

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Canadian Imperial Bank of Commerce ("CIBC")
Date of Document:	September 30, 2003
Summary of Order/Relief Sought or statement of purpose in filing:	Reply Memorandum of Fact and Law of CIBC in response to an Application involving a claim for set-off by United Rentals of Canada, Inc. ("United Rentals")
Court Sub-File Number	7:55

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

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*, RSNL 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

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

**MEMORANDUM OF FACT AND LAW OF
CANADIAN IMPERIAL BANK OF COMMERCE ("CIBC")**

This Memorandum is filed on behalf of CIBC in response to the Interlocutory Application involving a claim for set-off by United Rentals.

1. In its January 18, 2002 set-off letter, United Rentals attempted to set off the amount of \$329,254.74 (the "set-off amount") from the monies owed to it by Hickman Equipment (1985) Limited ("Hickman Equipment").

**Exhibit "A" of the Affidavit of
James Kirby dated February 27,
2003**

2. On February 27, 2003, PricewaterhouseCoopers Inc. ("PWC") submitted a Memorandum of Fact and Law ("PWC Memorandum") in its capacity as Receiver of Hickman Equipment, disputing the entitlement of United Rentals to the set-off amount.
3. CIBC supports the position taken by PWC that United Rentals is not entitled to the set-off amount.

Interest claimed by CIBC

4. CIBC is a secured creditor of Hickman Equipment and is currently owed approximately \$15,433,523.95, together with interest and costs.
5. 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 (the "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 ("GSA") 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").

6. The Hickman Equipment receivables were validly assigned to CIBC pursuant to the above-noted General Assignment of Accounts which provided, *inter alia*, as follows:

"Hickman Equipment (1985) Limited...hereby assign(s) and transfer(s) all debts, accounts, claims, monies and choses in action which now are of which may at any time hereafter be due or owing to or owned by the undersigned...(all of the foregoing being herein called the "Assigned Premises") to Canadian Imperial Bank of Commerce (herein called the "Bank") as a general and continuing collateral security for payment of all existing and future indebtedness and liability of the undersigned to the Bank wheresoever and howsoever incurred and any ultimate unpaid balance thereof, and as a first and prior claim upon the Assigned Premises."

**Affidavit of Jennifer Lee dated
February 7, 2003 filed in Sub-File
No. 7:25, Exhibit "B"**

7. The Hickman Equipment receivables were also validly secured by CIBC pursuant to the above-noted Debenture which provided, *inter alia*, as follows:

“As security for the due payment of all monies payable hereunder, the Company, as beneficial owner hereby, charges as and by way of a first floating charge to and in favour of the Bank, its successors and assigns, all its undertaking, property and assets, both present and future, of every nature and kind and wherever situate (other than such as are at all times validly subjected to the first fixed and specific mortgage and charge hereby created) including, without limitation, its franchises and uncalled capital.”

Lee Affidavit, Exhibit "C"

8. The Hickman Equipment receivables were also validly secured by CIBC pursuant to the above-noted General Security Agreement which provided, *inter alia*, as follows:

“The Customer mortgages, charges and assigns to CIBC...

- (b) All Personal Property: all of the Customer's present and after-acquired undertaking and Personal Property (including any property that may be described in Schedule "A").”

The term Personal Property is defined in the General Security Agreement as follows:

““Personal Property” means personal property and includes among other things Inventory, Equipment, Receivables, Books and Records, Chattel Paper, Goods, Documents of Title, Instruments, Intangibles (including intellectual property), Money and Securities and includes all Accessions to such property.”

Lee Affidavit, Exhibit "H"

9. By virtue of the Security Documents, there was no mutuality between the Hickman Equipment receivables and its debts to United Rentals. As a result, there is no set-off at law for any of the Hickman Equipment receivables.

10. By virtue of s. 36 of the PPSA, CIBC claims a first priority interest over the Hickman Equipment receivables pursuant to the Security Documents.

Equitable Set-Off

11. An equitable set-off can occur under the following situations:
- (a) Where the money sought to be set-off has accrued and become due prior to the notice of its assignment; or
 - (b) Where the money sought to be set-off arose out of the same contract or series of events, or was clearly connected to the same contract or series of events, that gave rise to the debt.

***Holt v. Telford* [1987] 2 S.C.R. 193
[Tab 1]**

12. CIBC submits that United Rentals had constructive notice of the assignment of Hickman Equipment's receivables by virtue of the prior registrations of the Security Documents. The British Columbia Court of Appeal has held that constructive notice is sufficient to defeat a claim for equitable set-off:

“The old principle that constructive notice has no place in commercial transactions has been displaced in cases where security interests are registered pursuant to registration statutes, since the purpose of those statutes is to provide notice to the world of the security interest. Although s. 178 provides for registration of a notice of intention to give security, rather than of notice of the security itself, its purpose and effect are the same. Since the defendant had constructive notice of the bank's security, its later right to set-off could not prevail...the defendant could have protected itself by means of a set-off agreement with T. Ltd. or the bank.”

***Royal Bank of Canada v. Lions Gate Fisheries Limited* (1990) 76
D.L.R. (4th) 289 (B.C.C.A.) [Tab 2]**

13. In the *Lions Gate Fisheries* case, the security agreement itself was never registered, but mere notice of the security was sufficient to defeat a claim for equitable set-off. In the present case, true copies of the General Assignment of Accounts and the Debenture were registered at the appropriate public registries

thus providing United Rentals with constructive notice of the assignment of Hickman Equipment's receivables before any indebtedness occurred between it and Hickman Equipment.

