SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person	Bombardier Capital Leasing Ltd. ("Bombardier")
Date of Document	5 February, 2003
Summary of Order/Relief Sought or Statement of Purpose in Filing	- Notice of Objection by Bombardier - Bombardier objects to the Interlocutory Application (*Inter Partes*) of CIBC Equipment Finance Ltd. ("CEFL") for an Order permitting amendment to CEFL's PPSA Registration after the date of Bankruptcy and Receivership.
Court Sub-File Number:	7:30

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 ("Hickman Equipment") pursuant to Rule 25 of the ***Rules of the 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***, Chapter B-3 of the Revised Statutes of Canada, 1985, as amended (the "BIA")

NOTICE OF OBJECTION

1. Bombardier objects to the Interlocutory Application (*Inter Partes*) of CEFL, Court Sub-File Number 7:30, for an Order permitting amendment to CEFL's PPSA Registration after the date of Bankruptcy and Receivership.

2. Bombardier has presented its security interest claim to PricewaterhouseCoopers Inc., the Receiver ("PWC"). On or about November 8, 2002, PWC issued its Final Determination of the Bombardier Claim and allowed the Bombardier Claim as a valid secured claim. A true copy of the Bombardier Final Determination is attached as Exhibit "NP #1" to the Affidavit of Nicolas Potvin filed in Bombardier's application bearing Court Sub-File Number 7:38 for a determination of its priority and entitlement, *vis-a-vis* other claimants, to the proceeds from the sale of the Bombardier Units referenced herein at paragraph 3 ("the Potvin Affidavit").

3. The Bombardier Claim dealt with the following five (5) units (the "Bombardier Units").

	Stock#	Model	Serial #
1.	N1854	John Deere 330LC Excavator	FF0330X080456
2.	N1858	John Deere 330LC Excavator	FF0330X080518
3.	C001547	John Deere 200LC Excavator	FF0200X050655
4.	C001491	John Deere 230LC Excavator	FF0230X060319
5.	N1603	John Deere 892E Excavator	FF892EX007239

4. Bombardier holds security for the indebtedness of Hickman Equipment with respect to the Bombardier Units. The sources and grounds for the security of Bombardier in relation to the indebtedness of Hickman Equipment to Bombardier are set forth in the Potvin Affidavit.

5. By Order of this Honourable Court granted February 8, 2002, under the *Company*

Creditors' Arrangement Act (the "CCAA Order") and, in particular, paragraph 4(c) thereof, "the right of any Person to commence or continue enforcement, realization or collection proceedings ... including, without limitation, the right of any Person to take any step in asserting, perfecting or registering any right or interest ..." was stayed for a period of 30 days or until further Order of this Court.

6. The 30 day stay period under the CCAA Order was continued by Order of this Honourable Court dated February 22, 2002.

7. By a Receiving Order dated March 13, 2002, and filed March 14, 2002 (the "Receiving Order") Hickman Equipment was adjudged bankrupt and PricewaterhouseCoopers Inc. (PWC) was appointed Trustee in bankruptcy in accordance with the BIA.

8. The stay period under the CCA Order was continued by Order of this Honourable Court in the Receiving Order and, in particular, paragraph 37 thereof.

9. On March 13, 2002, CEFL breached the stay provisions of the CCAA Order by filing PPSA registration to include Hickman Equipment as an Enterprise Debtor.

10. The Receiver disallowed the security of CEFL as it was determined by the Receiver that the CEFL PPSA registrations on March 13, 2002, were in breach of the stay, and thus invalid.

11. Bombardier requests that the Interlocutory Application (*Inter Partes*) of CEFL for an Order permitting amendment to CEFL's PPSA Registration after date of Bankruptcy and Receivership be dismissed.

DATED at St. John's, in the Province on Newfoundland and Labrador, this 5 day of February, 2003.

FRENCH, DUNNE & ASSOCIATES
Solicitors for Bombardier Capital Leasing Ltd.
whose address for service is:
Suite 122, Elizabeth Towers
100 Elizabeth Avenue
St. John's, NL
A1B 1S1

TO: The Supreme Court of Newfoundland and Labrador, Trial Division

AND TO: Patterson Palmer Law
Solicitors for PWC
For Posting on the PWC Website

AND TO: White, Ottenheimer & Baker
Solicitors for CEFL
Attention: Gregory W. Dickie

AND TO: Benson Myles
Solicitors for CIBC
Attention: Geoffrey L. Spencer

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Canadian Imperial Bank of Commerce
Date of Document:	February 4, 2003
Summary of Order/Relief Sought or statement of purpose in filing:	Memorandum of Fact and Law in response to the appeal by CIBC Equipment Finance Limited "CEFL" of the Receiver's/ Trustee's Final Determination for CEFL issued December 11, 2002 (the "CEFL Final Determination")
Court Sub-File Number	7:30

2002 01T 0352
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, Chapter C-36 of the Revised Statutes of Canada 1985, as amended

AND IN THE MATTER OF the plan of compromise or arrangement of Hickman Equipment (1985) Limited

AND IN THE MATTER OF 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

District of Newfoundland
Court No. 9733
Estate No. 100813

MEMORANDUM OF FACT AND LAW

BENSON • MYLES
Suite 900, Atlantic Place
P.O. Box 1538
St. John's, NF A1C 5N8
Attention: Geoffrey L. Spencer
Solicitors for Canadian Imperial Bank of Commerce

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, Chapter C-36 of the Revised Statutes of Canada 1985, as amended

AND IN THE MATTER OF the plan of compromise or arrangement of Hickman Equipment (1985) Limited

AND IN THE MATTER OF 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

District of Newfoundland
Court No. 9733
Estate No. 100813

MEMORANDUM OF FACT AND LAW

This memorandum is filed on behalf of Canadian Imperial Bank of Commerce ("CIBC") in response to an Interlocutory Application of CIBC Equipment Finance Limited ("CEFL") for consent to have registered the CEFL PPSA registrations on March 13, 2002 and for an Order requiring the Receiver to so reflect such registrations in the CEFL Final Determination.

FACTS

1. CIBC is a secured creditor of Hickman Equipment (1985) Limited ("Hickman Equipment") and is currently owed approximately $15,433,523.95, together with interest and costs.

2. CIBC holds the following security for the indebtedness of Hickman Equipment:

(a) General Assignment of Accounts, Etc., dated January 4, 1985 and registered at the Assignment of Book Debts Registry on January 16, 1985 as registration no. 16040 (continued under the PPSA on June 29, 2001 as registration no. 1063565).

