

COPY

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	CIBC Equipment Finance Ltd.
Date of Document:	January 14, 2003
Summary of Order/Relief Sought Or Statement of Purpose in Filing:	Interlocutory Application by CIBC Equipment Finance Ltd ("CEFL") for payment to CEFL of the proceeds from the sale by the Receiver of the equipment referenced in the Application
Court Sub-File Number:	7:46

2002 01 T No. 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

IN THE MATTER OF

a Court ordered Receivership  
of Hickman Equipment (1985) Limited  
("HEL") 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*  
R.S.C. 1985, C. B-3, as amended  
(the "BIA")

INTERLOCUTORY APPLICATION (INTER PARTES)  
OF CIBC EQUIPMENT FINANCE LTD.


The Interlocutory Application (Inter Partes) of CEFL says as follows:

1. By a Receiving Order dated March 13, 2002 and filed March 14, 2002 (the "Receiving Order") HEL was adjudged bankrupt and Pricewaterhouse Coopers Inc. ("PWC") was appointed Trustee in bankruptcy in accordance with the BIA.
2. By a Receivership Order dated March 13, 2002 and filed March 14, 2002 (the "Receivership Order") PWC was appointed receiver without security "... of all the property, assets, entitlements and undertakings (the "Assets") 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.*

3. In light of the above, and by virtue of the Receiving Order, CEFL filed a proof of claim in the Bankruptcy of HEL dated October 22, 2002.
4. In accordance with an Order of this Honourable Court dated May 14, 2002, PWC commenced and completed the liquidation of substantially all of the assets of HEL by auction.
5. As stated in the Final Determination (the "**Final Determination**") of CEFL issued December 11, 2002, and posted on PWC's Internet Site for HEL, PWC has disallowed CEFL's claim in respect to the units listed at Schedule "A" to this Application (the "**CEFL Units**"). PWC claims in the Final Determination that the security interests of CEFL is rejected for lack of perfection under the Personal Property Security Act ("**PPSA**") due to an amendment of CEFL's PPSA registration after a court ordered Stay was issued by this Honourable Court. PWC claims that the filing of an amendment during the Stay is considered a breach of the court order, and therefore, the registration was invalid and CEFL's security interest was not perfected.
6. On December 30, 2002, CEFL filed an objection to the Final Determination and issued a further application for an order allowing the registration under the PPSA during the Stay. If CEFL is correct in its determination that the registration during the Stay is valid, then CEFL has a valid security interest in the CEFL Units. The total indebtedness from HEL to CEFL is \$3,141,130.09 as is stated at Paragraph 7 of the Final Determination.
7. CEFL has been advised by PWC that PWC has received as proceeds of the liquidation of each of the CEFL Units, the amounts set out in the 3rd column of the table at Schedule "A" to this Application (the "**Proceeds**").
8. CEFL has a first ranking security interest in the CEFL Units by virtue of the security and other documents referenced by PWC at paragraph 8 in the Final Determination.
9. CEFL, therefore, applies to this Honourable Court for an Order approving the payment to CEFL by the Receiver of the Proceeds.

**DATED AT** St. John's, in the Province of Newfoundland & Labrador, this 15th day of January, 2003.

  
Gregory W. Dickie  
White, Ottenheimer & Baker  
Solicitors for CIBC Equipment  
Finance Ltd.  
whose address for service is:  
Baine Johnston Centre  
10 Fort William Place  
P.O. Box 5457  
St. John's, NL  
A1C 5W4

**ISSUED AT** St. John's, in the Province of Newfoundland & Labrador this 17<sup>th</sup> day of January, 2003.

  
CLERK

**SCHEDULE "A"**

<b>Equipment Description</b>	<b>Serial Number</b>	<b>Auction Proceeds</b>
200 LC Excavator	FF0200X501362	\$135,000.00
850C Dozer	T0850C888907	\$160,000.00
450H Dozer	T0450HX889199	\$127,500.00
Timberjack Forwarder	17DD0305	\$306,000.00
Blaw-Knox Paver	551028-64	\$213,780.00
330 LC Excavator	FF0330X080456	\$170,000.00
330 LC Excavator	FF0330X080518	\$170,000.00
330 LC Excavator	FF0330X080747	\$199,500.00
370 Excavator	FF0370X080344	Not Yet Sold
<b>TOTAL PROCEEDS</b>		<b>\$1,481,750.00</b>

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IN THE MATTER OF

a Court ordered Receivership  
of Hickman Equipment (1985) Limited  
("HEL") 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*  
R.S.C. 1985, C. B-3, as amended  
(the "BIA")

NOTICE

You are hereby notified that the foregoing Application will be made to the Judge presiding in chambers at the Court House, Duckworth Street, St. John's, Newfoundland & Labrador on the 11 day of Feb, 2003 at 10 a.m. or so soon thereafter as the Application can be heard.