14. Moreover, United Rentals had actual knowledge of the existence of CIBC's Debenture no later than February 1, 1999, the date of the Asset Purchase Agreement between United Rentals and Hickman Equipment.

Kirby Affidavit, Exhibit "D"

15. Actual notice has been given if it can be shown that information is supplied that would operate on the mind of a rational person in business and make them act with reference to this information:

"It must depend on the facts of the case but I am quite prepared to say that I think the court would expect to find that those who allege that the trustee had knowledge of the encumbrance had made it out, not by any evidence of casual conversation, much less by any proof of what would only be constructive notice, but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the encumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shewn that in any way the trustee has got knowledge of that kind, knowledge which would operate on the mind of any rational man or man of business and make him act with reference to the knowledge he has so acquired, then I think the end is attained, and there has been fixed upon the conscience of the trustee and through that upon the trust fund a security against its being parted with in any way that would be inconsistent with the encumbrance which has been created."

***Lloyd v. Banks* [1867-68] III, Ch. A. 488 at 490 [Tab 3]**

16. CIBC submits that the Debenture was brought to United Rentals' attention at the time of execution of the February 1, 1999 Asset Purchase Agreement, and this information was such that a reasonable person in business would have acted upon it and correspondingly regulated their conduct. United Rentals could have protected its position by entering into a set-off agreement with Hickman Equipment at that time, however, United Rentals chose not to do so.

17. The set-off amount arose subsequent to April of 2001 and therefore subsequent to the constructive notice, and the actual notice, of the assignment of Hickman Equipment's receivables.

Kirby Affidavit, Exhibit "A"

18. Since the set-off amount arose subsequent to United Rentals having both constructive notice and actual notice of the assignment to CIBC of Hickman Equipment's receivables, United Rentals cannot claim an equitable set-off with respect to the set-off amount.

Inter-Relationship of the Contracts or Series of Events

19. To obtain an equitable right of set-off, a party must establish a relationship between the claims which is such that the claim of the defendant has been brought about by, or has been contributed to by, or is otherwise closely bound up with, the rights that are relied on by the plaintiff and which is such that it would be unconscionable that he should be able to proceed without permitting a set-off.

I.C.F. Spry, The Principles of Equitable Remedies (5th) (Canada: Carswell Company, 1997) [Tab 4]

20. The "Spry Test" is one of several acceptable tests for determining whether there is a sufficient connection between the claims sought to be set-off.

K.R. Palmer, The Law of Set-Off in Canada (1993) (Aurora: Canada Law Book, 1993) at 94 [Tab 5]

21. A portion of the set-off amount relates to repairs performed by Hickman Equipment on equipment rented by United Rentals to Hickman Equipment. However, the Receiver has found that there is no inter-relationship between the invoices as they relate to specific contracts and obligations, each independent of the other.

Kirby Affidavit, Exhibit “A”

22. CIBC submits that the repair contracts and the rental contracts are separate instruments. They are not so closely connected as to make it unconscionable to disallow United Rentals’ claim for set-off.

Spry, The Principles of Equitable Remedies, Supra

***Agway Metals Inc. v. Dufferin Roofing Ltd.* (1991) 46 C.P.C. (2nd) 133 (Ontario General Division) [Tab 6]**

23. Any right to equitable set-off is affected by the bankruptcy context:

... it is important to note that, just because cross-claims are closely connected to one another, it does not mean that set-off will necessarily follow. Not only must the connection be sufficiently close to warrant an exercise of the equitable jurisdiction of the court, the remedy must not result in any form of inequity.

19 In order to determine whether equitable set-off should be allowed in this case, it is therefore necessary to look at the connection between the claims and also to consider the effect the remedy would have on the equities between the parties.

...

22 In this case, because of the intervening bankruptcy, the equities are no longer just between SLF and Sugarman and Mitchell or even between SLF and the CIBC. The rights of others have come into play. These rights cannot simply be ignored on the basis that the CIBC lent the money that created the capital account in question. If the respondent's argument was accepted, the unsecured creditor who lent the bankrupt money to buy a car would be able to claim priority over the car based on that fact alone and in the absence of any secured interest in the car. Such a result would be contrary to the scheme of distribution under the BIA. It would result in an unfair preference of one unsecured creditor over other unsecured creditors. Similarly, in this case, the resulting unfairness to SLF, if any, must be assessed in the context of the bankruptcy where other unsecured creditors may stand to lose.”

***Canada Trustco Mortgage Co. v. Sugarman* (1999) 179 D.L.R. (4th) 548 (Ontario Court of Appeal) [Tab 6]**

24. CIBC submits that allowing United Rentals' claim for set-off would have the effect of re-ordering the priorities as set out in the *Bankruptcy and Insolvency Act* and result in an unfair preference to the detriment of other creditors and contrary to s. 95 of the *Bankruptcy and Insolvency Act*.
25. CIBC repeats the foregoing paragraphs and requests that the Court order United Rentals to pay the set-off amount to PWC, in its capacity as Receiver of Hickman Equipment, and further order that CIBC is entitled to the set-off amount.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 30th day of September, 2003.

BENSON•MYLES

Per: _____
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