley
- viii. Correspondence dated February 27, 2002 from CFSL to Allen McKinnon, Deloitte & Touche Inc. setting out a claim in the amount of \$150,436.69 with respect to the Timberjack. Attached is a copy of the PPSA Registration Statement, the Chattel Mortgage and Promissory Note, and electronic correspondence between the Monitor and CFSL.
- ix. Correspondence dated March 6, 2002 from G.E. Capital Canada Equipment Financing to Nobel enclosing a copy of the Conditional Sales Agreement, a copy of the invoice, the cheque issued to HEL and a letter signed by HEL.

- x. Interlocutory Application (Inter Partes) of CFSL dated 21 May 2002
- xi. Memorandum of Fact and Law of CFSL dated 4 June 2002
- xii. Memorandum of Fact and Law, List of Authorities and Affidavit of Alan Dengo from John Deere Credit Inc., filed by John Deere Credit Inc.
- xiii. Memorandum of Fact and Law with respect to the Interlocutory Application filed by GMAC
- xiv. Decision of Justice Hall on the Interlocutory Application of Caterpillar Financial Services dated 21 June 2002
- xv. Correspondence from James Smyth, dated 18 October 2002, attaching:
  - Proof of Claim
  - Dealer Payment History, dated 8 March 2000, showing a payable to Toromont for \$187,195.00 and a net financed amount of \$186,395.00

## **9. Classification of the Assets**

The actual subjective use to which the assets are put by the debtor dictates whether the assets will be classified as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that the Timberjack 610 was held by HEL for sale or lease and as such, forms part of the inventory of HEL (s. 2(x) of the PPSA).

The use to which the Asset was put by Noble has not been determined, nor has the Trustee attempted to make any such determination.

## **10. Application of the PPSA**

By operation of s.4 of the PPSA, the Chattel Mortgage between CFSL and Noble contains an appropriate charging clause and qualifies as a security agreement governed by the PPSA. As a result of the unauthorized disposition of the Asset to HEL by Noble and by operation of s.29 of the Act, CFSL's security interest continues in the Asset (as held by HEL) and the PPSA governs CFSL's rights in the Asset.

The Trustee presumes that the sale (i.e. trade-in) of the Timberjack by Noble to HEL was not a sale in the ordinary course of business of Noble so as to allow HEL to take the Asset free of CFSL's security interest (s.31). This assumption is based on the Trustee's understanding that Noble's business does not include the sale or rental of heavy equipment, however the Trustee has not been provided sufficient information on Noble's business and its relationship with CFSL to make a definitive determination in this regard. As mentioned in Item 7 above, CFSL has stated that they did not expressly or impliedly authorize the trade-in of the Asset. The Trustee has not been provided any evidence of this fact, but has

accepted CFSL's assertion for the purposes of making this Final Determination.

## **11. PRE-PPSA/ Transitioning Issues**

Not applicable in this instance as the transaction between CFSL and Noble took place in 2000 and was therefore subsequent to the coming into force of the PPSA in the Province.

## **12. Perfection**

Section 20 of the PPSA holds that there are two required elements to a perfected security interest in collateral, regardless of the order of occurrence. There must be:

(i) **attachment** in accordance with section 13, which requires:

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.<sup>1</sup>
2. The debtor must have rights in the collateral; and
3. There must be a security agreement that meets the requirements of s. 11.

(ii) **a perfection step** in accordance with section 25 (perfection by possession) or section 26 (perfection by registration of a financing statement in the Personal Property Registry (the "PPR")).

### Is there attachment?

(i) Value given?

**YES** CFSL has provided a Dealer Payment History showing an account payable to Toromont and a net financed amount of \$186,395.00. This corresponds with the amount of the Promissory Note between Noble and CFSL. This is sufficient evidence that CFSL did provide value to Noble in exchange for the security interest in the Asset.

With respect to the transaction between HEL and Noble, the Trustee has been provided with an invoice from HEL evidencing the trade-in and a copy of a cheque from Noble to HEL.

<sup>1</sup> C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.

(ii) Rights in the collateral?

**YES** Both Noble and HEL held possession of the Asset, and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.<sup>2</sup>

**Note:** For the purposes of expressing an opinion with respect to HEL's rights in the collateral, the Trustee has not made any determination with respect to HEL's title in the collateral at issue nor with respect to the lawfulness of HEL's possession thereof.

(iii) Have the evidentiary requirements of s. 11 been met?

**YES** As between CFSL and Noble, the evidentiary requirements of s. 11, required for attachment, are established by the Chattel Mortgage and Promissory Note. Specifically, in accordance with s.11(1)(b), this agreement is in writing, has been signed by Noble as the debtor and provides an adequate description of the collateral that is secured.

Is there a perfection step?

**NO**

CFSL did register their security interest in the Timberjack, while it was in the hands of Noble, on the PPR. Registration number 110551 contains the following information:

- **General Description of Collateral:** "One (1) 1998 Timberjack 610, S/N 993395; One (1) 1998 Caterpillar 320BL, S/N 6CR02773; One (1) 1997 Caterpillar 320BL, S/N 6CR00647, complete with One (1) 1997 Fabtek 18" R2000 Processor, S/N 0897021; One (1) 1998 Timberjack 1010B, S/N 106019; One (1) 1998 Timberjack 608B, S/N 987291."
- **Serial Numbered Collateral:** "1998 Timberjack 610 (s/n 993395); 1998 Caterpillar 320BL (s/n 6CR02773); 1997 Caterpillar 320BL (s/n 6CR00647); 1998 Timberjack 1010B (s/n 106019); 1998 Timberjack 608B (s/n 987291); 1997 Timberjack 610 (s/n 983200); 1999 Timberjack 608B (s/n 10BA1043)."

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to CFSL's security interest in the Timberjack. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

However, Section 52(2) of the PPSA requires a secured creditor to register a financing statement in the PPR within 15 days of becoming aware that the debtor has disposed of the collateral if the secured party wishes to avoid having its security interest subordinated to

<sup>2</sup> Ibid. at p.84.

subsequent secured creditors of the debtor. CFSL has failed to register a financing statement naming HEL as the new debtor with respect to the Asset. Counsel for CFSL contends that CFSL was not aware of the disposition by Noble until the bankruptcy of HEL and at that time were prevented from registering a financing statement because of the automatic stay of proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). Nevertheless, the Trustee notes that in a 1993 decision, the Newfoundland Supreme Court, in Bankruptcy found that s.69(1) of the BIA does not prevent a secured creditor from filing its security documents.<sup>3</sup> However, after reviewing the order granted by the Court on February 8, 2002 in response to HEL's application under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (the "Initial Order"), the Trustee is of the opinion that the Initial Order stated that the right of any creditor to perfect or register a security interest in HEL's property was stayed for a period of 30 days (the "Stay").<sup>4</sup> The Stay was subsequently extended to April 17, 2002 by order of the Court on February 22, 2002 and was later extended indefinitely by the Receivership Order issued by the Court on March 13, 2002.<sup>5</sup>

While CFSL was stayed from amending its financing statement with respect to the Asset by virtue of the Stay, it does not alleviate the need for CFSL to make such an amendment to perfect its security interest in the Asset. The Initial Order provided an extension of any time periods related to HEL or HEL's property equal to the length of the stay created by the Initial Order. This extension was confirmed and extended in the Receivership Order. Therefore, if CFSL did not discover the disposition of the Asset until 13 March 2002 when the Receivership Order was issued, the 15 day period in which it had to register the change in debtor is effectively still running. Should CFSL receive permission from the Court to amend its financing statement to reflect the disposition of the Asset by Noble to HEL, CFSL's security interest will be perfected.

### **13. Proceeds**

CFSL is not making a claim to the proceeds of the Timberjack; rather, they are looking for its return.

### **14. Additional Comments on Priorities**

None

### **15. Auction Results**

<sup>3</sup> *Labrie Equipment Ltd/Equipment Labrie Ltee. v. Harvey & Co.* (1993) 21 C.B.R. (3d) 281 (NF SC).

