

<b><i>SUMMARY OF CURRENT DOCUMENT</i></b>	
Name of Issuing Party or Person:	Canadian Imperial Bank of Commerce ("CIBC")
Date of Document:	March 20, 2003
Summary of Order/Relief Sought or statement of purpose in filing:	Reply Memorandum of Fact and Law of CIBC to the Interlocutory Application (Inter Partes) of John Deere Credit Inc. ("JDCI") for payment to JDCI of the proceeds from the sale by the Receiver of the equipment referenced in the Application.
Court Sub-File Number	7:25

**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 Canadian Imperial Bank of Commerce ("CIBC") in response to the Interlocutory Application (Inter Partes) (the "Application") of JDCI for payment of the proceeds from the sale by the Receiver of certain assets of Hickman Equipment (1985) Limited ("HEL").

**Summary of CIBC's Position**

1. CIBC is a secured creditor of Hickman Equipment (1985) Limited ("HEL") and is currently owed approximately \$15,433,523.95, together with interest and costs.
2. CIBC holds the following security for the indebtedness of HEL:
  - (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”).

3. The Trustee determined that the security interests created in favour of CIBC by the Debenture were subject to a subordination clause in favour of the holders of

permitted encumbrances, including unperfected purchase money security interest (“PMSI”) holders.

4. In accordance with paragraph 15 of the Claims Plan and Section 135(4) of the *Bankruptcy and Insolvency Act*, CIBC has appealed the Final Determination with respect to the Trustee’s finding in relation to the security interests of CIBC based on the Debenture as set out in paragraph 3 above (the “Appeal”), namely CIBC has appealed, inter alia:

- (a) the Trustee’s finding that CIBC’s interests under the Debenture were subordinated to the interests of the holders of permitted encumbrances, including unperfected PMSI holders;

5. The Appeal has been concluded and the parties are awaiting a decision from this Honourable Court.

6. CIBC repeats and relies upon its arguments as set out in the Memorandum of Fact and Law filed in support of the Appeal and dated the 24<sup>th</sup> day of February, 2003, and its oral arguments made in relation thereto in support of the following position:

1. CIBC has a perfected security interest under the Debenture over all of HEL’s undertaking, property and assets, present and future, which security interest was perfected as of January 29, 1985.

2. The only security interests that rank in priority to CIBC are those that constitute valid, enforceable, perfected purchase money security interests, or those that have the benefit of a valid, binding and enforceable subordination agreement or similar agreement with CIBC.
7. Therefore, CIBC claims a first priority interest over the property referred to in JDCI's Application subject to any valid, enforceable, perfected purchase money security interest or any valid, binding and enforceable subordination agreement or similar agreement with CIBC.
8. CIBC submits that JDCI has not established that it has a valid PMSI in any of the equipment which would rank above the interests of CIBC.
9. CIBC states that it has not entered into any subordination agreement or similar agreement with JDCI.
10. CIBC therefore requests that this Honourable Court dismiss the application of JDCI for proceeds and further Order that, for those Units in respect of which this Court determines that priority of security interests rests with CIBC, that CIBC is entitled to the auction proceeds therefrom.

**Requirements for obtaining a purchase money security interest (PMSI) under the *Personal Property Security Act* (the "PPSA")**

11. A PMSI is defined in s.2 of the Act as:

(hh) “purchase money security interest” means:

i) a security interest taken in collateral to the extent that it secures all or part of the purchase price of the collateral,

ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights,

iii) the interest of a lessor of goods under a lease for a term of more than one year, and

iv) the interest of a consignor who delivers goods to a consignee under a commercial consignment,

but does not include a transaction of sale by and lease back to the seller, and for the purpose of this definition, “purchase price” and “value” include interest, credit costs and other charges payable for the purchase or loan credit.

12. Section 35 of the Act sets out the requirements that must be met in order to obtain a valid PMSI in collateral or its proceeds.