TO: See attached Distribution List hereto as Schedule "A"

## SCHEDULE "A"

## LIST OF PARTIES TO BE SERVED

ABM Amro Bank Canada/ ABN Amro Leasing & Tramac Equipment Ltd.	Aubrey L. Bonnell, Q.C./ Brian Winsor Terence J. Dolan/John Salmas <a href="mailto:abonnell@curtisdawe.nf.ca">abonnell@curtisdawe.nf.ca</a> <a href="mailto:tdolan@mccarthy.ca">tdolan@mccarthy.ca</a>	722-7521  416-868-0673
Bombardier Capital Leasing & Culease Financing Services	J. Vernon French, Q.C.	754-2701
Caterpillar Equipment	Colin D. Grant	905-849-1023
Cedarapids	Les Baumbach <a href="mailto:fbeizil@sharckcreay.com">fbeizil@sharckcreay.com</a>	319-399-4760
CIBC	R. Wayne Myles <a href="mailto:gspencer@bensonmyles.com">gspencer@bensonmyles.com</a> <a href="mailto:wmylcs@bensonmyles.com">wmylcs@bensonmyles.com</a>	579-2647
CIBC Equipment Finance Ltd./CIT Financial Ltd./ Tyco Capital	Gregory W. Dickie <a href="mailto:gdickie@wob.nf.ca">gdickie@wob.nf.ca</a>	722-9210
Contact Funding Group Inc.	Mark G. Klar <a href="mailto:Mark-k@chaiton.com">Mark-k@chaiton.com</a>	416-218-1831
Daimler Chrysler Financial Services/Daimler Chrysler Capital Services/Mercedes- Benz of Canada Inc.	Philip Buckingham/ Peter O'Flaherty Elaine Gray <a href="mailto:pjb@goodlaw.nf.ca">pjb@goodlaw.nf.ca</a> <a href="mailto:elaine.gray@gowlings.com">elaine.gray@gowlings.com</a>	722-4720  416-863-3527
Fabtek Corp.	Linc A. Rogers Rhodie E. Mercer, Q.C. <a href="mailto:rmercerc@mmvf.nf.ca">rmercerc@mmvf.nf.ca</a> <a href="mailto:linc.rogers@blakes.com">linc.rogers@blakes.com</a>	416-863-2653 726-5705
GE Capital	Harvey Chaiton Frederick Scalabrini	416-218-1849 905-319-4855
Group Holdings Ltd./ Hickman Equipment/ Hickman Leasing Ltd.	Griffith D. Roberts <a href="mailto:rstack@coxhanson.ca">rstack@coxhanson.ca</a> <a href="mailto:groberts@coxhanson.ca">groberts@coxhanson.ca</a>	726-2992
Ingersoll-Rand Canada Inc.	R. Barry Learmonth, Q.C. Jonathan Wigley <a href="mailto:ldc@nfld.net">ldc@nfld.net</a> <a href="mailto:jonathan.h.wigley@bakernet.com">jonathan.h.wigley@bakernet.com</a>	739-8151 416-863-6275
John Deere Ltd./ John Deere Credit Inc.	Neil L. Jacobs/Bruce Grant Maureen Ryan <a href="mailto:BugarestiDavidR@JohnDeere.com">BugarestiDavidR@JohnDeere.com</a> <a href="mailto:Njacobs@smss.com">Njacobs@smss.com</a>	722-4565

MTC Leasing Inc./ National Leasing Group Inc.	R. Paul Burgess <a href="mailto:pburgess@mwhslaw.nf.com">pburgess@mwhslaw.nf.com</a>	754-0915
ORIX Financing Services Canada Ltd.	Donald Yaeck	416-236-3010
Goodman Associates	Paul G. Goodman	902-425-3777
Royal Bank of Canada	Thomas O. Boyne, Q.C. <a href="mailto:tboyne@boyneclarke.ns.ca">tboyne@boyneclarke.ns.ca</a>	902-463-7500
TD Asset Finance Corp.	D. Bradford L. Wicks <a href="mailto:bwicks@wrmm.nf.net">bwicks@wrmm.nf.net</a>	753-5221
Wells Fargo Equipment Finance Co.	Richard Jones <a href="mailto:rlaw@istar.ca">rlaw@istar.ca</a>	416-361-6303
PricewaterhouseCoopers Trustee in Bankruptcy	Frederick Constantine James Kirby	722-0483 722-1428

**COPY**

<b>SUMMARY OF CURRENT DOCUMENT</b>	
<b>Name of Issuing Party or Person:</b>	<b>CIBC Equipment Finance Ltd.</b>
<b>Date of Document:</b>	<b>January 14, 2003</b>
<b>Summary of Order/Relief Sought Or Statement of Purpose in Filing:</b>	<b>Affidavit of Guy Giroux filed in support of the Interlocutory Application of CIBC Equipment Finance Ltd. (hereinafter "CEFL") for payment to CEFL of the proceeds from the sale by the Receiver of the equipment referenced in the Application.</b>
<b>Court Sub-File Number:</b>	<b>7:46</b>

2002 01 T No. 0352

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

**IN THE MATTER OF**

a Court ordered Receivership  
of Hickman Equipment (1985) Limited  
("HEL") 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*  
R.S.C. 1985, C. B-3, as amended  
(the "BIA")

**AFFIDAVIT**

I, Guy Giroux, of the City of Burlington, in the Province of Ontario, make oath and say as follows:

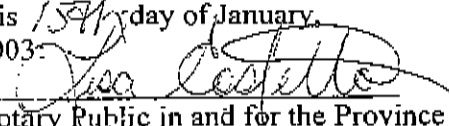
1. I am an Assistant Vice-President Portfolio Management with CEFL, the Applicant in an Interlocutory Application for disbursement of proceeds of sale of equipment pledged as security by HEL to CEFL (the "Application"), and as such have personal knowledge of the matters set forth herein, except where otherwise noted.