(b) Floating Charge Debenture in the amount of $3,000,000.00 dated January 7, 1985 and registered at the Registry of Deeds on January 29, 1985 at Roll 77, Frame 70, as amended, supplemented and confirmed by the following:

(i) Supplemental Debenture dated February 19, 1990 and registered on February 22, 1990 at the Registry of Deeds at Roll 732, Frame 839, which added a fixed charge to the Debenture;

(ii) Supplemental Debenture dated April 17, 1997 and registered on April 30, 1997 at the Registry of Deeds at Roll 1521, Frame 1435, which increased the principal amount of the Debenture to $5,000,000.00;

(iii) Supplemental Debenture dated August 6, 1997 and registered August 29, 1997 at the Registry of Deeds at Roll 1564, Frame 2095, which increased the principal amount of the Debenture to $10,000,000;

(iv) Supplemental Debenture dated July 9, 1998 and registered at the Registry of Deeds on July 15, 1998 at Roll 1668, Frame 1748, which increased the principal amount of the Debenture to $20,000,000.00

(continued under the PPSA on November 29, 2001 as registration no. 1403243).

(c) General Security Agreement dated January 25, 2000 and registered under the PPSA on January 28, 2000 as registration no. 78490.

(d) Bank Act Security registered on October 26, 2000 as registration no. 01074579

(hereinafter collectively referred to as the "Security Documents").

3. As a result of the Security Documents, CIBC held a security interest in all of the undertaking, property and assets, both present and future, of Hickman Equipment as of January 7, 1985.

4. By Order of this Honourable Court granted on the 8th day of February, 2002 under the *Company Creditors' Arrangement Act* (the "CCAA Order") and, in particular, paragraph 4(c) thereof, "the right of any Person to commence or continue enforcement, realization or collection proceedings...including, without limitation, the right of any Person to take any step in asserting, perfecting or registering any right or interest..." was stayed for a period of 30 days or until further Order of this Court.

5. The 30 day stay period under the CCAA Order was continued by Order of this Honourable Court dated February 22, 2002.

6. By Order of this Honourable Court granted on the 13th day of March, 2002, it was ordered that PricewaterhouseCoopers Inc. be appointed Receiver of Hickman Equipment (the "Receiver").

7. By a Receiving Order (the "Receiving Order") granted on the 13th day of March, 2002, pursuant to the provisions of the BIA, Hickman Equipment was adjudged bankrupt and PricewaterhouseCoopers Inc. was appointed as its trustee in bankruptcy.

8. The stay period under the CCAA Order was continued by Order of this Honourable Court in the Receiving Order and, in particular, paragraph 37 thereof.

9. On March 13, 2002, CEFL breached the stay provisions of the CCAA Order by filing PPSA registrations (the "CEFL PPSA Registrations") naming Hickman Equipment as an enterprise debtor.

10. The Receiver refused to take notice of the CEFL PPSA Registrations on the basis that such registrations were in breach of the stay provisions of the CCAA Order.

ISSUE

11. Should CEFL be granted consent to have registered the CEFL PPSA Registrations on March 13, 2002, during the stay of proceedings provided by the CCAA Order and continued by the Receiving Order?

ARGUMENT

12. At the time that the CEFL PPSA Registrations were filed on March 13, 2002, all creditors of Hickman Equipment were subject to the stay of proceedings provided by the CCAA Order. The purpose of the stay of proceedings is to maintain the status quo amongst creditors. The British Columbia Supreme Court has described the rationale behind such stay of proceedings as follows:

> "The essence of the stay provision of the CCAA is to maintain a status quo amongst creditors and prevent their maneuvering for position. Rectification of security documents affecting priorities made after a CCAA stay would defeat that intent."
>
> **Sharp-Rite Technologies Ltd. (Re) (2000) B.C.J. NO. 477 (British Columbia Supreme Court) [Tab 1]**

13. It is submitted that if the Court were to consent to the CEFL PPSA Registrations, such consent would defeat the purpose of the CCAA stay provisions and would effectively allow CEFL to maneuver for position during the CCAA stay.

14. At the time of the CCAA Order, CEFL had not perfected any security interest over the property of Hickman Equipment.

15. Meanwhile, CIBC had perfected its security interest in all of the undertaking, property and assets, both present and future of Hickman Equipment, as of January 7, 1985.

16. In the event that CEFL is able to establish that it filed the CEFL PPSA Registrations within 15 days of obtaining knowledge of the disposition of property from Hickman Leasing Limited to Hickman Equipment, then CEFL would likely assert that its security interest takes priority over CIBC's prior registered security interest by virtue of s. 36(8) of the PPSA, which states as follows:

> "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."
>
> ***Personal Property Security Act*, S.N. 1998, c. P-7.1, as amended**

17. It is submitted that CIBC will be prejudiced if this Court should decide to consent to CEFL's PPSA Registrations despite the stay provisions of the CCAA. Any such lifting of the CCAA stay would have the effect of elevating CEFL from an unsecured creditor to a secured creditor that is potentially ahead of all other creditors of Hickman Equipment with respect to the property covered by the CEFL PPSA Registrations. CIBC submits that such an elevation in status during

the stay provisions of the CCAA is contrary to the spirit and intent of the CCAA and should not be permitted:

Sharp-Rite Technologies Ltd. (Re), Supra

18. In addition to the stay of proceedings provided by the CCAA, the rights of all creditors to the assets of Hickman Equipment were further crystallized as of March 13, 2002, the date of bankruptcy of Hickman Equipment. It would therefore be inappropriate to alter the status of any of the creditors at this stage.

Halpenny v. Paddon **(1982) 41 C.B.R. (N.S.) 16 (Supreme Court of Canada) [Tab 2]**

19. CIBC repeats the foregoing paragraphs and requests that CEFL's application for consent to have registered the CEFL PPSA Registrations be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 4th day of February, 2003.