13. Section 35(2), which deals with PMSI's in inventory reads as follows:

(2) Subject to section 29, a purchase money security interest in inventory or its proceeds has priority over another security interest in the same collateral given by the same debtor where

(a) the purchase money security interest in the inventory is perfected when the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier;

(b) the secured party gives a notice to another secured party who has registered, before the registration of the financing statement relating to the purchase money security interest in the inventory, a financing statement where the collateral description in the financing statement includes the same item or kind of collateral or includes accounts;

(c) the notice referred to in paragraph (b) states that the person giving the notice expects to acquire a purchase money

security interest in the inventory of the debtor, and describes the inventory by item or kind; and

- (d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

Section 29 deals with security interests in proceeds generally.

### **Other relevant sections of the PPSA**

- 14. Section 70(2) dealing with 'Service of Notice' reads as follows:

- (2) A notice or demand sent by registered mail is considered to be given

- (a) when the addressee actually receives the notice or demand; or
    - (b) except when postal services are not functioning, on the expiry of 10 days after the date of registration,

whichever is early.

- 15. The residual general priority rules are set out in section 36 of the Act. This section reads as follows:

36(1) Where this Act provides no other method for determining priority between competing security interests in the same collateral, the following priority rules apply:

(a) priority between perfected security interests is determined by the order of the occurrence of the following:

- i) the registration of a financing statement under section 26 without regard to the time of attachment of the security interest,
- ii) possession of the collateral under section 25 without regard to the time of attachment of the security interest, or
- iii) perfection under section 6, 8, 27, 30 or 75,

whichever is the earliest;

(b) a perfected security interest has priority over an unperfected security interest; and

(c) priority between unperfected security interests is determined by the order of attachment of the security interests.

16. Section 26 of the Act reads as follows:

Subject to section 20, registration of a financing statement perfects a security interest in collateral.

17. Section 20 reads:

A security interest is perfected when

(a) it has attached; and

(b) all steps required for perfection under this Act have been completed,

regardless of the order of occurrence.

**CIBC's priority position**

18. CIBC's security interest created by the Debenture was perfected as of January 29, 1985.

19. CIBC's security interest was perfected before JDCI perfected its security interest which, at its earliest, would be December 14, 1999.

20. Therefore, unless JDCI can establish that it has valid PMSI's in any of the equipment referenced in the Application, CIBC's interest in the equipment, and

the auction proceeds therefrom, would rank in priority to that of JDCI based on the residual general priority rules set out in s.36 of the PPSA.

21. The onus is on JDCI to establish that it has a PMSI in either of the pieces of equipment, as either original collateral or proceeds.

Dube v. Bank of Montreal  
(1986) 27 D.L.R. (4<sup>th</sup>) 718  
(Sask. C.A.) [Tab 1]

Canadian Imperial Bank of  
Commerce v. Marathon  
Realty Co. (1987), 40 D.L.R.  
(4<sup>th</sup>) 326 (Sask. C.A.)  
[Tab 2]

22. CIBC submits that JDCI has not established that it has a valid PMSI in any of the equipment referenced in the Application, which would rank in priority to CIBC's security interest.

**JDCI does not have a valid PMSI in any of the equipment referenced in the Application**

23. In order for JDCI to establish a PMSI in any of the units which ranks above the interests of all other creditors, JDCI must provide evidence to establish that it has met the requirements of s.2(hh) and s.35(2) of the PPSA.

24. In order to meet the definition of a PMSI set out in s.2(hh), the purpose of the agreement [which secures the interest in the collateral] must be “to enable the debtor to acquire rights” in the very thing that is put up as collateral for the loan.