2. By a Receiving Order dated March 13, 2002 and filed March 14, 2002 (the **"Receiving Order"**) HEL was adjudged bankrupt and Pricewaterhouse Coopers Inc. (**"PWC"**) was appointed Trustee in bankruptcy in accordance with the BIA. A copy thereof is posted on the Internet Site established by PWC for the HEL Insolvency.
3. By a Receivership Order dated March 13, 2002 and filed March 14, 2002 (the **"Receivership Order"**) PWC was appointed receiver without security *"...of all the property, assets, entitlements and undertakings (the "Assets") 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."* A copy thereof is posted on the Internet Site established by PWC for the HEL Insolvency
4. In light of the above, and by virtue of the Receiving Order, CEFL filed a Proof of Claim in the Bankruptcy of HEL, dated October 22, 2002.
5. I am advised by PWC that PWC, in accordance with an Order of this Honourable Court dated May 14, 2002, commenced and completed the liquidation of substantially all of the Assets of HEL by auction.
6. CEFL claims the benefit of a security interest in nine (9) pieces of heavy equipment which was in the possession of HEL at the time of the Receiving Order (the **"CEFL Equipment"**).
7. In October 1999 3 pieces of the CEFL Equipment (the **"1999 Equipment"**) were financed by CEFL and conditional sales agreements for them were registered under the Registry for Conditional Sales and Chattel Mortgages (the **"Old Registry"**) in the name of the original debtor, Hickman Leasing Limited (**"HLL"**). These registrations were properly transitioned to the new Personal Property Registry (the **"PPR"**) as was required by the Newfoundland Personal Property Security Act (**"PPSA"**).
8. In 2001, another financing was facilitated by CEFL. This financing was for 12 pieces of heavy equipment (the **"2001 Equipment"**). Notice of CEFL's security interest was in this equipment was properly registered under the PPSA in the name of the debtor for whom they were financed, HLL. Of the 2001 Equipment, 6 pieces have been sold out of trust (proceeds not paid to CEFL) to independent thirds parties..
9. On February 8, 2002, the Court ordered a stay against the right of any creditor to perfect or register a security interest against the Assets (the **"Stay Order"**). This stay was later extended indefinitely.
10. Subsequent to the Stay Order CEFL determined that the CEFL Equipment had been transferred by HLL to HEL, which I am advised by our Newfoundland Solicitors, White, Ottenheimer, & Baker, triggered the need to amend CEFL's PPSA registrations against the CEFL Equipment to name the transferee, HEL, as an enterprise debtor. On March 13, 2002 CEFL amended its registrations to include HEL as an enterprise debtor (the **"PPSA Amendment"**).

11. In the Final Determination issued December 11, 2002 (the "**Final Determination**"), PWC has determined that CEFL does not have a valid security interest in the units listed in Schedule "A" to the Application (the "**CEFL Units**"), a copy of which is also annexed hereto as Schedule "A". PWC states in the Final Determination that the PPSA Amendment, being made during the stay period imposed by the Stay Order, cannot be considered by them in determining whether CEFL's security interest in the CEFL Equipment has been perfected, and they therefore assessed CEFL's security interest as being unperfected (the "**Rejection**"). A true copy of the Final Determination is attached as Schedule "B" to this Affidavit.
12. CEFL has filed an application seeking approval and consent for the PPSA Amendment, directing the Receiver to consider the PPSA Amendment in assessing the perfection of CEFL's security interests in the CEFL Equipment (the "**Appeal**"). It is my understanding and belief that success of the Appeal would result in CEFL having a valid perfected security interest in the CEFL Equipment.
13. The total indebtedness of HEL to CEFL is \$3,141,130.09 as is stated at Paragraph 7 of the Final Determination.
14. CEFL has been advised by PWC that PWC has received as proceeds of the liquidation of each of the CEFL Equipment, the amounts set out in the 3rd column of the table on Schedule "A" hereto (the "**Proceeds**"), noting that one (1) piece of the 1999 Equipment has not been sold as of the date hereof, as a result of an Order of this Court on an application by Wells Fargo, which also claims a security interest in this piece of equipment.
15. This affidavit is sworn and filed in support of CEFL's Application to this Honourable Court for an Order approving the payment to CEFL by the Receiver of the Proceeds.

**SWORN** before me at  
in the Province of Ontario  
this 15th day of January,  
2003.

  
Notary Public in and for the Province  
of Ontario

Ion Annette Costello, Notary Public,  
Regional Municipality of Halton,  
Qualified in the attestation of instruments and  
the taking of affidavits, for  
CIV Financial Ltd.  
Expires April 5, 2004.

  
Guy Giroux

**SCHEDULE "A"**

<b>Equipment Description</b>	<b>Serial Number</b>	<b>Auction Proceeds</b>
200 LC Excavator	FF0200X501362	\$135,000.00
850C Dozer	T0850C888907	\$160,000.00
450H Dozer	T0450HX889199	\$127,500.00
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Blaw-Knox Paver	551028-64	\$213,780.00
330 LC Excavator	FF0330X080456	\$170,000.00
330 LC Excavator	FF0330X080518	\$170,000.00
330 LC Excavator	FF0330X080747	\$199,500.00
370 Excavator	FF0370X080344	Not Yet Sold
<b>TOTAL PROCEEDS</b>		<b>\$1,481,750.00</b>

## Schedule "B"

### FINAL DETERMINATION

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

Secured Party: CIBC EQUIPMENT FINANCE LIMITED ("CEFL")

#### 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 CEFL.

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

It is the opinion of the Trustee that CEFL has not properly perfected its security interest in the Assets. Therefore, CEFL'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:

"CSA"	-	<i>Conditional Sales Act</i> , R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"HLL"	-	Hickman Leasing Ltd.
"JD"	-	John Deere
"Old Registry"	-	The Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PMSI"	-	Purchase Money Security Interest

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

#### 4. The Assets

CEFL has made a claim to 9 pieces of heavy equipment. At the time of bankruptcy all 9 pieces remained in the inventory of HEL and 8 of these remaining pieces were sold at the Receiver's auction (details below). However, as a result of the interlocutory application of Wells Fargo Equipment Finance Co., one piece (indicated by "\*\*") was excluded from the auction by Court Order.