BENSON•MYLES

Per: _____
Geoffrey L. Spencer
Solicitors for Canadian Imperial Bank of Commerce
whose address for service is:
Suite 900, Atlantic Place
P.O. Box 1538
St. John's, NF A1C 5N8

To:

ABN Amro Bank Canada/ ABN Amro Leasing & Tramac Equipment Ltd.	Aubrey L. Bonnell, Q.C./ Brian Winsor David Timms Brent Keenan	722-7521 905-331-2020
Bombardier Capital Leasing	John French	754-2701

Bombardier Capital Leasing & Culease Financial Services	John French	754-2701
Caterpillar Equipment	Colin D. Grant	905-849-5512
CAT Finance	James Smyth, Q.C./ Philip Warren	754-5662
Cedarrapids	Nathan Mixdorf/ Francoise Belzil	319-399-4760 780-413-3152
CIBC Equipment Finance Ltd./CIT Financial Ltd./	Gregory W. Dickie	722-9210
Contract Funding Group Inc.	Mark G. Klar	416-218-1831
Daimler Chrysler Financial Services/ Daimler Chrysler Capital Services/ Mercedes-Benz of Canada Inc.	Philip Buckingham/ Peter O'Flaherty Elaine Gray	722-4720 416-863-3527
Fabtek Corp.	Linc A. Rogers Rhodie E. Mercer, Q.C.	416-863-2653 726-5705
GE Capital	Harvey Chaiton Frederic Scalabrini	416-218-1849 905-319-4855
GMAC	Thomas R. Kendell, Q.C.	722-1763
Group Holdings Ltd./ Hickman Equipment/ Hickman Holdings Ltd.	Robert Stack/ Griffith D. Roberts	726-2992
Ingersoll-Rand Canada Inc.	R. Barry Learmonth, Q.C. Jonathan Wigley	739-8151 416-863-6275
John Deere Ltd./ John Deere Credit Inc.	Neil L. Jacobs/ Bruce Grant/ Maureen Ryan	722-4565
MTC Leasing Inc./ National Leasing Group Inc.	R. Paul Burgess	754-0915
ORIX Financial Services Canada Ltd.	Donald Yaeck	416-236-3010
Goodman Associates	Paul G. Goodman	902-425-3777
PricewaterhouseCoopers Inc.	Frederick Constantine Carl Holm	722-0483 902-429-8215

Royal Bank of Canada	Thomas O. Boyne, Q.C.	902-463-7500
TD Asset Finance Corp.	D. Bradford L. Wicks	753-5221
Wells Fargo Equipment Finance Co.	Richard B. Jones	416-361-6303

Indexed as:

Sharp-Rite Technologies Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36
AND IN THE MATTER OF the Company Act, R.S.B.C. 1996, C. 62
AND IN THE MATTER OF Sharp-Rite Technologies Ltd.

[2000] B.C.J. No. 477
2000 BCSC 414
Vancouver Registry No. A993276

British Columbia Supreme Court
Vancouver, British Columbia
Holmes J.
(In Chambers)

Heard: February 25, 2000.
Judgment: March 7, 2000.
(40 paras.)

Counsel:

Heather M.B. Ferris, for the company.
Ben J. Ingram, for RoyNat Inc.

¶ 1 **HOLMES J.**:— The Petitioner's application pursuant to the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), the Personal Property Security Act, R.S.B.C. 1996, c.-359 ("PPSA") and the inherent jurisdiction of the Court is for a declaration that a $2,000,000 Debenture executed January 7, 1998 by Sharp-Rite in favour of RoyNat [the "Debenture"] is unenforceable against the assets of Sharp-Rite.

¶ 2 Alternatively, the Petitioner seeks a declaration there are no monies owing under and secured by the Debenture and Sharp-Rite is entitled to its full release and discharge.

¶ 3 RoyNat opposes the application and seeks an order the issue as to the validity and enforceability of the Debenture be referred to the trial list.

THE ISSUES:

¶ 4 Sharp-Rite entered into a lease with RoyNat August 21, 1998 for the acquisition and financing of a Toshiba CNC Boring Machine ("the equipment"). RoyNat asserts the Debenture

is security generally for the performance by Sharp-Rite of its lease obligations.

¶ 5 The application raises questions of whether any money is owing under the Debenture and, if so, whether the Debenture is enforceable against Sharp-Rite's fixed or current assets. There is also an issue as to whether the Debenture may be rectified.

TRANSACTION:

¶ 6 Sharp-Rite acquired the equipment by lease from RoyNat in what appears from the documentation a typical commercial leasing arrangement which paralleled a loan secured by the impugned Debenture.

¶ 7 It appears a Debenture, envisaged as collateral security for the performance by Sharp-Rite of its lease obligations, was in error inappropriately documented as if it was a separate principal loan transaction.

¶ 8 Sharp-Rite's position is that the Debenture loan documents reflect an entirely fictitious transaction that is not related to the equipment lease arrangement. They have that appearance.

¶ 9 It is common ground no monies were ever advanced under the Debenture.

¶ 10 The Debenture states it is pursuant to an Offer Letter agreement of September 29, 1997 regarding the equipment acquisition. That letter refers to a lease arrangement and "a security deposit consisting of a subordinated charge on all fixed assets". [Emphasis added].

¶ 11 The Letter offers no explanation of the term "security deposit".

¶ 12 A reading of the Debenture clearly evidences a term loan of $2,000,000 to be funded with monthly interest payments at 14% commencing February 15, 1998 and principal repayment February 15, 2003.

¶ 13 RoyNat prepared all the documents in connection with the Debenture loan. They are consistent with the intent to represent a direct term loan. The documents include a Directors Resolution of Sharp-Rite accepting the terms of financing in the Offer Letter, borrowing $2,000,000 and the issuance of a Debenture, together with a Direction and Acknowledgement that authorizes the distribution of loan proceeds.

¶ 14 The Debenture provides the Offer Letter remains in effect except to the extent that it is inconsistent with the Debenture. [Affidavit of Jonni Fox sworn February 16, 2000; Ex. C, Clause 10].

ANALYSIS:

¶ 15 I do not accept the argument of counsel for RoyNat that this application may not properly be tried summarily in the CCAA proceeding and that it should be referred to the trial list with an order as to pleadings and discovery.

¶ 16 The matter concerns interpretation of the impugned Debenture and other contractual documents comprising the equipment lease and loan transaction.

¶ 17 The matter relates directly to issues in the CCAA; in particular, the status and priorities

to be accorded creditors.

¶ 18 Counsel could not suggest any documents bearing upon the issues that were not before the Court on this application. In my view, parol evidence is not admissible in respect of the interpretation of the relevant documents here in issue.

¶ 19 The Debenture contains no express language identifying an intention that it was to be collateral security to the lease transaction.

¶ 20 The Debenture language should be accorded a plain, literal and ordinary meaning, unless an absurdity would result. [The Law of Contract in Canada, G.H.L. Fridman, 3rd Ed. (Carswell, 1994) p. 454].

¶ 21 The "plain, literal and ordinary meaning" of the words of the Debenture are those of a direct term loan.

¶ 22 If an ambiguity does arise from the words of the contract documents, the contra proferentum principle of construction would apply against the lender RoyNat who authored all the relevant contract documents. [The Law of Contract in Canada, ibid, p. 454; Manulife Bank of Canada v. Conlin (1996), 139 D.L.R. (4th) 426 at pp. 432-433].