<sup>4</sup> See paragraph 4(c).

<sup>5</sup> See paragraph 37(a).

The 1998 Timberjack 610 (s/n 993395) was sold at the Trustee's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium) was \$95,000.00.

**TAB 2**



**SUMMARY OF CURRENT DOCUMENT**

**NAME OF ISSUING PARTY OR PERSON:**

**CATERPILLAR  
FINANCIAL SERVICES  
LIMITED**

**DATE OF DOCUMENT:**

**("CATERPILLAR")**

**SUMMARY OF ORDER/RELIEF SOUGHT:**

**24 FEBRUARY 2003  
ORDER REVERSING  
FINAL  
DETERMINATION OF  
THE RECEIVER  
DATED NOVEMBER 28  
2002**

**COURT SUB-FILE NO.:**

**7:29**

**2002 01T 0352**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION**

**IN THE MATTER of a Court ordered Receivership  
of Hickman Equipment (1985) Limited  
("Hickman Equipment") pursuant to Rule 25 of  
the Rules of Supreme Court, 1986 under the  
Judicature Act, R.S.N.L. 1990, c. J-4, as amended**

**AND IN THE MATTER of the Bankruptcy  
and Insolvency Act R.S.C. 1985, c.B-3, as  
amended ("the BIA")**

**-AND-**

**District of Newfoundland and Labrador  
Court No. 9733  
Estate No. 100813**

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER of the Bankruptcy of  
Hickman Equipment (1985) Limited  
("Hickman Equipment"), carrying on business  
at 1269 Topsail Road, in the City of Mt. Pearl,  
in the Province of Newfoundland and Labrador**

## **MEMORANDUM OF FACT AND LAW**

### **FACTS:**

1. The Applicant, Caterpillar Financial Services Limited, is a body corporate, duly incorporated and existing under the laws of the Province of Newfoundland and Labrador, having its head office in St. John's, Newfoundland and Labrador.
2. In February 2000 the Applicant provided financing to Noble's Lumber Yard Limited (Noble) in the amount of One hundred eight six thousand three hundred ninety five dollars (\$186,395.00) together with interest as set forth in a Promissory Note made between the Applicant and Noble.
3. As security for the said indebtedness the Applicant and Noble entered into a Chattel Mortgage wherein Noble was the Mortgagor and the Applicant was the Mortgagee and the Mortgagor assigned by way of Mortgage unto the Mortgagee certain goods and chattels including the following: one 1998 Timberjack, Model 610 Forwarder, Serial Number 993395 (hereinafter referred to as "the Chattel")
4. Noble took possession of the Chattel in or around February, 2000.
5. Pursuant to the provisions of the *Personal Property Security Act*, S.N. 1998, c. P. 7.1 ("PPSA") the Applicant caused to be registered a serial number financing

statement at the Personal Property Security Registry on the 17<sup>th</sup> day of February, 2000.

6. On February 8<sup>th</sup>, 2002 this Honourable Court granted an Order made under an Application by Hickman Equipment (1985) Limited ("Hickman") and Wells Fargo under the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 (the "Initial Order") and that this Initial Order *inter alia* appointed Deloitte and Touche Inc., Monitor of Hickman and stayed (the "Stay") the right of any creditor to perfect or register a security interest in Hickman's property for a period of thirty (30) days.
7. In an Order of this Honourable Court dated February 22<sup>nd</sup>, 2002 the Initial Order and the Stay referred to therein were extended until April 17<sup>th</sup>, 2002.
8. In a Receivership Order by this Honourable Court dated March 13<sup>th</sup>, 2002 under the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 ("BIA") it was ordered that PricewaterhouseCoopers Inc. ("PWC") be appointed the Receiver of the assets of Hickman Equipment. ("the Receiving Order") and it was further Ordered that the Initial Order and the stay referred to therein were extended indefinitely.
9. By further Order of this Court dated May 14<sup>th</sup>, 2002 and filed May 17<sup>th</sup>, 2002 PWC's plan for realization of the assets of Hickman was approved (the Realization Plan Order).

10. The Realization Plan Order approved PWC's plan for determination of the rights and entitlements of creditors and claimants of the assets of Hickman (the "Claims Plan").
11. Under paragraph 5 and 7 of the Claims Plan, the determination of the rights and entitlement of creditors and claimants to the assets of Hickman involved:
  - (A) A determination of whether a claimant had a valid, perfected and enforceable ownership or security interest in the assets of Hickman or the proceeds arising therefrom;
  - (B) A determination of the priority of claimant's interest *vis-à-vis* other claimants.
12. Under paragraph 20 of the Claims Plan, PWC proposed that the order of priority of claims to an asset of Hickman or to the proceeds therefrom be determined using the priority rules established by the PPSA and other applicable law.
13. In or around the 22<sup>nd</sup> of February 2002, the Applicant became aware that, contrary to the terms of the above noted Chattel Mortgage, Noble had traded in the Chattel to Hickman on the understanding that Hickman would pay out the debt outstanding to the Applicant.
14. In June, 2002 the Applicant made application to this Honourable Court to determine whether it was appropriate to exempt the Chattel from the provisions of the Initial Order and subsequent Receiving Order.

15. In an Order of this Honourable Court dated June 21<sup>st</sup>, 2002, Mr. Justice Hall denied the Application of the Applicant and authorized the Receiver to dispose of the Chattel in accordance with the Realization Plan and the proceeds thereof being subject to the Costs Allocation Plan and the Claims Plan.
16. On the 15<sup>th</sup> day of October, 2002 the Applicant made a claim to PWC for proceeds from the Chattel in the amount of \$150,436.69.
17. In accordance with the terms of said Claims Plan, on the 28<sup>th</sup> day of November, 2002, the Receiver presented its Final Determination (Tab 1 herein) to the Applicant with respect to the claim on proceeds by the Applicant.
18. In said Final Determination of the Receiver it was their opinion that the Applicant at one time held a valid perfected priority security interest in the Timberjack but that this interest had expired. Specifically, the Receiver stated that s. 52 (2) of the PPSA applied and that the Applicant failed to register a financing change statement within 15 days of becoming aware that Noble had transferred the Timberjack to Hickman.
19. On or about the 23<sup>rd</sup>, day of December, 2002 the Applicant appealed the Final Determination of the Trustee in a Notice of Appeal filed with this Honourable Court stating that the grounds for appeal were as follows:

- (1) That Respondent erred in stating in paragraph 2 of Final Determination that the Appellant had not perfected its security interest in the asset as therein defined;
- (2) That the Respondent erred when it stated at Paragraph 13 of the Final Determination that the Appellant was not claiming an interest in the specific proceeds generated by the sale of the Assets;
- (3) That the Respondent erred when it stated in Paragraph 12 of the Final Determination that the Appellant had not completed all necessary perfection steps permitted in law and not specifically prohibited by Order of this Honourable Court.<sup>1</sup>

**ISSUE 1:**

Did the Respondent err in stating in paragraph 2 of Final Determination that the Appellant had not perfected its security interest in the asset as therein defined?

20. For a secured creditor to acquire a valid security interest in collateral, and the best rights possible against all interested parties, the Personal Property Security Act *Personal Property Security Act*, S.N. 1998, c. P. 7.1 ("PPSA") requires that the security interest must have "attached" and been "perfected". This requirement is set forth in s. 20 of the PPSA which states as follows:

**Perfected security interest**

20. A security interest is perfected when

- (a) it has attached; and

---

<sup>1</sup> For the sake of clarity of the argument in this Memorandum Issue 1 and 3 will be discussed in sequence.

b) all steps required for perfection under this Act have been completed, regardless of the order of occurrence.

21. It is the Applicant's position that they have clearly performed the requirements of s.

20 of the PPSA.