1. JD 330 LC Excavator (FF0330X080518)	2. JD 370 Excavator (FF0370X080344)*
3. JD 330 LC Excavator (FF0330X080456)	4. 330 LC Excavator (FF0330X080747)
5. Blaw Knox Pave (551028-64)	6. 850C Dozer (T0850CX888907)
7. 450H Dozer (T0450HX889199)	8. 200LC Excavator (FF0200X501362)
9. Timberjack Forwarder (17DD0305)	

#### 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 continued by this registration", endorsements, if any, on the security agreements reviewed and the pre-PPSA legislation and the applicable common law relating to their registration.

Both the PPSA, and the *Conditional Sales Act* (the latter statute being part of the "prior law") provide that property in goods pass to a purchaser from a seller or trader where the sale is in the ordinary course of business of the seller or trader. In some instances HEL transferred equipment subject to a security interest to a purchaser without discharging the security interest. In some cases the purchaser granted a security interest to another lender, while in other cases the purchaser transferred the equipment to a third party who, in turn granted a security interest to a lender. Due to the lack of evidence concerning all transactions involving the Assets, we are unable to determine if sales by HEL were "in the ordinary course of business" such as to enable the purchaser to receive clear title to the equipment in order to allow a subsequent lender to obtain a valid security interest or a subsequent transferee to obtain clear title.

No opinion is expressed as to the rank or priority of any security interest created by the Documentation.

No opinion is expressed with regard to any collateral covered by the Documentation, but not referred to in this Final Determination.

Pursuant to the terms of the Court Order establishing the Claims Plan, this Final Determination determines the validity of security claimed and whether such security has been properly perfected. For the assistance of readers, the Trustee has sometimes provided comments concerning the priority of such security vis-à-vis other parties but such

priority-related comments are made without prejudice to any position which may be taken at any future date by any other party in regards to priorities.

Notwithstanding the findings in this Final Determination concerning the validity of the Claim as secured or otherwise, PricewaterhouseCoopers Inc. is not precluded by such determination from challenging the Claim as being reviewable or fraudulent pursuant to the provisions of the BIA or any applicable provincial legislation.

Except where a specific claim to proceeds has been made and material provided in support of that claim, the Trustee expresses no opinion with respect to claims to proceeds or claims involving tracing. An outline of the proceeds claims processes and issues are set out in s.13.

## **7. Overview of Claim**

CEFL is claiming a security interest in the 9 pieces of heavy equipment listed above. The original security was taken with respect to 15 pieces, but it appears that 6 pieces were sold out of trust to third parties.

CEFL's Proof of Claim dated October 22, 2002 and the documents attached thereto indicate a total claim of \$3,141,130.09. This is a secured claim.

The 9 assets can be broken into two groups as follows:

- 3 pieces that were registered at the Old Registry on October 4, 1999 - (# 1-3 in the list above).
- 6 pieces that were registered in the PPR on April 27, 2001 and again on May 3, 2001 (# 4-9 in the list above).

CEFL's claim with respect to these assets differs from the claims advanced by other creditors of HEL, since it arises from financing provided to HLL rather than HEL. The claim involves the operation of s.36(8) of the PPSA which addresses a transfer of secured collateral by a debtor where the transferee does not take free of the security interest. In such a case, the security interest given by the debtor would take priority over a prior-registered security interest covering after-acquired property of the transferee. The exception to this is where the secured party has actual knowledge of the transfer and fails to amend its financing statement to include the name of the transferee within the 15 day grace period imposed by s.52 of the Act.

A flow chart of the transactions at issue is set out in the flow charts attached hereto. CEFL's position is that it financed a sale of equipment from HEL to HLL, but that subsequent to this sale, HLL, as debtor, transferred the 9 pieces to HEL, without CEFL's knowledge or consent. As such, HEL, as transferee, does not take the 9 pieces free of CEFL's security interest. Rather, CEFL takes the position that its security interest in the 9 pieces is

preserved since it registered a financing statement naming HEL as debtor within 15 days of obtaining actual knowledge of the unauthorized disposition (s.36(8) and s.52 of the PPSA).

The analysis of the Claim requires 2 separate considerations:

1. The validity of CEFL's security as concerns its debtor, HLL.
2. The transfer of the assets from HLL to HEL and whether CEFL's security is preserved.

There is a further issue concerning amendments made by CEFL to it's registered security interests over the Assets that is explained in detail in Section 12 of this Final Determination.

## **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. Proof of Claim dated October 22, 2002, and attachments thereto.

### The 3 Assets:

- iii. Assignment of Receivables dated September 29, 1999 between CEFL and HLL. This is with respect to the receivables for assets #1-3 in the list above.
- iv. Guarantee and Indemnity dated September 29, 1999 in favour of CEFL whereby HEL is guarantor of the obligations of HLL.
- v. Invoice from HEL dated July 27, 1999 to HLL for the 3 Excavators (#1-3 above)
- vi. 3 separate leases dated September 1, 1999 between HLL and HEL for the 3 pieces:
  - o Lease # 741 JD 330 LC Excavator (FF0330X080518) (asset #1 above)
  - o Lease # 737 JD 370 Excavator (FF0370X080344) (asset #2 above)
  - o Lease # 738 JD 330 LC Excavator (FF0330X080456) (asset #3 above)
- vii. Correspondence dated April 17, 2001 between CIT Financial Limited and HEL re: release of interest.
- viii. 3 separate Conditional Sales Contracts (complete with a Delivery and Acceptance Certificate) between HLL (buyer/borrower) and HEL(seller) dated September 29, 1999:
  - o Contract # - 556098 - Excavator (FF0330X080518).
  - o Contract # - 556099 - Excavator (FF0330X080456).
  - o Contract # - 556096 - Excavator (FF0370X080344).
- ix. Copy of HEL blank cheque.
- x. Copy of Newcourt wire transfer requisition for \$2,268,899.92 payable to HLL.
- xi. Copy of input information for wire transfer.
- xii. Confirmation of wire transfer reference #9284173 for the amount of \$2,268,899.92.