¶ 23 The Court of Appeal has on several occasions considered and applied the contra proferentum principle in rejecting the existence of an equitable mortgage or charge arising despite ambiguity in the contractual documents. [Royal Bank of Canada v. Mesa Estates Ltd. (1985), 70 B.C.L.R. 7 (C.A.); Bank of Montreal v. Orr (1986), 4 B.C.L.R. (2d) 1 (C.A.); Bank of Montreal v. Aitken (1989), 38 B.C.L.R. (2d) 377 (S.C.) affirmed (1990), 52 B.C.L.R. (2d) 211 (C.A.)].

¶ 24 The Lease Agreement on the equipment postdated by some seven months the creation of the Debenture. The lease contains an Entire Agreement clause, and is devoid of reference to the existence of additional security by way of Debenture.

¶ 25 It is clear no term loan was ever funded under the Debenture, no monthly interest payments were made, and that there is no balance outstanding.

¶ 26 RoyNat, prior to this application, never requested nor required an amendment of the Debenture to reflect a security for indebtedness and obligation of Sharp-Rite either generally or specifically in regard to its obligation to RoyNat under the lease.

¶ 27 In the alternative any Debenture security that may be said to arise from the provisions of the Offer Letter must be interpreted as intending to charge fixed assets but registration was made in respect of current assets.

¶ 28 The Debenture's registration against current assets is unenforceable and a new registration now prevented by virtue of the CCAA stay.

¶ 29 I agree with counsel for the Petitioner that the extent of "implied terms" that counsel for RoyNat suggests should be read into the Debenture document would change that document completely. It would amount to rewriting the Debenture.

¶ 30 RoyNat argues it is entitled to an equitable charge because the Offer Letter contained a promise by Sharp-Rite it would provide a charge on its fixed assets. I do not consider the Offer Letter creates a charge. It does not provide for any of the terms of a security document.

¶ 31 RoyNat argues that Sharp-Rite should be estopped from challenging the validity of the Debenture. The declaration sought however is only that there is nothing owing under the Debenture. It is sought in the context of a reorganization under the protection of a stay in the CCAA. It is necessary to a determination of voting rights on any proposal to be advanced and it affects rights of the other creditors.

¶ 32 I do not see how an alleged debtor can be estopped from seeking to know what debt, if any, it owes.

¶ 33 I am compelled to the view that the ambiguity RoyNat seeks to raise is not an ambiguity arising from a reading of the words of the document. The words of the document are clear. The ambiguity must be that the entire Debenture document package was chosen inappropriately, and presumably in error, to effect a limited type of collateral Debenture security related to the Lease Agreement.

¶ 34 The Debenture security of Sharp-Rite was defective and impaired at the time the stay under the CCAA was granted. Any form of rectification elevating the registration from an unsecured to a secured claim during the stay would affect the status and entitlement of other creditors during the stay period. [Halpenny Estate v. Context Systems Inc. (Trustee of), [1982] 1 S.C.R. 559, 133 D.L.R. (3d) 257; Re Shipman Boxboards Ltd., [1942] O.R. 118 (H.C.)].

¶ 35 The essence of the stay provision of the CCAA is to maintain a status quo amongst creditors and prevent their manoeuvring for position. Rectification of security documents affecting priorities made after a CCAA stay would defeat that intent.

¶ 36 In any event a basis for rectification of the lending documents by RoyNat appears tenuous. The terms of the agreement between Sharp-Rite and RoyNat derives from the Offer Letter and the Debenture appears contrary to those terms.

¶ 37 It is not contracts that are rectified. Instruments made pursuant to contracts may be rectified. [Juliar v. Attorney General of Canada, [1999] O.J. No. 3554].

¶ 38 There is no evidence to suggest there was ever a contract by which a charge against current assets, as opposed to fixed assets, would be granted. RoyNat is entirely without foundation to seek rectification to have the Debenture cover current assets or have its registration rectified to that result.

¶ 39 I do not however find it necessary to determine whether grounds existed that would have permitted rectification of the Debenture prior to the CCAA stay, or that there might be a possibility of a future rectification. I do find it is inappropriate to apply for a determination as to rectification of a security document during the currency of the CCAA proceeding.

¶ 40 The Petitioner has shown entitlement to a declaration there are no monies owing under and secured by the Debenture pursuant to Clause 14 of Schedule "A" and it is therefore entitled to a full release and discharge of the Debenture.

HOLMES J.

QL Update: 20000314
cp/i/qldrk/qltlm

HALPENNY v. PADDON

Supreme Court of Canada, Laskin C.J.C., Beetz, Estey, McIntyre and Chouinard JJ.

Heard — May 13 and 14, 1981.
Judgment — April 5, 1982.

Secured creditors — Kinds of security — Bonds and debentures — Late registrations — Petition filed before registration of debenture — Application for late registration more than three years after execution of debenture — Application for late registration refused — Effect of "dating back" provisions of Bankruptcy Act.

The sole executor in the appellant estate improperly withdrew moneys from the estate and caused them to be advanced to a company of which he was the president and principal or sole shareholder. The loan was made without the knowledge or consent of the beneficiaries of the estate. A debenture was executed in 1975 by the company at or about the time the moneys were improperly advanced by the estate but the debenture was never registered under the Corporations Securities Registration Act ("C.S.R.A.") and the debenture was not in registrable form. No payments were made under the debenture and before any of the facts came to light, the executor of the estate disappeared and was found dead. Letters of administration were taken out. A petition for a receiving order against the company was filed in 1978. In 1979 the administrators brought a motion for an order for late registration of the debenture under s. 7 of the C.S.R.A. The application for late registration was refused and a receiving order was made. On appeal two issues were before the court: whether s. 7 of the C.S.R.A. empowered the court, in the circumstances, to issue an order extending the time for registering the debenture and whether s. 75 of the Bankruptcy Act operated so as to enable the court to make an order under s. 7 of the C.S.R.A. after the effective date of a receiving order, i.e., the date of the petition in bankruptcy.

Held—Appeal dismissed.

From the point of view of the appellant administrators, the fraud, negligence or inadvertence of the deceased executor was a "sufficient cause" within the meaning of s. 7(1) of the C.S.R.A. for a failure to register. This was different from a case where a party first deliberately concealed a debenture and later sought relief from a court. There was nothing in s. 7(1) of the C.S.R.A. to bar the court from ordering the extension of time, subject to such terms and conditions as might be appropriate and as the statute authorized.