22. Under s. 13 of the PPSA attachment occurs when:

**When attachment occurs**

13. (1) A security interest, including a security interest in the nature of a floating charge, attaches when

- (a) value is given;
- (b) the debtor has rights in the collateral; and
- (c) "except for the purpose of enforcing rights as between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 11.

**Evidentiary requirements**

11. (1) A security agreement is enforceable against a third party only where

- (a) the collateral is in the possession of the secured party or another person on the secured party's behalf; or
- (b) the debtor has signed a security agreement that contains
  - (i) a description of the collateral by item or kind, or by reference to one or more of the following: "goods", "document of title", "chattel paper", "security", "instrument", "money" or "intangible",
  - (ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property, or
  - (iii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except one or more of the following: "goods", "document of title", "chattel paper", "security", "instrument", "money" or "intangible".
- (2) A secured party does not have possession of collateral for the purpose of paragraph (1)(a), where the collateral is in the apparent possession or control of the debtor or the debtor's agent.
- (3) A description is inadequate for the purpose of subparagraph (1)(b)(i) if it describes the collateral as consumer goods or equipment without further describing the item or kind of collateral, but where the personal property to be excluded from a description of collateral under subparagraph (1)(b)(iii) is the consumer goods of the debtor, the excluded property may be described simply as consumer goods.
- (4) A description of collateral as inventory is adequate for the purpose of paragraph (1)(b) only while it is held by the debtor as inventory.

23. It is the Applicant's position that "value" was clearly given in this matter and the s.13(1)(a) requirement has been met. Under the definitions in s. 2 of the *Act* "value" is defined as "consideration sufficient to support a simple contract". Clearly the advancing of funds under the terms of the promissory note and Chattel Mortgage by the Applicant to Noble (as debtor) easily meets this standard.

24. It is also the Applicant's position that the debtor (Noble) clearly had rights in the collateral and the s.13(1)(b) requirement has also been met. It is the Applicant's position that Noble acquired rights at the time the Chattel Mortgage and promissory note were executed. The fact that Noble took possession of the equipment and made regular payments on the amounts outstanding further evidences their interest in the collateral. Therefore, as the debtor (Nobles) did not dispose of the collateral to any third party before the security interest had attached, the debtor (Nobles) had rights in the collateral under the meaning of the section at the time of attachment.

25. As the Applicant is also seeking to enforce rights against third parties to the agreement, it is further the Applicant's position that the requirement of s.13(1)(c) [through s.11 (1) (b) (i)] has also been met. First, the President and a Director of the debtor signed the Chattel Mortgage. Second, the Chattel Mortgage included a serial number description of the collateral in Schedule "B" annexed thereto. Lastly, the Chattel Mortgage clearly included language that gave the secured party a *real* interest in the debtor's asset for the purpose of securing the obligation under their agreement. For example, in paragraph 6 of the Chattel Mortgage it was stated



that "If the mortgagor fails to pay the amount to the said Promissory Note or any amount charged to the Mortgagor hereunder or fails to comply with any other term or condition of this Mortgage or of the Promissory Note....the Mortgagee may take immediate possession of the property". Again, s. 11 s.11 (1) (b) (i) has been met and the security interest had properly attached. [emphasis added]

26. It is also the Applicant's position that a perfection step has been followed and the requirement of s. 20 (b) above has clearly been met.

27. Under s. 26 of the PPSA it is stated that **"registration of a financing statement perfects a security interest in collateral"**. Under s. 44( 4) of the *Act* it is stated that **"Registration of a financing statement is effective from the time that a registration number, date and time is assigned to the registration in the registry"**. Under s. 44(5) of the Act it is stated that **"A financing statement may be registered before or after a security agreement is made or a security interest attaches"**.

[emphasis added]

28. It is the Applicant's position therefore that the registration of a financing statement at the PPR on or about February 17<sup>th</sup>, 2000 perfected their security interest in the collateral (under the meaning of s.26) at that time.

## **ISSUE 2:**

Did the Respondent err when it stated in Paragraph 12 of the Final Determination that the Appellant had not completed all necessary perfection steps permitted in law and not specifically prohibited by Order of this Honourable Court?

29. As was stated above, it is the Applicant's position that they held a valid perfected security interest in the Chattel at the time of Registration on or about February 17<sup>th</sup>, 2000, and indeed even the Trustee seemingly agrees with this point.

30. However, the Trustee, in its determination, opines that the Applicant did not have a perfected security interest in the Chattel at the time of the granting of the Initial Order because it had failed to register a financing change statement at the PPR.

31. More specifically, the Trustee stated in paragraph 12 that "section 52(2) of the PPSA requires a secured creditor to register a financing statement in the PPR within 15 days of becoming aware that the debtor has disposed of the collateral if the secured party wishes to avoid having its security interest subordinated to subsequent secured parties of the debtor. CFSL has failed to register a financing statement naming HEL as the new debtor with respect to the Asset".

32. It is the Applicant's position that for this Honourable Court to grant this appeal its decision will turn on whether or not the Trustee relied on the correct section of the PPSA that would govern the Applicant's responsibilities after the transfer of the Chattel from Noble to Hickman (Re: Taylor, Tab 2, at paragraph 4).

33. The Applicant notes that s. 52 (2) of the PPSA states *inter alia* the following:

- (2) Where a security interest is perfected by registration and the secured party has knowledge of
  - (a) information required to register a financing statement disclosing the transferee as the new debtor, where all or part of the debtor's interest in the collateral is transferred; or
  - (b) the new name of the debtor, if there has been a change in the debtor's name, the security interest, in the transferred collateral where paragraph (a) applies, and in the collateral where paragraph (b) applies, is subordinate to
  - (c) an interest, other than a security interest, in that collateral, arising in the period from the expiry of the fifteenth day after the secured party has knowledge of the information referred to in paragraph (a) or the new name of the debtor to the time the secured party amends the registration to disclose the name of the transferee as the debtor or to disclose the new name of the debtor or takes possession of the collateral;
  - (d) a perfected security interest in the collateral that is registered or perfected in the period referred to in paragraph (c); and
  - (e) a perfected security interest in the collateral that is registered or perfected after the secured party had knowledge of the information referred to in paragraph (a) or the new name of the debtor and before the expiry of the fifteenth day referred to in paragraph (c), if, before the expiry of the 15 days,
    - (i) the registration of the security interest first referred to in this subsection is not amended to disclose the transferee of the collateral as the new debtor or to disclose the new name of the debtor, or
    - (ii) the secured party does not take possession of the collateral.

34. The Applicant respectfully submits that this is the incorrect section of the PPSA to apply and that, rather, the Trustee should have applied s. 52(4) of the PPSA which states as follows:

- (4) Where the debtor's interest in part or all of the collateral is transferred by the debtor without the consent of the secured party and there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party acquires knowledge of the name of the most recent transferee of the collateral, the secured party is considered to have complied with subsection (2) if the secured party registers a financing statement not later than 15 days after acquiring knowledge of
  - (a) the name of the most recent transferee of the collateral; and
  - (b) the information required to register a financing change statement, and the secured party need not register financing change statements with respect to any intermediate.

[Emphasis Added]

35. It should be noted that this Honourable Court has already ruled in a prior hearing that "Caterpillar had no direct dealing with Hickman Equipment with respect to the subject transactions..." (Tab 3 herein). Therefore, the Applicant submits that the Chattel clearly was transferred by the debtor without its consent and this Court must conclude that section 52 (4) applies and thus the Appeal should be granted as the Trustee misapplied the correct section of the PPSA.

36. Further, the Applicant also submits that the Trustee erred in fact and law when it stated above that the correct date is March 13<sup>th</sup>, 2002. Rather, the Applicant states the correct date should be February 8<sup>th</sup>, 2002, (paragraph 6 herein) the date of the Initial Order which has subsequently been extended.