### The 6 Assets:

- xiii. Invoice from HEL to HLL dated December 29, 2000 to HLL with respect to five assets (#4-8 above).



- xiv. Invoice from HEL to HLL dated January 10, 2001 for the sale of, *inter alia*, a, Timberjack Forwarder (#9 in the list above).
- xv. 12 Separate leases between HLL and HEL:
  - o Lease # 827 – Jan.1/01 - Excavator (FF0200X501362) (#8 above).
  - o Lease # 828 – Jan.1/01 - Excavator (FF0200X501391).
  - o Lease # 829 – Jan.1/01 - Excavator (FF0200X501453).
  - o Lease # 830 – Jan.1/01 - Excavator (FF0330X080747) (#4 above).
  - o Lease # 831 – Jan.1/01 - Crawler Dozer (T0450HX889199).(#7 above)
  - o Lease # 832 – Jan.1/01 - Dozer (T0850CX888907).(#6 above)
  - o Lease # 833 – Jan.1/01 - Loader (DWTC62H577315).
  - o Lease # 834 – Jan.1/01 - Paver (551028-64) (#5 above).
  - o Lease # 844 – Feb.1/01 - Forwarder (17DD0305).(#9 above)
  - o Lease # 846 – Feb.1/01 - Harvester (01AB2122).
  - o Lease # 851 – Feb.1/01 - Dynapac Model (58314351).
  - o Lease # 852 – Feb.1/01 - Tramac Breaker (121444).
- xvi. Correspondence dated April 23, 2001 between CEFL and Bombardier Capital Leasing addressing priorities.
- xvii. Correspondence dated March 23, 2001 between CEFL and ABN AMRO Leasing addressing priorities.
- xviii. Correspondence dated April 17, 2001 between CIT Financial Limited and HEL re: release of interest.
- xix. Correspondence dated April 18, 2001 between John Deere Limited and CEFL addressing priorities.
- xx. Correspondence dated April 2, 2001 between CEFL and G.E. Capital Canada Equipment Financing addressing priorities.
- xxi. Correspondence dated March 23, 2001 between National Leasing Group Inc. and CEFL addressing priorities.
- xxii. Correspondence dated April 9, 2001 between CEFL and Mellon Leasing addressing priorities.
- xxiii. Undated correspondence between CEFL and Charter Financial Company addressing priorities.
- xxiv. Correspondence dated May 7, 2001 between CEFL and CIBC addressing priorities.
- xxv. Correspondence dated May 8, 2001 between GMAC and CEFL addressing priorities.
- xxvi. Correspondence dated May 4, 2001 between Cyber Lease and T D Asset Finance Corp. addressing priorities.
- xxvii. Correspondence dated May 16, 2001 between CEFL and Daimler Chrysler addressing priorities.
- xxviii. Correspondence dated May 16, 2001 between CEFL and Wayburn Credit Union Limited addressing priorities.
- xxix. Undated correspondence between Credit Union Central of Saskatchewan and CEFL addressing priorities.
- xxx. Undated correspondence between Cooperative Trust Company of Canada and CEFL addressing priorities.

- xxxi. Correspondence dated May 9, 2001 between Assinibola Credit Union Limited and CEFL addressing priorities.
- xxdii. Undated correspondence between Biggar and District Credit Union Limited and CEFL addressing priorities.
- xxdiii. Correspondence dated May 14, 2001 between CEFL and Kelvington Credit Union addressing priorities.
- xxdiv. Correspondence dated May 9, 2001 between CEFL and Yorkton Credit Union Limited addressing priorities.
- xxdv. Correspondence dated May 18, 2001 between CEFL and Cyber Lease Corporation addressing priorities.
- xxdvi. Correspondence dated March 27, 2001 between CEFL and CIBC addressing priorities.
- xxdvi. Undated correspondence between CEFL and Hickman Motors Limited addressing priorities.
- xxdviii. Correspondence dated May 14, 2001 between Bank of Nova Scotia and CEFL addressing priorities.
- xxdix. 6 separate Conditional Sales Contracts (complete with a Delivery and Acceptance Certificate) between HLL (buyer/borrower) and HEL (seller) dated May 29, 2001:
  - o Contract # 079472- Excavator (FF0330X080747).
  - o Contract # 079483- Paver (551028-64).
  - o Contract # 079474 - Dozer (T0850CX888907).
  - o Contract # 079473- Dozer (T0450HX889199).
  - o Contract # 165838- John Deere Excavator (FF0200X501362).
  - o Contract # 079486 - Timberjack Forwarder (17DD0305).
- xxdvii. Wire transfer requisition for the amount of \$2,978,778.10 payable to HEL.
- xxdviii. Journal entry indicating wire transfer in the amount of \$2,978,778.10 to HEL.
- xxdix. Copy of an e-mail confirming wire transfer in the amount of \$2,978,778.10 to HEL.