The failure to register was not a "transaction" within the meaning of s. 75 of the Bankruptcy Act separate and distinct from the act of the issuance of the debenture. The registration to be effected under s. 7(1) was likewise not a new "transaction" and, even if it were, it did not meet three of the four tests or standards of s. 75(1). To qualify under s. 75 the appellant must take the "transaction" to be that which occurred in 1975, when the debenture was issued, so as to escape the fatality of notice of the bankruptcy of the debtor company under s. 75(1). The transaction, the debenture, was not invalidated by the Bankruptcy Act, but the preservation against invalidation must be directed to the act of late registration which would occur after the bankruptcy and the concurrent appointment of the trustee.

The corporation was without assets as of the date of his filing of the petition for a receiving order; effective that date, the assets were vested in the trustee in bankruptcy. The rights of the creditors in those assets were crystallized on that date. Section 75 of the Bankruptcy Act could not arrest the dating back of the receiving order under s. 50(4) of the Bankruptcy Act so as to make effective an order made under s. 7 of the C.S.R.A. Section 75(1) did not operate in these circumstances to preserve a right or authority to register a debenture pursuant to s. 7 of the C.S.R.A. or otherwise so as to cause the debenture, when so registered, to be binding upon the trustee in bankruptcy and so as thereby to elevate the unsecured claim of the administrators to a secured claim in priority to the claims of existing creditors at the time of registration.

Cases considered

Abraham (S.) & Sons, Re, [1902] 1 Ch. 695 — referred to.

Heather's House of Fashion Inc., Re (1977), 15 O.R. (2d) 73, 23 C.B.R. (N.S.) 161, 1 B.L.R. 1, 75 D.L.R. (3d) 9 (C.A.) — referred to.

Kris Cruisers Ltd., Re [1949] Ch. 138, [1948] 2 All E.R. 1105 — distinguished.

Pic-N-Save Ltd., Re, [1973] 3 O.R. 200, 19 C.B.R. (N.S.) 42, 36 D.L.R. (3d) 334 (C.A.) — referred to.

Statutes considered

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 50(4), 75.

Corporations Securities Registration Act, R.S.O. 1970, c. 88 [now R.S.O. 1980, c. 90], ss. 1(*f*), 2(1), (3), 7.

[Note up with 3 Can. Abr. (2d) *Bankruptcy*, XI, 2, o.]

APPEAL from order, 8 B.L.R. 230, refusing late registration of debenture in view of intervening bankruptcy.

E.A. Cherniak, Q.C., for appellant.

F. Bennett, for respondent.

5th April 1982. The judgment of the court was delivered by

ESTEY J.:—This appeal [from 8 B.L.R. 230] raises the interrelationship of the Corporation Securities Registration Act, R.S.O. 1970, c. 88 [now R.S.O. 1980, c. 90], and the Bankruptcy Act, R.S.C. 1970, c. B-3, where bankruptcy proceedings arise before registration of a corporate debenture is completed. The facts are simple but their chronology is most important. A sole executor in the appellant estate improperly withdrew moneys from the estate and caused them to be advanced to a company of which the sole executor was the president and presumably the principal or sole stockholder. The loan was made without the knowledge or consent of the beneficiaries of the estate. A debenture was ex-

ecuted by the debtor company on or about the time the moneys were improperly advanced by the estate, but the debenture was never registered under the Corporation Securities Registration Act, which for convenience is hereafter referred to as the C.S.R.A. Furthermore, the debenture was not in registrable form.

No payments were ever made under the debenture and before any of the facts came to light the executor of the appellant estate disappeared and was found dead. Letters of administration were taken out and the administrators in due course applied to the court for an order under s. 7 of the C.S.R.A. for the late registration of the debenture. The following is a chronology of these events.

(a) 26th November 1975: date of debenture of corporate debtor.

(b) 30th April 1976: resolution of the board of the corporate debtor authorizing the debt.

(c) 23rd November 1978: petition in bankruptcy against corporate debtor.

(d) 10th January 1979: motion by appellants for order for late registration of debenture under C.S.R.A.

(e) 30th January 1979: order for late registration refused; order dated 31st January 1979.

(f) 30th January 1979: after motion refused, petition in bankruptcy heard and granted (date of order not in the record).

It would appear that the motion for an order for the late registration of the debenture was adjourned in order to bring it on for hearing in bankruptcy court by Anderson J., who was scheduled to hear the petition in bankruptcy against the debtor company on 30th January 1979. Hence the application and the petition were heard by Anderson J. in that order on 30th January. It would appear that while the formal order dismissing the application for late filing is dated 31st January, in fact oral reasons were given at the conclusion of the hearing and this order was dismissed prior to the receiving order, which was apparently made orally on 30th January. [See (sub nom. *Re Halpenny; Re Context Systems Inc.)* 29 C.B.R. (N.S.) 159, 6 B.L.R. 1].

Two principal issues are raised in this appeal:

1. Does s. 7 of the C.S.R.A. empower the court

(a) in the circumstances of this appeal to issue an order extending the time for registering the debenture;

(b) to make an order extending time for registration when the effect would be to give the appellant priority over creditors whose claims arose in the period between the expiry of the time for registration and the application for an order extending the period for registration; and,

(c) to rectify omissions in the form of the debenture so as to put the debenture in registrable form;

2. Does s. 75 of the Bankruptcy Act operate so as to enable the court to make an effective order under s. 7 of the C.S.R.A., as above, notwithstanding the fact that such order would be made after the effective date of a receiving order, that is to say, the date of the petition in bankruptcy?

The learned trial judge refused the application on two grounds: Firstly, [p. 166]:

> If it [the order permitting late filing] affects the rights of the creditors and affects the rights of the holder as against the creditors it does so adversely, and it would be an improper exercise of discretion to grant relief to the applicant which had that result. If it does not affect those rights the order has no effect and the discretion ought not to be exercised to make a bootless order.

Secondly, the trial court interpreted s. 7(1) of the C.S.R.A. as limiting the circumstances in which such an order might be made by the application of the interpretative rule of ejusdem generis to the expression "any omission or misstatement in any document filed under this Act was accidental or due to inadvertance or impossibility or other sufficient cause". The court found no such circumstance here arising. The Court of Appeal, speaking through Dubin J.A., did not agree [8 B.L.R. at p. 233] that s. 7, where the words "other sufficient cause" are employed, should be read ejusdem generis with the words "accidental, inadvertence or impossibility". The Court of Appeal further disagreed with the judge of first instance that an order for extension of time to register should not be granted where there were creditors in existence at the time of the application for such an order. The Court of Appeal, however, agreed in the result with the trial court for two reasons:

(a) As regards s. 7 of the provincial Act [p. 235]:

> Where the evidence discloses that the instrument was not registered so that its existence would be concealed from the public, an application to extend the time for registration should be dismissed.