*C. Walsh, “An Introduction to the New Brunswick Personal Property Security Act” (1995) at p. 161*  
**[Tab 3]**

25. A PMSI is not created in collateral where the debtor acquires rights in the collateral *before* it enters into a loan agreement covering the collateral and/or receives advances with respect to the loan.

s.2(hh) of the PPSA;

*Greyvest Leasing Inc. v. Canadian Imperial Bank of Commerce* (1993),  
 5 P.P.S.A.C. (2d) 187 (Ont.C.A.)  
**[Tab 4]**

26. According to s.35(2) of the Act the following requirements have to be met in order for JDCI to establish that it holds a PMSI which ranks in priority to the interests of all other creditors:

- 1) JDCI’s interest in the collateral must have been perfected prior to HEL taking possession of the equipment. In accordance with s.26 and s.20 of the Act this means that the registration of the financing statement registering JDCI’s security interest in the collateral must have been registered in the PPR *prior* to HEL, or another person on its behalf, taking possession of the equipment;

- 2) JDCI must have given notice, in accordance with s.35(2)(b) & (c) of the PPSA to all necessary creditors (the “PMSI notice”);
- 3) the PMSI notice must have been received by the creditors *before* the PMSI was perfected (ie. before registration of the financing statement); and
- 4) the PMSI notice must have been received by the creditors *before* HEL, or another person on its behalf, took possession of the equipment.

**The PMSI notices were not given or received before registration of the financing statement**

27. With respect to all pieces of equipment referenced in the Application, JDCI is relying upon registration of a financing statement on December 14, 1999, as the date of perfection of its security interest.

Memorandum of Fact and Law of  
JDCI, February 7, 2003 at  
paragraph 4.

28. According to JDCI, the PMSI notices were sent out on December 14, 1999 to certain creditors, including CIBC. JDCI is relying upon s.70(2) of the PPSA with respect to the PMSI notices being deemed to be given not later than on the expiry

of the 10<sup>th</sup> day after the date of registration, which in this case would be December 25, 1999.

Memorandum of Fact and Law of  
JDCL, February 7, 2003 at  
paragraph 5.

29. The PMSI notices were not, therefore, given or received before registration of the financing statement as required by s.35(2)(b) of the PPSA.
30. In discussing s.34(2) of the New Brunswick *Personal Property Security Act*, which is the equivalent section to our s.35(2), Catherine Walsh, in “An Introduction to the New Brunswick Personal Property Security Act” states:

“advance notice, stating that the inventory financier expects to acquire a PMSI in inventory and describing the inventory by item or kind must be given to any prior-registered secured party *before the PMSI is perfected by registration* and before the debtor obtains possession of the collateral” (emphasis added)

C. Walsh, *An Introduction to the New Brunswick Personal Property Security Act*, at page 163. [Tab 5]

31. Further, McLaren, in *Secured Transactions in Personal Property in Canada*, in describing the requirements to obtain a valid PMSI under Ontario law, states as follows:

*“before making its own registration, the purchase-money party must search the registry system and give notice to all parties who have registered a financing statement classifying the collateral as inventory”.* (emphasis added)

McLaren, *Secured Transactions in Personal Property in Canada*, volume 2, at p.5-57.  
[Tab 6]

32. JDCI has failed to meet the requirements of s. 35(2)(b) of the PPSA and therefore does not hold a PMSI in any of the units referenced in the Application

**The PMSI notices were not given or received before HEL took possession of the equipment**

33. In order to meet the requirements of s.35(2)(a) and (d) of the PPSA, JDCI must establish that its security interest was perfected, and the PMSI notices were given *before* HEL took possession of the equipment.
34. JDCI has not provided any evidence as to when HEL took physical possession of any of the equipment.

35. JDCI submits that the date upon which HEL obtained possession “as debtor” was subsequent to the date of perfection of JDCI’s security interest and the date the PMSI notices were given. JDCI is relying upon the date which HEL took possession of the equipment “as debtor” in order to meet the requirements of s.35(2) of the PPSA.
36. JDCI appears to be relying upon caselaw to the effect that, in certain cases, the relevant date for the purposes of determining possession is the date upon which the debtor ‘takes possession of the collateral as a debtor’.