## 9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that the 9 assets were all held by HEL for sale or lease and as such, they form part of the inventory (s. 2(x) of the PPSA).

## 10. Application of the PPSA

CEFL financed the conditional sale of the 3 pieces by HEL to HLL in September 1999 and the conditional sale of the 6 pieces by HEL to HLL in May 2001. It is the opinion of the Trustee that by operation of s. 4, such transactions are governed by the PPSA.

## 11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13, 2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest relates and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-ppsa registration for purposes of priority. There are a number of conditions set out in the Act. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for the 3 pieces secured in 1999. The Trustee has confirmed that each of these has been registered in the Old Registry on October 4, 1998 and that they comply with the requirements set out in s.5 of the CSA.

In accordance with the transitioning provisions, CEFL registered 3 separate financing statements with respect to each of the conditional sales as follows:

- ◇ **Registration #1285157** dated October 16, 2001 naming HLL as debtor (amended by **Registration #1652447** on March 13, 2002 to add HEL as the debtor) contains the following description:

*JD 330 LC Excavator s/n FF0330X080456, 1999; together with all accessions, attachments and accessories, and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, money or intangibles.*

*Pre-ppsa information continued by this registration: 742436-October 4, 1999 – Conditional Sales Act.*

- ◇ **Registration #1285120** dated October 16, 2001 naming HLL as the debtor (amended by **Registration #1652438** dated March 13, 2002 to add HEL as debtor) contains the following description:

*JD 330 LC Excavator s/n FF0330X080518, 1999; together with all accessions, attachments and accessories and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, monies or intangibles.*

*Pre-ppsa registration information continued by this registration: 742439 – October 4, 1999 – Conditional Sales Act.*

- ◇ **Registration #1285139** dated October 16, 2001 naming HLL as debtor (amended by **Registration #1652429** dated March 13, 2002 to add HEL as debtor) contains the following description:

*JD 370 Excavator s/n FF0370X080344, 1999; together with all accessions, attachments and accessories and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, monies or intangibles.*

*Pre-ppsa registration information continued by this registration: 742435 – October 4, 1999 – Conditional Sales Act.*

It is the opinion of the Trustee that the original registrations of these three security interests were properly registered in the PPR and the relevant date for purposes of perfection would be the date of registration in the Old Registry. However, as explained in Section 12 below, it is the opinion of the Trustee that the amendments to these three financing statements on March 13, 2002 were not valid and therefore the security interests are not validly perfected as against HEL.

## **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.

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

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

Is there attachment?

- (i) Value given?

**YES** The Conditional Sales Contracts executed with respect to the 3 pieces and also with respect to the 6 pieces contain confirmation of delivery and acceptance certificates, duly executed by HLL. The fact that the assets financed by CEFL were delivered to HLL provides the necessary evidence to confirm that value was indeed given by CEFL to HLL with respect to the secured transaction. Furthermore, the Trustee has been provided with evidence of wire transfers to the account of HLL for the 1998 financing and to the account of HEL for the 2001 financing. It is the opinion of the Trustee that such documentation provides the necessary evidence of value for purposes of attachment.

- (ii) Rights in the collateral?

**YES** 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>. HLL acquired the assets through the financing provided by CEFL for the conditional sales contracts. Furthermore, s. 13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when s/he obtains possession of them under the lease.

**Note:** For the purposes of expressing a position 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** The evidentiary requirements of s. 11, required for attachment, are established by the conditional sales contracts. Specifically, in accordance with s.11 (1) (b), the contracts are in writing, they have been signed by HLL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?

**NO**

CEFL did take steps to perfect its security interest in the Assets by amending its registrations soon after learning of the disposition of the Assets by HLL to HEL.

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

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>3</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 Receiving Order issued by the Court on March 13, 2002.<sup>4</sup> By amending its registrations on March 13, 2002 to include HEL as debtor, CEFL was in breach of the Stay and therefore the Trustee is of the opinion that such a registration is invalid and does not act to perfect CEFL's security interest in the Assets.

**Note:** The Receiving Order permits creditors to make application to the Court for lifting of the Stay (see paragraph 5).

***The 3 pieces***

- ◊ **Registration #1285157** (as above)
- ◊ **Registration #1285120** (as above)
- ◊ **Registration #1285139** (as above)

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 descriptions in the above-noted financing statements satisfy these requirements.

***The 6 pieces***

- ◊ **Registration #922716** dated April 27, 2001, which names HLL as the debtor (amended by registration #1652456 on March 13, 2002 to add HEL as debtor) contains the following description:

*All present goods now owned or acquired or financed by the secured party and leased or otherwise made available to the debtor, as described herein, and contained in Conditional Sales Contract between the debtor and secured party, together with all attachments, exchanges, replacement parts, repairs and additions thereto, and all present and future accounts, intangibles, instruments, chattel paper, documents of title, securities and money, and all proceeds of the foregoing in any form, including goods, documents of title, chattel paper, securities, instruments, money and intangibles and all proceeds thereof.*

*Timberjack 1270C Harvester (s/n 01282122)*

<sup>3</sup> See paragraph 4(c).

<sup>4</sup> See paragraph 37(a).