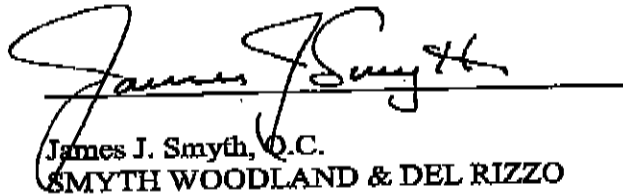
**ISSUE 3:**

That the Respondent erred when it stated at Paragraph 13 of the Final Determination that the Appellant was not claiming an interest in the specific proceeds generated by the sale of the Assets.

37. The Applicant submits that, as was stated in paragraph 16 of this Memorandum, following the above noted decision of this Honourable Court disallowing the Application to have the Chattel exempted from the HEL bankruptcy it made a valid proof of claim to the Trustee requesting the proceeds from same.

Dated at St. John's in the Province of Newfoundland and Labrador, this 24<sup>th</sup> day of

FEBRUARY, A.D., 2003.

A handwritten signature in cursive script, reading "James J. Smyth", is written over a horizontal line.

James J. Smyth, Q.C.

SMYTH WOODLAND & DEL RIZZO

Solicitors for the Applicant

Whose address for service is:

Suite 100, 16 Forest Road

St. John's, Newfoundland

A1C 2B9

## **TAB 1**

PricewaterhouseCoopers Inc.  
Atlantic Place, Box 75,  
215 Water Street, Suite 802  
St. John's, NL  
Canada A1C 6C9  
Telephone +1 (709) 722 3883  
Facsimile +1 (709) 722 1428

**REGISTERED MAIL**

Mr. Jim Smythe  
Smythe Woodland & Del Rizzo  
16 Forest Road  
Suite 100  
St. John's, NL  
A1C 2B9

November 28, 2002

Dear Sir/Madame:

**Re: Hickman Equipment (1985) Ltd. -- In Receivership**  
**Re: Caterpillar Financial Services**

PricewaterhouseCoopers Inc. acts as Court Appointed Receiver of Hickman Equipment (1985) Limited pursuant to a court order dated March 13, 2002. Hickman Equipment (1985) Limited was placed into bankruptcy by way of the Receiving Order also issued on March 13, 2002. Copies of the Court Orders and other related information may be obtained from our website at [www.pwcglobal.com/bis-hel](http://www.pwcglobal.com/bis-hel).

By Court Order dated May 14, 2002 a Claims Plan was approved. A copy of this plan can also be found on the above website.

Paragraph 14 of the Claims Plan provided as follows "...the Trustee will issue the Final Determination of the Claim in question, either allowing it as a valid secured claim under Section 135(4) of the *Bankruptcy and Insolvency Act* or disallowing it as a valid secured claim...". Paragraphs 15 and 16 of the Claims Plan provide the details of appeal rights both from rejected claims or those that may be accepted for other creditors. Paragraph 17 of the Claims Plan provides other options where the Trustee believes determination of the claims requires a trial or other legal process.

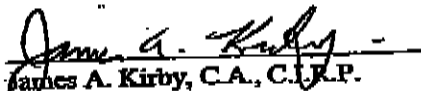
Attached is our notice of rejection of your security together with the final determination.



Pursuant to Paragraph 16 of the Claims Plan where the Trustee has allowed a claim as a valid secured claim, the Court will be asked to confirm this determination after which the Trustee's final determination will be final and binding on all claimants. Notice of the court hearing for confirmation of the Trustee's final determination will be forwarded to all known secured creditors at least five (5) days prior to the court hearing.

Yours very truly,  
PricewaterhouseCoopers Inc.

Per:

  
James A. Kirby, C.A., C.I.P.P.  
Senior Vice-President

JAK/cmc

Encl.

FinalDetermination(Reject-Caterpillar-Nov28.doc



District of Newfoundland  
Division No. 01  
Court No. NF9733  
Estate No. 100985

**NOTICE OF DISALLOWANCE OF SECURITY**  
(subsection 135)

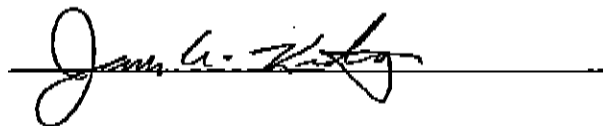
**IN THE MATTER OF THE BANKRUPTCY OF  
HICKMAN EQUIPMENT (1985) LIMITED**

Take notice that as trustee acting in the matter of the bankruptcy of Hickman Equipment (1985) Limited, pursuant to subsection 135(2) of the Act, we have disallowed your security on the property in whole for the reasons in the attached Schedule "A" (Final Determination).

And further take notice that if you are dissatisfied with our decision in disallowing your security in whole, you may appeal to the court within the 30-day period after the day on which this notice is served, or within such other period as the court may on application made within the same 30-day period allow.

Dated at St. John's, Newfoundland & Labrador, this 28<sup>th</sup> day of November, 2002.

PricewaterhouseCoopers Inc. -- TRUSTEE  
Per:



TO:

Caterpillar Financial Services  
c/o Mr. Jim Smythe  
Smythe Woodland & Del Rizzo  
16 Forest Road  
Suite 100  
St. John's, NL A1C 2B9

**REGISTERED**

# **SCHEDULE A FINAL DETERMINATION**

(Issued in accordance with paragraph 14 of the Claims Plan)

Secured Party: **CATERPILLAR FINANCIAL SERVICES LIMITED**  
**("CFSL")**

## **1. Introduction**

PWC as Receiver continues to hold the Assets of HEL under the terms of the Receivership Order granted on March 13, 2002. The Claims Plan is intended to provide a mechanism by which Claimants assert Claims to these Assets.

Pursuant to paragraph 14 of the Claims Plan a Final Determination is to be made by the PWC as Trustee either allowing or disallowing a Claim as a valid secured claim under section 135(4) of the BIA. This is the Trustee's Final Determination in respect of CFSL.

Capitalized terms used in this Final Determination shall have the meaning ascribed to them in the Claims Plan unless otherwise defined herein.

## **2. Summary Final Determination**

CFSL did not perfect its security interest in the Asset. Therefore, CFSL's claim is disallowed as a valid secured claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

## **3. Defined Terms:**

For ease of Reference in this Final Determination, the Trustee has applied the following definitions/ abbreviations:

"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"Noble"	-	Noble's Lumber Yard
"PMSI"	-	Purchase Money Security Interest

"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	<i>Personal Property Security Act</i> , S.N.L. 1998, c.P - 7.1
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

#### **4. Assets**

- 1) 1998 Timberjack 610  
(993395)

#### **5. Assumptions**

In preparing this Final Determination, the Trustee has made the following assumptions:

- i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;
- ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;
- iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;
- iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and
- v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

#### **6. Qualifications**

Since there is no title registration system in the Province relating to personal property, any opinion respecting title is based solely upon the relevant Documentation.

For the purpose of determining the validity under prior law of security interests created and registered before the implementation of the PPSA and transitioned by registration in the PPR, the Trustee has only reviewed the security agreements and their registrations referenced in the PPR search report section entitled: "Pre-PPSA registration information

doing so, Noble has breached the terms of the Chattel Mortgage and that CFSL is entitled to seize the Asset.

CFSL brought an application before the Court on this matter and Mr. Justice Hall held that although CFSL had no direct dealings with HEL, it had nevertheless become a creditor of HEL and therefore CFSL's claim was subject to the provisions of the Realization Plan, Costs Allocation Plan and Claims Plan.

The Proof of Claim dated, 15 October 2002, indicates a total claim of \$150,436.69 comprised of an Unsecured Claim in the amount of \$0.00 and a Secured Claim in the amount of \$150,436.69.