(b) Because a petition in bankruptcy had been filed prior to

the application for the order of extension, the effect of the receiving order, relating back as it does to the date of the petition, was to remove from the debtor and to transfer from it to the trustee all the assets of the debtor.

The Court of Appeal therfore concluded [p. 236]:

> If an order were made to extend the time for registration, the instrument would be registered at a time when there was no property in the bankrupt upon which it could give a valid security.

I turn now to the first submission with reference to the authority of the court under s. 7(1) of the C.S.R.A. to make an order extending the time for registration of the debenture in question.

As stated, s. 2(1) and (3) of the C.S.R.A. require the registration of a debenture within 30 days of execution to be effective against subsequent creditors, which include a bankruptcy trustee (s. 1(*f*)). Section 7(1) of the Act then makes provision for late registration:

> 7.—(1) Subject to the rights of other persons accrued by reason of any omission or misstatement referred to in this section, a judge of the Supreme Court, on being satisfied that the omission to file an instrument or affidavit within the time prescribed under this Act was accidental or due to inadvertence or impossibility or other sufficient cause, may, in his discretion, extend the time for registration, or order the omission or misstatement to be rectified on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter or thing, as he thinks fit to direct.

Setting to one side for the moment the opening phrase of the subsection, it will be seen that the authority to extend the time for registration may be exercised "in his discretion" when the judge is "satisfied that the omission to file . . . was accidental or due to inadvertence or impossibility, or other sufficient cause". Plainly this is not a case "accident" or "inadvertence" or "impossibility". The words "other sufficient cause" must, however, be accorded a meaning and a purpose for inclusion in the sentence. The words preceding this expression do not constitute a class and as Dubin J.A. said, speaking for the Court of Appeal: "This is not a case for the application of the ejusdem generis rule". In this connection see *Re S. Abrahams & Sons*, [1902] 1 Ch. 695 at 699. But that, in my view, does not end the matter. The failure to register was assumed by the judges in both courts below to be the result of a positive decision "because of the adverse effect it would have on the credit of the company". No doubt the decision also reflected

the desire of the sole surviving executor to keep the knowledge of the advances from the estate assets to his company from the beneficiaries of the estate. The executor had at least three legal personalities at the time in question: he was the sole surviving executor, the estate solicitor, and the president of the debtor company. In the latter capacity he was in opposite interest to the beneficiaries of the estate. He was in breach of his duty in his office as executor. His failure to register or to cause his company to register was a positive action in all the circumstances, no doubt carefully deliberated. In my view, this cause was of a kind quite different from the other enumerated causes in the subsection and is included in the expression "other sufficient cause".

However, it is said by the appellants and indeed by the Court of Appeal that the judicial discretion authorized in s. 7(1) should not be exercised where failure to register was due to a desire to conceal the existence of the security from the public. In support is cited *Re Kris Cruisers Ltd.*, [1949] Ch. 138, [1948] 2 All E.R. 1105, where Vaisey J. said at pp. 141-42 that such an order would be appropriate to relieve a mortgagee of the consequences of his own negligence:

> . . . provided that the court is satisfied that the omission to register was not an omission with any fraudulent intention but was, in the words of the Act, "due to inadvertence or to some other sufficient cause" . . . That seems to me to be inadvertence, inattention, carelessness, but very far removed from the kind of case in which this relief should be refused—a typical case of which would be obviously where there was some fraudulent or improper motive in withholding the knowledge of the existence of the charge from the public, to whom the registration of it would have given the appropriate notice.

There the court was concerned with carelessness of the corporate officers and their legal advisers. The illustrations mentioned in the quotation above are ex gratia comments on the reach of a similar but not identical provision to that found in s. 7(1). Here we are concerned with an estate whose agent acted against the interests of the estate and in his own interests; a breach of his duty as an officer appointed by the court to administer the assets of the deceased. The beneficiaries are directly affected. While, as regards Mitches, the failure to register is unexplained, as regards the beneficiaries there is an explanation which appears in the record. That explanation is that the existence of the debenture was unknown to the beneficiaries until after Mitches' death, at which time the present proceedings were begun. From the point of view

of the appellants, the fraud, negligence or inadvertence of Mitches is a "sufficient cause" for a failure to register. This is completely different from a case where a party first deliberately conceals a debenture, and then later seeks relief from a court. No doubt that would be the sort of case Vaisey J. was contemplating in the extract set out above.

The estate represented by the late executor was, of course, defenceless to the depradations of the personal representative at the time of his wrongdoing. The beneficiaries had no part in the appointment process of the wrongdoing executor, who by an accident of fate became the sole surviving executor. The deceased selected him (and another who died) and the court appointed him to office by grant of letters probate. The substantive interest in the estate is that held by the beneficiaries. They are powerless in the selection procedure and virtually powerless in the appointment procedure of the personal representative of the deceased, the executors of the estate. They are, however, at considerable risk in practice and with little authority in the administration of the affairs of the estate. It would be anomolous if a consideration of their plight were to be omitted from the determination of the exercise of discretion under s. 7.

The wrongdoer's appointment was revoked and the probate court appointed the appellants in his place. They now seek the exercise of the court's discretion to permit late registration of this security. I can see nothing in s. 7(1) to bar a court from ordering the extension of time subject to such terms and conditions as may be appropriate and as the statute authorizes. Such an order is, of course, made in any event under the umbrella of the opening words of the subsection.

The learned judge of first instance declined to make the requested order for the further reason that such an order would either prejudice existing creditors of the company or be ineffective. His comments have been quoted above. The Court of Appeal took a different view. The existence of other creditors' claims which would be prejudiced by the priority accorded the debenture (other than those whose rights accrued by reason of the omission to register) should not be a bar to the exercise of discretion to extend. This the Court of Appeal said is so because "such [other] creditors should not be in a better position than they would have been if the registration had been made on time". With this I respectfully agree providing the court is there referring to

creditors' claims arising after the late registration is effected. This is so because the opening of s. 7(1) makes the extension order "subject to the rights of other persons accrued by reason of any omission or misstatement referred to in this section"; i.e., the failure to register the debenture within the 30-day period. On this point the judge of first instance took the opposite view, doubting that these words afforded any protection to creditors and fearing that the attachment of any conditions, as the section invites the court to do, would be [p. 167] "merely . . . the deferral of the problem which is now before me". With the greatest respect, I come to a different conclusion with reference to this aspect of s. 7(1).

The effect of all this, of course, is but to qualify the circumstances here encountered for the exercise of statutory discretion. This, however, is all subject to the conclusion of the second issue, the operation in these proceedings of the Bankruptcy Act.