See, for example, *Guaranty Trust Co. of Canada v. CIBC* (1989), 2 P.P.S.A.C. (2d) 88 (High. Ct. Just.), affirmed on appeal, (1993), 6 P.P.S.A.C. (2d) 51 [Tab 7] and *Air Products*, [2000] O.J. No. 1396 (Ont. Sup. Ct. Jus.) [Tab 8].

37. It is submitted that this caselaw is distinguishable from the present case since those cases deal with the equivalent to s.35(1) of the PPSA, which covers ‘collateral and its proceeds, *other than inventory*’ rather than s.35(2) which deals specifically with PMSI’s in ‘inventory’.
38. According to s.35(1), and its equivalent in other provinces, a creditor seeking to obtain the benefit of the super priority status of a PMSI in relation to collateral or its proceeds, other than inventory, is required to perfect its security interest ‘not later than 15 days after the debtor, or another person at the request of the debtor,

- obtains possession of the collateral’. This section, therefore, specifically permits a debtor to take possession of the collateral before the creditor’s security interest is the collateral in perfected.
39. In sharp contrast, section 35(2), which deals specifically with PMSI’s in inventory, precludes the debtor from taking possession of the inventory before perfection of the security interest, otherwise, the creditor cannot avail of the super priority status granted under this section.
  40. Furthermore, s.35(1) dealing with collateral other than inventory, does not require PMSI notices to be sent to other creditors. This is specifically required under s.35(2) and further, these notices must be sent before the debtor takes possession.
  41. It is obvious that section 35 draws a clear distinction between ‘inventory’ and other types of collateral, when setting out the requirements that have to be met in order to avail of the super priority status afforded to a PMSI. Any cases dealing with the interpretation of s.35(1), or its equivalent, cannot be applied to the interpretation of s.35(2), due to the significant differences between the two sections. Clearly, the drafters of the legislation intended to distinguish between “inventory” and other types of collateral.
  42. In the *Guaranty Trust* decision, the court dealt with s.34(3) of the Ontario PPSA which at that time, read as follows:

(3) A purchase-money security interest in collateral or its proceeds, other than inventory, has priority over any other security interest in the same collateral if the purchase-money security interest was perfected at the time the debtor obtained possession of the collateral or within ten days thereafter.

*Guaranty Trust Co. of Canada v. CIBC* (1989), 2 P.P.S.A.C. (2d) 88 (High. Ct. Just.), affirmed on appeal, (1993), 6 P.P.S.A.C. (2d) 51 at p.94.  
**[Tab 7]**

43. At issue was whether the creditor had perfected its security interest within ten days of the debtor taking possession of the collateral. The court held that the debtor took possession of the collateral for the purposes of s.34(3) when the property became collateral, ie. when the purchase and loan transactions were completed.
44. Subsequent to this decision, the Ontario PPSA was amended to add the words “as debtor” to qualify when the debtor took possession of the collateral. The current section, now s.33(2), reads as follows:

33(2) *Except where the collateral or its proceeds is inventory or its proceeds*, a purchase-money security interest in collateral or its proceeds has priority over any other security interest in the

same collateral given by the same debtor if the purchase-money security interest,

(a) in the case of collateral, other than an intangible, was perfected before or within ten days after,

(i) the debtor obtained possession of the collateral *as a debtor*, or

(ii) a third party, at the request of the debtor, obtained or held possession of the collateral,

whichever is earlier,

*Personal Property Security Act*, R.S.O. 1990, c.P.10. (emphasis added) [Tab 9]

45. It is noteworthy that the Ontario legislature only chose to make this change to the section dealing with collateral *other than inventory*. S.33(1), which deals with PMSI's in inventory does not require that the debtor take possession of inventory "as debtor", but references mere possession. Therefore, the Ontario legislature has maintained the distinction between inventory and other types of collateral in the PMSI priority section of the Ontario PPSA and it is clear that the PMSI notices must be given and the security interest perfected, *before* the debtor takes possession of the inventory.

46. This strict requirement to perfect a PMSI and give PMSI notices before the debtor obtains possession of the inventory is confirmed by the caselaw dealing with PPSA provisions equivalent to our s.35(2).