## **8. Documentation**

In preparing this final determination, the Trustee has considered and relied upon only the following information provided to it from all sources:

- i. PPR search conducted in the name of the debtor on March 21, 2002.
- ii. Chattel Mortgage and Promissory Note between Nobel and CFSL both dated February 7, 2000 in the amount of \$186,395.00
- iii. Correspondence from CFSL dated June 21, 2001 to Nobel providing a buy-out quote for the Timberjack (s/n 993395)
- iv. Invoice from HEL to Nobel dated June 26, 2001 for the sale of a Timberjack 1110B Forwarder (s/n 10DH1023). Trade-in on this sale was the Timberjack (s/n 993395)
- v. Copy of a cheque from Nobel dated 28 June 2001 in the amount of \$37,728.00
- vi. Copy of a cheque from G.E. Capital Equipment Financing to HEL dated July 9, 2001 in the amount of \$379,463.99, pursuant to a Conditional Sales Agreement with Nobel
- vii. Correspondence from Nobel to Dave Bradley
- viii. Correspondence dated February 27, 2002 from CFSL to Allen McKinnon, Deloitte & Touche Inc. setting out a claim in the amount of \$150,436.69 with respect to the Timberjack. Attached is a copy of the PPSA Registration Statement, the Chattel Mortgage and Promissory Note, and electronic correspondence between the Monitor and CFSL
- ix. Correspondence dated March 6, 2002 from G.E. Capital Canada Equipment Financing to Nobel enclosing a copy of the Conditional Sales Agreement, a copy of the invoice, the cheque issued to HEL and a letter signed by HEL

- x. Interlocutory Application (Inter Partes) of CFSL dated 21 May 2002
- xi. Memorandum of Fact and Law of CFSL dated 4 June 2002
- xii. Memorandum of Fact and Law, List of Authorities and Affidavit of Alan Dengo from John Deere Credit Inc., filed by John Deere Credit Inc.
- xiii. Memorandum of Fact and Law with respect to the Interlocutory Application filed by GMAC
- xiv. Decision of Justice Hall on the Interlocutory Application of Caterpillar Financial Services dated 21 June 2002
- xv. Correspondence from James Smyth, dated 18 October 2002, attaching:
- Proof of Claim
  - Dealer Payment History, dated 8 March 2000, showing a payable to Toromont for \$187,195.00 and a net financed amount of \$186,395.00

## **9. Classification of the Assets**

The actual subjective use to which the assets are put by the debtor dictates whether the assets will be classified as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that the Timberjack 610 was held by HEL for sale or lease and as such, forms part of the inventory of HEL (s. 2(x) of the PPSA).

The use to which the Asset was put by Noble has not been determined, nor has the Trustee attempted to make any such determination.

## **10. Application of the PPSA**

By operation of s.4 of the PPSA, the Chattel Mortgage between CFSL and Noble contains an appropriate charging clause and qualifies as a security agreement governed by the PPSA. As a result of the unauthorized disposition of the Asset to HEL by Noble and by operation of s.29 of the Act, CFSL's security interest continues in the Asset (as held by HEL) and the PPSA governs CFSL's rights in the Asset.

The Trustee presumes that the sale (i.e. trade-in) of the Timberjack by Noble to HEL was not a sale in the ordinary course of business of Noble so as to allow HEL to take the Asset free of CFSL's security interest (s.31). This assumption is based on the Trustee's understanding that Noble's business does not include the sale or rental of heavy equipment, however the Trustee has not been provided sufficient information on Noble's business and its relationship with CFSL to make a definitive determination in this regard. As mentioned in Item 7 above, CFSL has stated that they did not expressly or impliedly authorize the trade-in of the Asset. The Trustee has not been provided any evidence of this fact, but has

accepted CFSL's assertion for the purposes of making this Final Determination.

## **11. PRE-PPSA/ Transitioning Issues**

Not applicable in this instance as the transaction between CFSL and Noble took place in 2000 and was therefore subsequent to the coming into force of the PPSA in the Province.

## **12. Perfection**

Section 20 of the PPSA holds that there are two required elements to a perfected security interest in collateral, regardless of the order of occurrence. There must be:

(i) attachment in accordance with section 13, which requires:

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.<sup>1</sup>
2. The debtor must have rights in the collateral; and
3. There must be a security agreement that meets the requirements of s. 11.

(ii) a perfection step in accordance with section 25 (perfection by possession) or section 26 (perfection by registration of a financing statement in the Personal Property Registry (the "PPR")).

### Is there attachment?

(i) Value given?

YES CFSL has provided a Dealer Payment History showing an account payable to Toromont and a net financed amount of \$186,395.00. This corresponds with the amount of the Promissory Note between Noble and CFSL. This is sufficient evidence that CFSL did provide value to Noble in exchange for the security interest in the Asset.

With respect to the transaction between HEL and Noble, the Trustee has been provided with an invoice from HEL evidencing the trade-in and a copy of a cheque from Noble to HEL.

<sup>1</sup> C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.

(ii) Rights in the collateral?

**YES** Both Noble and HEL held possession of the Asset, and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.<sup>2</sup>

**Note:** For the purposes of expressing an opinion with respect to HEL's rights in the collateral, the Trustee has not made any determination with respect to HEL's title in the collateral at issue nor with respect to the lawfulness of HEL's possession thereof.

(iii) Have the evidentiary requirements of s. 11 been met?

**YES** As between CFSL and Noble, the evidentiary requirements of s. 11, required for attachment, are established by the Chattel Mortgage and Promissory Note. Specifically, in accordance with s.11(1)(b), this agreement is in writing, has been signed by Noble as the debtor and provides an adequate description of the collateral that is secured.

Is there a perfection step?

**NO**

CFSL did register their security interest in the Timberjack, while it was in the hands of Noble, on the PPR. Registration number 110551 contains the following information:

- **General Description of Collateral:** "One (1) 1998 Timberjack 610, S/N 993395; One (1) 1998 Caterpillar 320BL, S/N 6CR02773; One (1) 1997 Caterpillar 320BL, S/N 6CR00647, complete with One (1) 1997 Fabtek 18" R2000 Processor, S/N 0897021; One (1) 1998 Timberjack 1010B, S/N 106019; One (1) 1998 Timberjack 608B, S/N 987291."
- **Serial Numbered Collateral:** "1998 Timberjack 610 (s/n 993395); 1998 Caterpillar 320BL (s/n 6CR02773); 1997 Caterpillar 320BL (s/n 6CR00647); 1998 Timberjack 1010B (s/n 106019); 1998 Timberjack 608B (s/n 987291); 1997 Timberjack 610 (s/n 983200); 1999 Timberjack 608B (s/n 10BA1043)."

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to CFSL's security interest in the Timberjack. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

However, Section 52(2) of the PPSA requires a secured creditor to register a financing statement in the PPR within 15 days of becoming aware that the debtor has disposed of the collateral if the secured party wishes to avoid having its security interest subordinated to

<sup>2</sup> Ibid. at p.84.

subsequent secured creditors of the debtor. CFSL has failed to register a financing statement naming HEL as the new debtor with respect to the Asset. Counsel for CFSL contends that CFSL was not aware of the disposition by Noble until the bankruptcy of HEL and at that time were prevented from registering a financing statement because of the automatic stay of proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). Nevertheless, the Trustee notes that in a 1993 decision, the Newfoundland Supreme Court, In Bankruptcy found that s.69(1) of the BIA does not prevent a secured creditor from filing its security documents.<sup>3</sup> However, after reviewing the order granted by the Court on February 8, 2002 in response to HEL's application under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (the "Initial Order"), the Trustee is of the opinion that the Initial Order stated that the right of any creditor to perfect or register a security interest in HEL's property was stayed for a period of 30 days (the "Stay").<sup>4</sup> The Stay was subsequently extended to April 17, 2002 by order of the Court on February 22, 2002 and was later extended indefinitely by the Receivership Order issued by the Court on March 13, 2002.<sup>5</sup>

While CFSL was stayed from amending its financing statement with respect to the Asset by virtue of the Stay, it does not alleviate the need for CFSL to make such an amendment to perfect its security interest in the Asset. The Initial Order provided an extension of any time periods related to HEL or HEL's property equal to the length of the stay created by the Initial Order. This extension was confirmed and extended in the Receivership Order. Therefore, if CFSL did not discover the disposition of the Asset until 13 March 2002 when the Receivership Order was issued, the 15 day period in which it had to register the change in debtor is effectively still running. Should CFSL receive permission from the Court to amend its financing statement to reflect the disposition of the Asset by Noble to HEL, CFSL's security interest will be perfected.