If the second ground for judgment in the Court of Appeal is well founded, there is nothing that a court may properly or effectively do under s. 7 of the C.S.R.A.

The petition in bankruptcy preceded the application for extension of time under the C.S.R.A. by several months. By the operation of s. 50(4) of the Bankruptcy Act:

> (4) The bankruptcy shall be deemed to have relation back to and to commence at the time of the filing of the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

The debtor from that date forward (23rd November 1978) was without assets, the assets being with effect that date vested in the trustee under the Bankruptcy Act. The rights of the creditors in these assets thus were crystallized on that date. Dubin J.A. put it this way in the Court of Appeal [p. 236]:

> A petition in bankruptcy was filed prior to the date of the application for an extension of time to register the instrument. Following the dismissal of the application to extend the time for registration, a receiving order was made, and the receiving order is not under appeal. If an order were made to extend the time for registration, the instrument would be registered at a time when there was no property in the bankrupt upon which it could give a valid security.

The Court of Appeal did not expressly refer to s. 75 of the Bankruptcy Act, which the appellant says meets the situation otherwise arising as a result of s. 50(4) of that Act. The appellant

goes on to conclude that s. 7(1) of the C.S.R.A. remains available to the court for the authorization of late registration of the debenture. Section 75(1) of the Bankruptcy Act provides as follows:

> 75. (1) Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and with respect to the avoidance of certain settlements and preferences, nothing in this Act invalidates, in the case of a bankruptcy
>
> (*a*) any payment by the bankrupt to any of his creditors,
>
> (*b*) any payment or delivery to the bankrupt,
>
> (*c*) any conveyance or transfer by the bankrupt for adequate valuable consideration, or
>
> (*d*) any contract, dealing, or transaction by or with the bankrupt for adequate valuable consideration,
>
> if both the following conditions are complied with, namely:
>
> (*e*) that the payment, delivery, conveyance, assignment, transfer, contract, dealing, or transaction, as the case may be, is in good faith and takes place before the date of the bankruptcy, and
>
> (*f*) that the person, other than the debtor, to, by, or with whom the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction was made, executed or entered into, has not at the time of the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction, notice of any act of bankruptcy committed by the bankrupt.

Omitting the surplusage, the subsection reads as regards the situation now before this Court as follows:

> . . . nothing in this Act invalidates . . . any . . . transaction . . . by . . . the bankrupt for adequate valuable consideration if . . . the . . . transaction . . . is in good faith and takes place before the date of bankruptcy, and . . . the person . . . with whom the . . . transaction was made . . . has not at the time of the transaction, notice of any act of bankruptcy.

Here the bankrupt received money from the appellant estate and issued in return therefor a debenture. Though that instrument was not registered, nor indeed was it in registrable form, it is not in law an invalid or unenforceable instrument as against the issuer by reason of non-registration. In the limited record in this appeal it appears to be valid as against the debtor company. It is not, as we have seen above, binding on creditors of the issuing company. Section 75 does not affect this situation. It simply provides that the Bankruptcy Act shall not by any provision thereof invalidate the debenture as such if (as is the case here) it was issued in a transaction in good faith prior to the bankruptcy and without notice

of any act of bankruptcy having been committed by the debenture issuer. All that refers to the transaction in which the debtor company borrowed money from the appellant and issued, as evidence of the debt, the debenture which included a floating charge against the assets of the company. None of that transaction is, by reason of s. 75, invalidated by the Bankruptcy Act.

However, the debenture was not registered and by applicable provincial law it was not effective as against creditors (s. 2(1) and (3) of the C.S.R.A.). The term "creditor", by s. 1(*f*) of the same statute, includes a trustee under the Bankruptcy Act. There is, therefore, nothing "to invalidate" in the words of s. 75(1) by reason of the failure to register the debenture. Provincial law had already precluded any third party effect in the debenture. The Bankruptcy Act is left with nothing to engage under s. 75. The estate remains an unsecured creditor of the company under the pending bankruptcy, its status wholly unaffected by s. 75(1).

The failure to register the debenture created the unsecured status of the appellant and s. 75(1) has no affirmative effect which might improve or elevate that status to one of a secured creditor, or even to the stage where an order under s. 7 of the provincial Act might have that effect against existing creditors. The failure to register is not a "transaction" separate and distinct from the act of the issuance of the debenture. The registration to be effected under s. 7(1) is likewise not a new "transaction" and even if it were it does not meet three of the four tests, or standards, of s. 75(1). Firstly, there is no independent "valuable consideration" in support of the alleged "transaction". Secondly, it did not take place before the bankruptcy. Thirdly, the appellant is not effecting this new "transaction" without notice of any act of bankruptcy on the part of the issuing company. Whatever s. 75 may be thought to contemplate, it does not include such an artificial concept of "transaction" and certainly not a transaction where the party to it, who now claims the protection of s. 75, had full knowledge of the bankruptcy of the issuer. To qualify under s. 75 the appellant must take the "transaction" to be that which occurred in 1975 when the debenture was issued so as to escape the fatality of notice of the bankruptcy of the debtor company under s. 75(1); but that transaction, the debenture, is not invalidated by the Bankruptcy Act. However, the preservation against invalidation must be directed to the act of late registration and not to the act of issuance of the debenture, which would occur entirely after the bankruptcy and the concurrent appointment of the trustee.

Section 75 cannot, in my view, be seen to arrest in some manner the dating back of the receiving order under s. 50(4) so as to make effective an order made under s. 7(3) of the provincial Act. Dubin J.A. must be taken to allude to this when he observed [p. 237]: "There is no authority to extend the time for registration nunc pro tunc". The Ontario Court of Appeal dealt with some aspect of the Bankruptcy Act and s. 7 of the C.S.R.A. in *Re Heather's House of Fashion Inc.* (1977), 15 O.R. (2d) 73, 23 C.B.R. (N.S.) 161, 1 B.L.R. 1, 75 D.L.R. (3d) 9. While that case is fundamentally different from the instant case in that the petition in bankruptcy was not filed until after the registration of the debenture, it does contain helpful observations about the interrelationship of the two statutes here under consideration, and explains in part the judgment of the Court of Appeal in this appeal. For example, Dubin J.A. for the court in *Heather's*, supra, stated, at p. 165:

> This court held that in light of s. 2(3), where the petition in bankruptcy preceded the date of registration of the debenture, the debenture was void as against the unsecured creditors who became such prior to registration. In arriving at that conclusion, the court was content to merely state the words of s. 2(3) without any extended reasons. However, in the *Re Pic-N-Save Ltd.* case [[1973] 3 O.R. 200, 19 C.B.R. (N.S.) 42, 36 D.L.R. (3d) 334 (C.A.)], by reason of the receiving order relating back to the date of the filing of the petition as provided for in the Bankruptcy Act, R.S.C. 1970, c. B-3, the property of the debtor had vested in the trustee in bankruptcy before the debenture had been registered. Therefore, in the *Re Pic-N-Save Ltd.* case at the date of registration there was no property in the bankrupt upon which he could give a valid security.