See *Elmcrest Furniture Manufacturing Ltd. v. Price Waterhouse Ltd. as Receiver and Manager of 216200 Alberta Ltd.* (1985), 5 P.P.S.A.C. 22 (Sask. Q.B.) [Tab 10]; *Re. Fosters Service (81) Ltd.; Terra Power Tractor Co. Ltd. v. Touche Ross Limited and Royal Bank of Canada* (1985), 5 P.P.S.A.C. 192 (Sask. Q.B.) [Tab 11]; and *Massey-Ferguson Industries Ltd. v. Melfort Credit Union Ltd. et al.* (1986), 6 P.P.S.A.C. 120 (Sask. Q.B.) [Tab 12]

47. The case of *Elmcrest Furniture Manufacturing Ltd. v. Price Waterhouse Ltd as Receiver and Manager of 216200 Alberta Ltd*, dealt with s.34(2) of Saskatchewan's PPSA, which in 1985 read as follows:

(2) ...a purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if:

- (a) the purchase-money security interest in the inventory is perfected at the time the debtor receives possession of it; and
- (b) the purchase-money secured party serves a notice on any person who has registered a financing statement or security agreement covering the same type or kind of collateral, unless the purchase-money secured party registers his interest before that time, in which case the notice shall be served on secured parties who have registered financing statements or security agreements covering the same type or kind of collateral of the

debtor before registration by the purchase-money secured party.

(3) The notice required in subsection (2) shall:

(a) contain a statement that the person giving the notice has acquired or expects to acquire a purchase-money security interest in inventory of the debtor and its proceeds and a description of the inventory and its proceeds according to type or kind; and

(b) *be served at any time within a period of two years before the debtor receives possession of the collateral.*

*Elmcrest Furniture Manufacturing Ltd. v. Price Waterhouse Ltd. as Receiver and Manager of 216200 Alberta Ltd., supra, (emphasis added) [Tab 10]*

48. Elmcrest, claimed a PMSI in inventory in priority to the Royal Bank of Canada, which held a security interest in the inventory pursuant to a general security agreement. Elmcrest had registered its financing statement on February 15, 1983 and provided a PMSI notice to the Royal Bank on February 24, 1983. Elmcrest had supplied inventory to the debtor both before and after February 24, 1983, the date of its PMSI notices. The Saskatchewan Court of Queen's Bench went through an analysis of s.34 and held that s.34(3)(b) of the Act required that the PMSI notices be served *before* the debtor took possession of the collateral. As a result, the court held that Elmcrest could not claim a PMSI over inventory that had been in the possession of the debtor before Elmcrest's PMSI notices had been served.

49. The court found support for its findings in a report prepared by the Law Reform Commission of Saskatchewan entitled “Proposals for a Saskatchewan Personal Property Security Act”. The court cited the following passage from the report:

“In order to gain a priority status, the purchase-money financier must ensure that his security interest is perfected at the time the debtor receives possession of the collateral, *and* give to a registered security interest holder the prescribed notice. The purpose behind these requirements is to ensure that the secured party with the prior security interest is not induced by the acquisition of the new collateral by the debtor to make further advances or to relax policing measures with respect to his original collateral or its proceeds.”

After citing this passage, the court went on to state:

“Thus, the proponents of the legislation did not contemplate that a party with a perfected security interest in after acquired property should have to search the registry before making each advance in order to be certain of his priority.”

*Elmcrest Furniture Manufacturing Ltd. v. Price Waterhouse Ltd. as Receiver and Manager of 216200 Alberta Ltd.*, supra [Tab 10] at paragraph 10.

50. The Elmcrest case was followed in both *Re. Fosters Service (81) Ltd.; Terra Power Tractor Co. Ltd. v. Touche Ross Limited and Royal Bank of Canada* (1985), 5 P.P.S.A.C. 192 (Sask. Q.B.), supra [Tab 10], and *Massey-Ferguson Industries Ltd. v. Melfort Credit Union Ltd. et al.* (1986), 6 P.P.S.A.C. 120 (Sask. Q.B.), supra [Tab 11].