Timberjack 1410 8W Forwarder (s/n 17DD0305)  
 Dynapac CA251A (s/n 58314351)  
 JD 200LC (s/n FF0200X501453)  
 JD 300LC (s/n FF0330X080747)  
 JD TC62H (s/n DWTC62H577315)  
 JD 200LC (s/n FF0200X501391)  
 JD 450H (s/n T0450HX889199)  
 JD 200LC (s/n FF0200X501362)  
 JD 850C (s/n T0850CX888907)  
 Blaw-Knox PF-5510.1 Paver (s/n 55102864)  
 Tramac Breaker Model no. V55 (s/n 121444)

- ◇ **Registration #933770** dated May 3, 2001 naming HEL as the debtor contains the following description:

*An Assignment of Rentals from equipment financed by the secured party and leased to the debtor and to the extent the equipment may constitute or be deemed to be inventory, such equipment now or hereafter offered or furnished under any contract of service or intended for sale or lease, including all attachments, exchanges, replacement parts, repairs and additions and any and all leases, subleases, rentals, accounts and contracts with respect to the equipment which may now exist or hereafter arise, together with all rights thereunder and all rental and other payments and purchase options due and to become due thereunder.*

Serial Number Collateral

Timberjack 1270C Harvester (s/n 014B2122)  
 Timberjack 14108W Forwarder (s/n 17DD0305)  
 Dynapac CA251A (s/n 58314351)  
 JD 200LC (s/n FF0200X501453)  
 JD 330LC (s/n FF0330X080747)  
 JD C62H (s/n DWTC62H577315)  
 JD 200LC (s/n FF0200X501391)  
 JD 450H (s/n T0450HX889199)  
 JD 200LC (s/n FF0220X501362)  
 JD 850C (s/n T0850CX888907)  
 Blaw-Knox PF05510 Paver (s/n 55102864)  
 Tramac Breaker Model No. V55 (s/n 121444)

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 descriptions in the above-noted financing statements satisfy these requirements.

### 13. Proceeds

Section 29(1) of the Act provides a secured party with an automatic and statutory interest in the proceeds from the disposition of a secured asset by the debtor. While this right is automatic as against the debtor, the entitlement to proceeds must be perfected, in order to protect the secured party's entitlement as against competing creditors.

The Trustee has not made any determination as to CEFL's entitlement to proceeds with respect to other creditors as this is an issue of priority and not within the Trustee's mandate under the Claims Plan. However, the Trustee has outlined below the statutory requirements that must be met by a secured party in order to assert a claim to proceeds from the disposition of collateral as against other secured creditors.

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.<sup>5</sup>

Section 29(3) provides for 3 instances where perfection in proceeds is automatic and continuous. A security interest in proceeds is a continuously perfected security interest where the interest in the original collateral is perfected by a registration of a financing statement under Section 26 that:

- (a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;
- (b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or
- (c) Includes a description of the original collateral, where the proceeds consist of money, cheques or deposit accounts in a bank, credit union, or similar financial institutions.

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.<sup>6</sup>

As indicated above, collateral descriptions are governed by ss.23-24 of the Regulations. These rules extend to descriptions of collateral in the form of proceeds as well.

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<sup>5</sup> Ibid. at p.140.

<sup>6</sup> Ibid. at 140.



Note as well that the ability to assert a claim to proceeds is contingent upon two conditions. The debtor must have acquired rights in the proceeds and the proceeds themselves must be traceable (ref. s. s.2(ff)).

CEFL has not made any specific claim with respect to proceeds/ tracing.

#### **14. The Disposition from HLL to HEL**

We have outlined the position of CEFL with respect to the alleged disposition of the assets secured by CEFL by HLL to HEL. There are 2 key issues to be determined in order to assess the validity of CEFL's entitlement to the assets in the hands of HEL as transferee.

First, the disposition from HLL to HEL must be examined. As indicated above, it is the opinion of the Trustee that the assets are inventory. Inventory is generally intended for resale and therefore, even in the absence of express authority, the debtor is usually permitted to deal with it free of the security interest that binds it in the ordinary course of the debtor's business.<sup>7</sup> It is the position of the Trustee that there must be a determination by the Court as to whether HLL was under any restrictions with respect to disposition of the inventory financed by CEFL.

If the disposition from HLL to HEL is in the ordinary course of HLL's business and HLL was not precluded from disposing of the assets, then HEL takes the equipment free and clear of the secured party (s. 31 (2) of the PPSA). If not, there is no such protection. CEFL takes the position that the transfer of the equipment from HLL (its debtor) to HEL is not a sale in the ordinary course of HLL's business.

The determination of whether this is a sale in the ordinary course of HLL's business demands a determination by the Court. There are a number of indicia that play into the determination. These include such factors as whether the sale was advertised, the identity of the buyer (ordinary consumer as opposed to a dealer) and the quantity of goods (the greater the quantity the greater the suspicion). The courts will also consider the general circumstances and the overall pattern of conduct between the parties.

If it was not a transaction in the ordinary course of HLL's business, then section 36(8) and 52(2) of the PPSA require CEFL as the secured party to amend its financing statement so as to include the name of the transferee as a new debtor within 15 days of having knowledge of the information required to register the transfer.

As indicated above, the 3 pieces were properly transitioned on October 16, 2001 and these financing statements were amended on March 13, 2002 to include HEL, the transferee, as a debtor. The Trustee has no knowledge of when CEFL became aware of the disposition from HLL to HEL and therefore cannot opine on when the 15 day

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<sup>7</sup> Ibid. at 146.

period provided by s36(8) and 52(2) of the PPSA commenced. This will demand a determination by the Court.