In *Re Pic-N-Save Ltd.*, supra, the petition, as here, was filed before the registration of the debenture. The trial judge held that the debenture was valid as against the trustee in bankruptcy by reason of s. 75 and notwithstanding s. 50(4). With that the Court of Appeal (p. 50) appears to have disagreed. Houlden J. (as he then was), sitting in bankruptcy court, applied s. 75 in the protection of the debenture as follows (p. 49):

> If s. 75(1) is interpreted in the manner that I have suggested, then the debenture received by the bank falls within its protection. The debenture was given for adequate valuable consideration. It was received by the bank prior to the date of the receiving order, and the bank had no notice of any act of bankruptcy committed by the bankrupt. In my opinion, s. 75(1) was designed to protect a bona fide transaction such as the present one.

There, of course, the debenture was registered within the 30-day period and before the receiving order was issued. In our case the registration could be effected only after an extension order and, at the earliest, two months after the petition was filed. The judgment in the Court of Appeal in *Pic-N-Save*, supra, is very difficult to reconcile with that of the trial judge therein although the appeal was dismissed. Insofar as it purports to relate to the factual sequence in this appeal, I am content to leave *Pic-N-Save* as explained by Dubin J.A. in *Heather's*, supra, and in the judgment of the Court of Appeal herein.

I therefore would on this ground dismiss the application, as s. 75(1) does not operate in these circumstances to preserve a right or authority to register a debenture pursuant to s. 7 of the provincial Act or otherwise so as to cause the debenture, when so registered, to be binding upon the trustee in bankruptcy and thereby elevate the unsecured claim of the appellant to a secured claim in priority to existing creditors at the time of registration.

This disposes of all the issues which have arisen in these proceedings except that relating to the rectification of the deficiencies in the form of the debenture itself. This matter was not dealt with in either of the courts below because, by reason of the order of dismissal, the problem was rendered academic. For the same reason I make no comment with reference to the position of the court in such a circumstance.

In all the circumstances arising in this proceeding, I would take the lead of the courts below and make no order as to costs except that the respondent may recover his costs throughout from the estate of Context Systems Inc., the bankrupt.

Appeal dismissed.

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Canadian Imperial Bank of Commerce
Date of Document:	February 4, 2003
Summary of Order/Relief Sought or statement of purpose in filing:	Affidavit of Jennifer Lee in response to the appeal by CIBC Equipment Finance Limited "CEFL" of the Receiver's/ Trustee's Final Determination for CEFL issued December 11, 2002 (the "CEFL Final Determination")
Court Sub-File Number	7:30

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, Chapter C-36 of the Revised Statutes of Canada 1985, as amended

AND IN THE MATTER OF the plan of compromise or arrangement of Hickman Equipment (1985) Limited

AND IN THE MATTER OF 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

District of Newfoundland
Court No. 9733
Estate No. 100813

AFFIDAVIT OF JENNIFER LEE

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Court No. 9733
Estate No. 100813

AFFIDAVIT

I, Jennifer Lee, of St. John's, in the Province of Newfoundland and Labrador, make oath and state as follows:

1. That I am an Associate, Commercial Credit with Canadian Imperial Bank of Commerce ("CIBC");

2. That I have knowledge of all of the circumstances referred to herein except as otherwise stated;

3. That CIBC is a secured creditor of Hickman Equipment and currently has a claim in the bankrupt estate of Hickman Equipment in the amount of $15,433,523.95, together with interest and costs. A copy of CIBC's Proof of Claim is attached as Exhibit "A" to my affidavit filed in CIBC's appeal of the Trustee's Final Determination, bearing subfile #7:28A ("my Appeal Affidavit");

4. That CIBC holds the following security for the indebtedness of Hickman Equipment:

   (a) General Assignment of Accounts, etc., dated January 4, 1985 and registered at the Assignment of Book Debts Registry on January 16, 1985 as registration no. 16040 (continued under the PPSA on June 29, 2001 as registration no. 1063565) (a copy of which is attached as Exhibit "B" to my Appeal Affidavit).

   (b) Floating Charge Debenture in the amount of $3,000,000.00 dated January 7, 1985 and registered at the Registry of Deeds on January 29, 1985 at Roll 77, Frame 70 (a copy of which is attached as Exhibit "C" to my Appeal Affidavit), as amended, supplemented and confirmed by the following:

      (i) Supplemental Debenture dated February 19, 1990 and registered on February 22, 1990 at the Registry of Deeds at Roll 732, Frame 839, which added a fixed charge to the Debenture (a copy of which is attached as Exhibit "D" to my Appeal Affidavit);

      (ii) Supplemental Debenture dated April 17, 1997 and registered on April 30, 1997 at the Registry of Deeds at Roll 1521, Frame 1435,

which increased the principal amount of the Debenture to $5,000,000.00 (a copy of which is attached as Exhibit "E" to my Appeal Affidavit);

(iii) Supplemental Debenture dated August 6, 1997 and registered August 29, 1997 at the Registry of Deeds at Roll 1564, Frame 2095, which increased the principal amount of the Debenture to $10,000,000 (a copy of which is attached as Exhibit "F" to my Appeal Affidavit);

(iv) Supplemental Debenture dated July 9, 1998 and registered at the Registry of Deeds on July 15, 1998 at Roll 1668, Frame 1748, which increased the principal amount of the Debenture to $20,000,000.00 (a copy of which is attached as Exhibit "G" to my Appeal Affidavit)

(continued under the PPSA on November 29, 2001 as registration no. 1403243).

(c) General Security Agreement dated January 25, 2000 and registered under the PPSA on January 28, 2000 as registration no. 78490 (a copy of which is attached as Exhibit "H" to my Appeal Affidavit).

(d) Bank Act Security registered on October 26, 2000 as registration no. 01074579 (a copy of which is attached as Exhibit "I" to my Appeal Affidavit).

5. That I make this Affidavit in response to the appeal by CEFL of the Receiver's/Trustee's Final Determination for CEFL issued December 11, 2002.

SWORN TO before me at St. John's, in the Province of Newfoundland and Labrador, this 4th day of February, 2003:

JENNIFER LEE

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