### **13. Proceeds**

CFSL is not making a claim to the proceeds of the Timberjack; rather, they are looking for its return.

### **14. Additional Comments on Priorities**

None

### **15. Auction Results**

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<sup>3</sup> *Labrie Equipment Ltd./Equipment Labrie Ltee. v. Harvey & Co.* (1993) 21 C.B.R. (3d) 281 (NF SC).

<sup>4</sup> See paragraph 4(c).

<sup>5</sup> See paragraph 37(a).



The 1998 Timberjack 610 (s/n 993395) was sold at the Trustee's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium) was **\$95,000.00**.

**TAB 2**

# Taylor, Re (Manitoba Court of Queen's Bench)

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First hit: ▶	Legislation	Commentary	History and Treatments	Digests
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## Taylor, Re

In the Matter of: The Bankruptcy ▶ of: Allyn Joyce Taylor

Citation: 1999 CarswellMan 258, 12 C.B.R. (4th) 139, 139 Man. R. (2d) 161, 14 P.P.S.A.C. (2d) 232

Court: Manitoba Court of Queen's Bench

Judge: Registrar Goldberg

Judgment: April 28, 1999

Year: 1999

Docket: Winnipeg Centre BK 99-01-56594

Counsel: Richard Buchwald, for Bank of Nova Scotia.

Leigh C. Taylor, for ▶ Trustee ▶.

### Subject:

Insolvency

Corporate and Commercial

**Personal property security — Scope of legislation — True lease versus sales financing —** Lessor and lessee entered into agreement to lease motor vehicle for 24 months → Lessor assigned its interest in agreement to bank — Lessee made assignment in ▶ bankruptcy ▶ and ▶ trustee ▶ took possession of vehicle — Bank filed proof of claim in ▶ bankruptcy ▶ - ▶ Trustee ▶ disallowed claim on ground that lease contained option to purchase and thus constituted security agreement rather than true lease — Bank appealed — ▶ Appeal ▶ allowed — Lease stated that option to purchase not available to persons intending to use vehicle for personal, family or household use — Lessee selected both business use and personal/family/household use options — Selection of business use option meant that lease did contain option to purchase - At end of lease lessee would still have to pay \$13,702 to buy vehicle — Purchase price not nominal — Lessee contracted to pay only for use of vehicle — Transaction constituted true lease and not security agreement.

### Cases considered by Registrar Goldberg:

*Crown Cartridge Corp., Re* (1962), 220 F. Supp. 914 (U.S. Dist. Ct. S.D. N.Y.) — considered

*Mitsui & Co. (Canada) v. Royal Bank*, 32 C.B.R. (3d) 1, 180 N.R. 161, 123 D.L.R. (4th) 449, [1995] 2 S.C.R. 187, [42 N.S.R. (2d) 1, 407 A.P.R. 1 (S.C.C.) — considered

*MTC Leasing v. National Bank Leasing Inc.*, 120 Man. R. (2d) 108, [1997] 9 W.W.R. 228, 49 C.B.R. (3d) 87, 12 P.P.S.A.C. (2d) 312, 34 B.L.R. (2d) 20 (Man. Q.B.) — considered

*Ontario Equipment (1976) Ltd., Re* (1981), 33 O.R. (2d) 648, 1 P.P.S.A.C. 303, 14 B.L.R. 113, 38 C.B.R. (N.S.) 180, 125 D.L.R. (3d) 321 (Ont. Bkcty.) — considered

### Statutes considered:

Can. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 81(1) — referred to

N.S. *Conditional Sales Act*, R.S.N.S. 1989, c. 84

Generally — referred to

s. 2(1)(b) "conditional sale" (if) — referred to

Man. *Personal Property Security Act*, R.S.M. 1987, c. P35; C.C.S.M., c. P35

s. 2(a) — considered

Ont. *Personal Property Security Act*, R.S.O. 1990, c. P.10

Generally — referred to

◀ APPEAL ▶ by bank from ▶ disallowance of claim ▶ by ▶ trustee ▶.

### Registrar Goldberg:

1 In February, 1998 McPhillips Lincoln Mercury Sales ("the lessor") entered into a lease agreement with Allyn Joyce Taylor ("the lessee"), whereby the lessee agreed to lease a 1997 Ford Ranger vehicle for twenty-four months. The lessor assigned its interest in the agreement to the Bank of Nova Scotia ("the bank").

2 In September, 1998 the lessee made an assignment in ▶ bankruptcy ▶. The ▶ trustee ▶ took possession of the vehicle.

3 The bank filed a proof of claim (property) pursuant to s. 81(1) of *The ▶ Bankruptcy and Insolvency Act*, R.S.C. 1985 c.B-3, demanding return of the vehicle from the ▶ trustee ▶. The basis of the demand was that the lease agreement was a true lease and not a financing lease. The ▶ trustee ▶ disallowed the claim on the basis that the lease contained an option to purchase and thus constituted a security agreement. Because the bank had not registered a financing agreement regarding the lease, the ▶ trustee ▶'s position was that the lease was an unperfected security interest which was subordinate to the interest of the ▶ trustee ▶.

4 The bank appealed the ▶ trustee ▶'s disallowance of the proof of claim. The resolution of the bank's ▶ appeal ▶ from the ▶ trustee ▶'s disallowance turns on whether *The Personal Property Security Act*, R.S.M. 1987, c.P35 (and the registration requirements contained therein) apply to the lease.

5 Section 2 of *The Personal Property Security Act* states:

2. Subject to subsection 3(1), this Act applies

(a) to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust deed or trust receipt, and

(ii) an assignment, lease or consignment intended as security;

.....

6 The issue is whether the lease was intended to secure a conditional sale (as the ▶ trustee ▶ contends) or a true lease whereby the lessee simply paid for the use of the vehicle for a period of time (as the bank contends).

7 The *Personal Property Security Act* does not define which lease transactions are intended as security. The court must ascertain the intention of the parties at the time the agreement was made. To this end, the court will construe the agreement itself. While extrinsic evidence may be admissible on the issue of the nature of the transaction, none was offered in this case.

### The Legal Test

8 The provisions of *The Personal Property Security Act* (Ontario) as to which transactions are covered by the Act are the same as those in section 2 of the Manitoba statute. Therefore, Ontario cases are helpful in interpreting the Manitoba statute.

9 In *Re Ontario Equipment (1976) Ltd.* (1981), 1 P.P.S.A.C. 303 (Ont. Bkcty.), Henry, J. stated:

The critical issue in every case is the intention of the parties and this depends upon the facts of the case. (at 306)

10 He applied the following test from *Re Crown Cartridge Corp.*, 220 F. Supp. 914 (U.S. Dist. Ct. S.D. N.Y. 1962):

The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or a nominal amount.... If the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale....(at 306)

11 This test has been applied in Manitoba in *MTC Leasing v. National Bank Leasing Inc.* (1997), 12 P.P.S.A.C. (2d) 319 (Man. Q.B.).

### The Facts

12 The bank's first argument was that the lease did not contain an option to purchase. Paragraph 8 of the lease states:

#### 8. Option to Purchase

You shall have the first option to purchase the vehicle at the scheduled end of this Lease for \$13702.00 if at that time you are not in default. You must notify the Lessor no later than (30) thirty days prior to the end of the Lease if you want to purchase the vehicle. Upon payment in cash of the purchase option price, plus all applicable taxes and fees, title of the vehicle will be transferred to you. The option to purchase is not available to individuals intending to use the vehicle for personal family or household use in Manitoba.

13 The lessee selected both the business use and personal/family/household use options. The argument on behalf of the bank is that the selection of the personal/family/household use option disqualified the lessee from exercising the option to purchase.