As concerns the 6 pieces, the financing statements outlined above indicate that on April 27, 2001, CEFL registered a financing statement with respect to its interest in the pieces and in it named HLL as the debtor (#922716). 6 days later, on May 3, 2001, CEFL registered a financing statement in which it named HEL as the debtor, claiming a security interest in an assignment of rentals with respect to these pieces (#933770). CEFL amended its April 27, 2001 registration on March 13, 2002 to include HEL, the transferee, as a debtor. While it is possible to argue that this May 3, 2001 financing statement is evidence of CEFL's knowledge of the disposition from HLL to HEL, the Trustee has no specific knowledge of when CEFL became aware of the disposition and therefore cannot opine on when the 15 day period provided by s36(8) and 52(2) of the PPSA commenced. This will demand a determination by the Court.

**Note:** The Initial Order provides 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 the Court should determine that CEFL did not learn of the disposition until sometime during or after the 15 days prior to the date of the Initial Order, the 15 day period in which it had to register the change in debtor is effectively still running. Should CEFL receive permission from the Court to amend its financing statement to reflect the disposition of the Asset by HLL to HEL, CEFL's security interest will be perfected.

## **15. Additional Comments on Priorities**

While it is not within the mandate of the Trustee or Trustee's counsel to determine priorities, we nevertheless offer the following comments, in order to provide assistance to any creditors who may also have a valid and perfected security interest in the assets and wish to determine, for their own benefit, their ranking with respect to same:

- There are instances whereby an inventory financier such as CEFL may be entitled to claim a super-priority status (ref. s. 35(2)). CEFL has not provided evidentiary support for such an entitlement.
- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of CEFL's security interests are as follows:
  - The 3 assets: This will demand a determination by the Court as to when CEFL obtained knowledge of the disposition from HLL to HEL. If CEFL registers in the name of HEL within 15 days (as extended) of obtaining knowledge of the disposition, then by operation of s.36(8), its interest will take priority over a prior registered security interest covering after acquired property given by HEL. If not, then the relevant date must be the date of registration in the name of HEL.

The 6 assets: This will demand a determination by the Court as to when CEFL obtained knowledge of the disposition from HLL to HEL. If CEFL registers in the name of HEL within 15 days (as extended) of obtaining knowledge of the disposition, then by operation of s.36(8), its interest will take priority over a prior registered security interest covering after acquired property given by HEL. If not, then the relevant date must be the date of registration in the name of HEL.

## 16. Auction Results

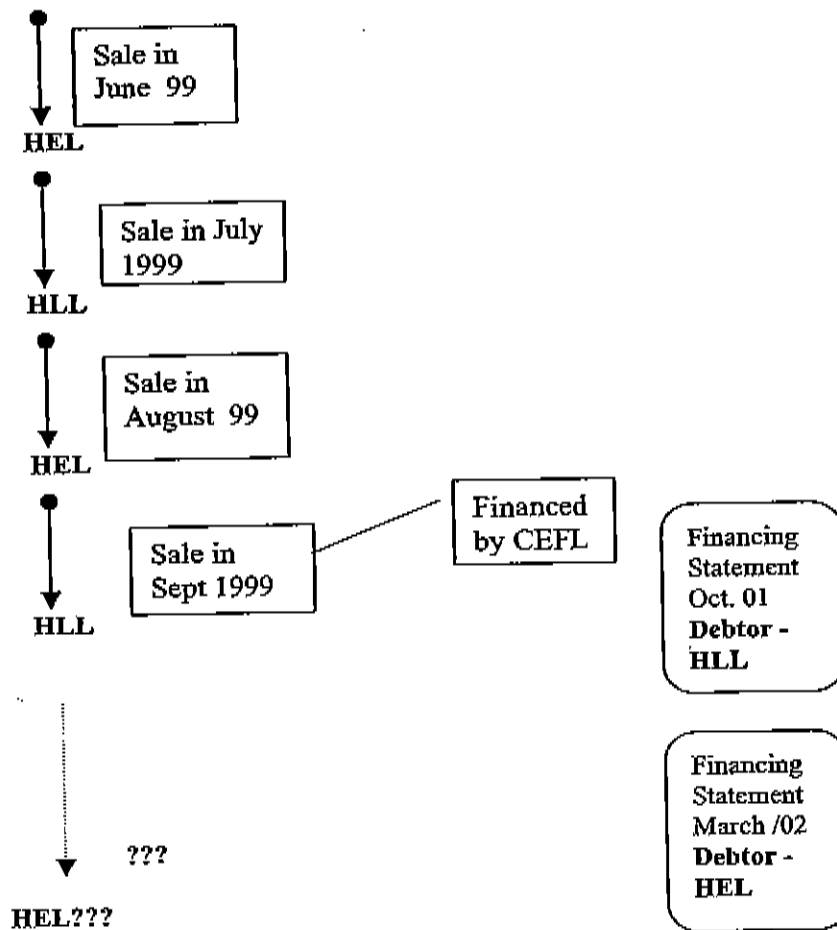
The following assets were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium):

(Asset #1)	200LC Excavator (s/n FF0200X501362)	\$135,000.00
(Asset #2)	850C Dozer (s/n T0850C888907)	\$160,000.00
(Asset #3)	450H Dozer (s/n T0450HX889199)	\$127,500.00
(Asset #4)	Timberjack Forwarder (s/n 17DD0305)	\$306,000.00
(Asset #5)	Blaw-Knox Paver (s/n 551028-64)	\$213,750.00
(Asset #6)	330LC Excavator (s/n FF0330X080456)	\$170,000.00
(Asset #7)	330LC Excavator (s/n FF0330X080518)	\$170,000.00
(Asset #8)	330LC Excavator (s/n FF0330X080747)	\$199,500.00

Net amount obtained (bid amount less LVG buyer's premium) **\$1,481,750.00**

THE 3 PIECES

John Deere Limited (Complete Goods)



THE 6 PIECES