14 The alternative interpretation of paragraph 8 of the lease is that while the selection of personal/family/household use would not qualify the lessee to exercise the option, the selection of business use would. Put another way, by contracting for business use as well as personal/family/household use, the lessee qualified to exercise the option to purchase. The latter interpretation is consistent with other provisions in the agreement; the insertion of an option to purchase price in paragraph 8, and the marking (with an X) of "with option to purchase" (rather than "without option to purchase") at the top of the document. The latter interpretation also makes commercial sense because the lessor is more likely to be willing to commit to an option to purchase price if the vehicle is being leased for a heavier use (that is business use), rather than for the usually lighter personal use.

15 I therefore conclude that the lease did contain an option to purchase. However, that is not the end of the inquiry. The next step is to consider whether the option to purchase price at the end of the lease is for a nominal or a substantial amount.

16 The lessor paid \$4,040.00 down (this included the first monthly payment of \$280.00) and was obligated for 23 more monthly payments of \$280.00 each, or \$6,440.00. After 24 months, the lessee, having paid over \$10,000.00, would still have to pay \$13,702.00 more to buy the vehicle. The purchase price is not nominal. It is substantial. I therefore conclude that the lessee only contracted to pay for the use of the vehicle. The transaction is a true lease, not intended as security, and not subject to the provisions of *The Personal Property Security Act*.

17 Before concluding these reasons I should note that the ¶ trustee ¶ relied on *Mitsui & Co. (Canada) v. Royal Bank*, [1995] 2 S.C.R. 187 (S.C.C.) in support of the argument that the agreement was a conditional sale. In that case, the Supreme Court of Canada held that any lease containing an option to purchase falls within the scope of *The Conditional Sales Act* R.S.N.S. 1989, c.84 regardless of whether the option is to be exercised at a nominal amount or at fair market value. However, that case turned on the provision in the Nova Scotia statute which defines a conditional sale as "any contract for the hiring of goods by which it is agreed that the hirer shall become, or have the option of becoming, the owner of the goods upon full compliance with the terms of the contract".

18 There is no qualifying provision in the Nova Scotia statute (as there is in the Manitoba statute) that the lease be intended as security. In Nova Scotia, if the lease contains an option to purchase, it falls within the definition of a conditional sale. Because of provincial variations in the treatment of leases, the *Mitsui* decision is not applicable in Manitoba.

19 Major, J. noted at para 15 of the majority decision in *Mitsui*:

The Act by its terms is applicable to lease which contain an option to purchase. This is different from the more modern Personal Property Security legislation currently enacted in many of the provinces. That legislation is based on art. 9 of the American *Uniform Commercial Code*, and deals with concepts such as "security interest" and "security agreement" which are foreign to the *Conditional Sales Act*. The issue of whether a lease is intended by way of security or whether it is in substance a security agreement arises under Personal Property Security legislation. Cases decided under personal Property Security legislation have no application to the case at bar as this ¶ appeal ¶ turns on the provisions of the somewhat antiquated *Conditional Sales Act*.

#### Conclusion

20 The ¶ appeal ¶ of the ¶ trustee ¶ is allowed. The bank shall have its costs of \$350.00 payable from the estate.

¶ Appeal allowed.

**TAB 3**

*Robert M. Hall*  
*Justice*

<b>SUMMARY OF CURRENT DOCUMENT</b>	
<b>Name of Issuing Party or Person:</b>	Hall, J.
<b>Date of Document:</b>	2002 06 21
<b>Summary of Order/Relief Sought or statement of purpose in filing:</b>	Decision in Interlocutory Application by Caterpillar Financial Services Limited seeking recovery of equipment in the possession of the court appointed Receiver of Hickman Equipment (1985) Limited
<b>Court Sub-File Number:</b>	9:02 (Decision in Interlocutory Application - See Sub-File 7:08)

DATE: 2002 06 21  
DOCKET: 2002 01 T 0352

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION**

**IN THE MATTER OF** a Court Ordered Receivership of Hickman Equipment (1985) Limited pursuant to Rule 25 of the *Rules of the Supreme Court, 1986* under the *Judicature Act, R.S.N. 1990, c. J-4*, as amended

**AND IN THE MATTER OF** the *Bankruptcy and Insolvency Act*, Chapter B-3 of the *Revised Statutes of Canada, 1985*, as amended

**AND IN THE MATTER OF** an Application by Caterpillar Financial Services Limited

Heard June 10, 2002

**DECISION OF HALL, J.**



**Background**

[1] Hickman Equipment (1985) Limited ("Hickman Equipment") was granted protection against its creditors by an Order of this Court dated February 7, 2002 ("Initial Order") made pursuant to the Companies' Creditors Arrangement Act, Chapter C-36, Revised Statutes of Canada, 1985, as amended. The plan of compromise or arrangement of Hickman Equipment did not come to fruition with the result that Hickman Equipment consented to an application by one of its creditors that a Receiving Order issue against it pursuant to the provisions of the Bankruptcy and Insolvency Act, Chapter B-3 of the Revised Statutes of Canada, 1985, as amended, and that a Court appointed receiver ("Receiver") be appointed pursuant to Rule 25 of the Rules of the Supreme Court of Newfoundland, 1986, under the Judicature Act, RSN, 1990 c. J-4 ("Receivership Order"). The Receivership Order was dated March 13, 2002 and filed March 14, 2002.

[2] In the Receivership Order PricewaterhouseCoopers Inc. was appointed Receiver over all the "Assets" of Hickman Equipment. The term "Assets" was defined in the Receivership Order as "all of the property, assets, entitlements and undertaking ... of Hickman Equipment wheresoever situate including without limitation all property assets and undertaking comprised in the term 'Property' as such term is defined in the Initial Order." "Property" was defined in the Initial Order to be "any present or future property, assets and undertaking of [Hickman Equipment], including any property held in whole or in part, directly or indirectly, by [Hickman Equipment] as principal, agent or nominee, beneficially or otherwise."

[3] By a further Order dated May 14, 2002 and filed May 16, 2002, this Court approved a plan for the disposition of Hickman Equipment by PricewaterhouseCoopers as Receiver ("Realization Plan") and authorized PricewaterhouseCoopers Inc. to proceed with the implementation of that Realization Plan. Under the Realization Plan the Receiver was authorized to enter into a contract with LVG Auctions providing for the sale of the heavy equipment assets and property of Hickman Equipment. That Order further provided that amounts received from the sale or otherwise from the Receiver's dealing with or recovery of any of the Assets, net of any cost chargeable against the Asset, stand in the place and stead of the Asset maintained by the Receiver, without prejudice to any claim being advanced against such proceeds as could have been advanced against the Asset, and any such claim against such of the Proceeds would be subject to the same priorities as claims against the Asset.

[4] Notwithstanding the provisions of the Receivership Order and the Order approving the Realization Plan, the Court entertained applications by various creditors claiming that certain Assets in which they claimed ownership or other interests ought not to be included in the Realization Plan. In addition to the obvious incentive of obtaining a possession claimed by the various creditors, there was an additional incentive for creditors to have goods in which they claimed an interest exempted from the Realization Plan so that the creditors claiming such goods might potentially avoid any liability for a *pro rata* sharing of the cost of the receivership in accordance with the Cost Allocation Plan also approved by this Court on May 14, 2002.

**Nature of Caterpillar Services Limited ("Caterpillar")**

[5] Caterpillar is in a somewhat different position from other parties seeking to obtain recovery of equipment from the Receiver in that Caterpillar did not have any direct dealing with Hickman Equipment as a lender nor did it take security from Hickman Equipment over the heavy equipment it now seeks to recover (being a 1998 Timberjack, Model 610 Forwarder, Serial Number 993395 (the "Equipment")). This is because, in February 2000, Caterpillar provided financing to Noble's Lumber Yard Limited ("Noble") in the amount of \$186,395.00. As security for this indebtedness Caterpillar and Noble entered into a Chattel Mortgage and Noble assigned the Equipment to Caterpillar. Caterpillar registered a financing statement in Noble's name as debtor pursuant to the provisions of the Personal Property Security Act, S.N. 1998, c. P.-7.1 (the "PPSA"). In February 2002, Caterpillar claims it became aware, for the first time, that Noble had traded in the Equipment to Hickman Equipment and that Noble had parted with the possession of the Equipment without the permission of Caterpillar, thereby breaching the terms of the Chattel Mortgage and entitling Caterpillar to immediate possession of the Equipment. Caterpillar wrote to Deloitte and Touche Inc., the Monitor of Hickman Equipment appointed pursuant to the Initial Order, and demanded immediate possession of the Equipment. The Monitor refused to surrender possession of the Equipment to Caterpillar with the result that to date the Equipment remains in the possession of the Receiver. Caterpillar therefore applied to this Court for an order directing the Receiver to deliver the Equipment to Caterpillar.

**Purpose of Recovery of Possession Applications**

[6] All parties to the present application understood that this Court would entertain the present application and others of a like nature outside of the procedures established under the Realization Plan (and the Claims Plan collateral to it) where the claimant/applicant could establish ownership to the equipment sought to be recovered such that it would be appropriate that such equipment be exempted from the provisions of the Realization Plan and the Costs Plan. Where it was not appropriate to exempt such equipment from the Realization Plan, the equipment and any proceeds realized from its deposition or sale thereof by the Receiver would become subject to the provisions of the Claims Plan authorized under paragraph 10 of the Receivership Order which provided:

"10. **THE COURT ORDERS** that ... the Receiver is hereby empowered ... generally to do all things which may be reasonably necessary in order to facilitate the development of a plan and procedural structure ... for the determination of the legal and equitable rights of all creditors and claimants including, without limitation:

...

- e) to conduct such investigations and analyses of the Assets as may in its judgment be necessary or advisable to enable it to develop a plan for the determination of the rights and entitlement of creditors to the Assets or parts thereof, and presents such plan and to apply to this Court for any direction or directions with respect to the preparation, development or implementation of such plan, including the allocation of costs of the entire process, (the 'Claims Plan')."

[7] A two-step process utilizing the provisions of ss. 81 and 81.1 and ss. 128 and 135 of the Bankruptcy and Insolvency Act and s. 68 of the PPSA to determine the interests of claimants in the Assets was approved.

[8] Therefore the issue for this present application was simply to determine whether it was appropriate to exempt the Equipment claimed by Caterpillar from the provisions of these plans.

**Caterpillar's Argument**

[9] The argument of Caterpillar essentially rested on two foundations as follows:

(1) That in its Chattel Mortgage Noble had covenanted as follows:

"The Mortgagor shall not use the property for hire and shall not, without the consent of the Mortgagee, part with the possession or control of the property, sell or transfer any interest in the property or remove or cause or permit the property to be removed longer than thirty (30) days from the district within which the Mortgagor maintains its head office on the date hereof as hereinbefore recited."; (emphasis added)

and

(2) That it had properly perfected its security over the Equipment pursuant to the PPSA and Noble, by reason of being in breach of the covenant not to part with the possession or control of the Equipment, had thereby entitled Caterpillar to recover possession of same. Because Caterpillar claimed its security was the first registered security over the Equipment, it asserted it had priority thereto and was entitled to possession thereof. In its oral argument Caterpillar essentially put forward the proposition that Hickman Equipment could not obtain any interest in the particular Equipment by Caterpillar because it was aware of Caterpillar's Chattel Mortgage at the time it took the Equipment in trade on a new piece of equipment and therefore had constructive knowledge of the specific prohibition against Noble parting with possession of the Equipment or selling it (as set out above).

[10] Under the PPSA Noble was clearly a "debtor" being indebted to Caterpillar. Section 34(2) of the PPSA deals with a debtor transferring rights in collateral notwithstanding a provision in a security agreement prohibiting such transfer or declaring the transfer to be default. The section provides:

"The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer by the debtor does not prejudice the rights of the secured party under the agreement or otherwise, including the right to treat a prohibited transfer as an act of default."

[11] Clearly this section envisions and permits Noble to transfer an interest in the Equipment to Hickman Equipment notwithstanding the specific provision of the Chattel Mortgage prohibiting its transfer. By reason of the Equipment being traded in for a new piece of equipment purchased from Hickman Equipment, Hickman Equipment acquired an interest therein. That interest fell within the definition of "Assets" as contained in the Receivership Order in that it was "property" or an "entitlement" of Hickman Equipment "as principal, agent or nominee, beneficially or otherwise".

[12] Counsel for Caterpillar claims that if Hickman Equipment did obtain an interest in the Equipment, it did so by fraud in that it arranged financing for Noble with GE Capital Corporation which financing was sufficient to pay for the new equipment and to pay out the outstanding balance owing by Noble to Caterpillar. However, GE Capital Corporation paid the full financing proceeds to Hickman Equipment and Hickman Equipment fraudulently did not pay off Caterpillar. In addition Hickman subsequently obtained floor financing for the very same piece of equipment from John Deere Credit Inc. for \$135,000.00. Because of these frauds by Hickman Equipment, counsel for Caterpillar contends that Hickman Equipment, being aware of the Caterpillar security interest by reason of its alleged proper and prior registration, received no interest in the property. Similarly because John Deere Credit Inc. received its potential interest in the Equipment as a result of the fraud of Hickman Equipment, it too received no interest in the Equipment.

### Decision

[13] The PPSA creates a whole new 'substance test' for characterizing transactions governed by the Act. Section 4 thereof states:

"4.(1) Subject to s. 5, this Act applies

(a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral; and

(b) without limiting the generality of paragraph (a), to a chattel mortgage, conditional sale, fixed charge, floating charge, pledge, trust indenture, trust receipt, an assignment, a consignment, lease, trust or transfer of chattel paper where they secure payment or performance of an obligation ..."

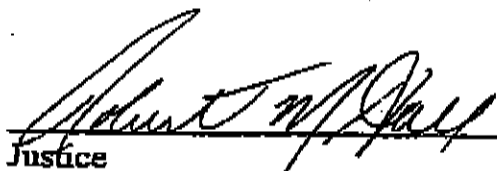
It is clear that the party in whom the title is actually vested and the form of the transaction are not to be relied upon in determining whether or not a security interest exists.

[14] In order to create an uniformity of approach the provisions of s. 34 of the PPSA set out in paragraph [10] hereof dealing with the rights of a debtor in collateral to be transferred notwithstanding provisions in a security agreement prohibiting that transfer, make logical sense.

[15] Section 52(4) of the PPSA reenforces this conclusion in that it provides that where a debtor's interest in collateral is transferred by the debtor without the consent of the secured party, then the secured party is required to register a financing statement in the name of the transferee not later than 15 days after acquiring knowledge of the name of the most recent transferee and the information required to register a financing change statement.

[16] All of these provisions make it abundantly clear that the old provisions of the pre-PPSA types of security dealing with prohibitions against sale, refinancing, or transfer of possession are no longer applicable. Therefore, even though Caterpillar had no direct dealings with Hickman Equipment with respect to the subject transactions, it has nonetheless become a creditor of Hickman Equipment by reason thereof. That being the case, the Equipment claimed by Caterpillar must logically become subject to the provisions of the Realization Plan, the Cost Allocation Plan and the Claims Plan.

[17] The application of Caterpillar is therefore denied and the Receiver is authorized to dispose of the Equipment in accordance with the provisions of the Realization Plan with the proceeds thereof being subject to the provisions of the Costs Allocation Plan and the Claims Plan.

  
Justice

James Smyth, Q.C., for Caterpillar Financial Services Limited.

Michael Harrington, Q.C., for John Deere Credit Inc.

Thomas Kendell, Q.C., for General Motors Acceptance Corporation.

Geoffrey Spencer for Canadian Imperial Bank of Commerce.

Michael Drover for Noble's Lumber Yard Limited.

Frederick Constantine for PricewaterhouseCoopers Inc.