51. The distinction between PMSI's in inventory and PMSI's in collateral other than inventory is also discussed and supported by McClaren in *Secured Transactions in Personal Property in Canada*, volume 2.

McClaren, *Secured Transactions in Personal Property in Canada*, volume 2, at 5-52 to 5-70, *supra* [Tab 6]

52. In discussing the requirements of the Saskatchewan PPSA relating to PMSI's in inventory, McClaren states:

The purchase-money interest in inventory takes priority over the after-acquired property interest if it is perfected no later than the time that the debtor receives possession of the inventory and if there has been compliance with the notice requirements of s.33(1)(b). In order to obtain the priority given by s.33(1), the secured party must perfect its interest before the debtor receives possession of the inventory.

McClaren, *Secured Transactions in Personal Property in Canada*, volume 2, at 5-54 - 5-55, *supra* [Tab 6]

53. McClaren goes on to state:

A secured party with an interest in inventory who wishes to ensure entitlement to the priority in s.33(1) must register a financing statement before making any advances to the debtor on incoming goods. The purchase-money secured party must also have complied with the written notification requirements, which state that the notice must have been "received" by the other party entitled to the notification *before the goods reach the debtor* and must contain the information required by s.33(1)(c)...*Notification*

*given after the debtor receives the goods is ineffective.* (emphasis added)

McClaren, *Secured Transactions in Personal Property in Canada*, volume 2, at 5-56, supra [Tab 6]

54. Neither McLaren, nor any of the case law referenced above, interpret the notion of ‘possession’ as meaning ‘possession as debtor’ when dealing with PMSI’s in inventory.

McClaren, *Secured Transactions in Personal Property in Canada*, volume 2, at pp. 5-64.3 - 5-70 generally and specifically at p.5-68, supra [Tab 6]

55. The main distinction between the sections of the PPSA dealing with PMSI’s in inventory and PMSI’s in collateral other than inventory is that the section governing PMSI’s in collateral other than inventory does not require any notice to be given to other creditors and it allows for a grace period following the day after the debtor takes possession of the collateral, within which the PMSI creditor can perfect its PMSI interest. This grace period does not exist for PMSI’s in inventory.
56. McLaren discusses the reasoning behind the grace period for PMSI’s in collateral other than inventory and states as follows:

There is a ten-day grace period which permits the purchase-money financier to deliver the goods immediately without fear of sacrificing its priority, provided perfection is accomplished within the following ten days. This grace period was designed to protect a financier who was unable to arrange advance registrations in many typical purchase-money transactions, particularly those arising out of sales of consumer goods and commercial equipment.

McClaren, *Secured Transactions in Personal Property in Canada*, volume 2, at pp. 5-68.1 - 5-69, *supra* [Tab 6]

57. Catherine Walsh in discussing the rationale behind this grace period confirms the statements made by McClaren and states:

Although the Act generally eschews the use of grace periods, commercial reality requires an exception for a pmsi in non-inventory collateral. This type of purchase money financing, particularly at the consumer retail level, is frequently concluded on-the-spot with little or no prior negotiation. Without a grace period to effect registration, the supply of purchase money credit might well be diminished. Moreover, the availability of a grace period reflects established commercial expectations under prior law at least in the case of pmsi's taken by sellers and lessors of the collateral.

C. Walsh, "An Introduction to the New Brunswick Personal Property Security Act" (1995) at p. 162 [Tab 3]

58. This rationale does not apply to PMSI's in inventory. Rather, as noted above, the courts seek to ensure that a secured party with a prior security interest in

inventory receives prior notice of a subsequent PMSI in inventory so that it is not induced by the acquisition of new collateral to make further advances.

59. CIBC repeats the foregoing paragraphs and submits that ‘possession’ as that term is used in s.35(2) refers to the plain meaning of that word and not ‘possession as debtor’. A creditor claiming a PMSI in inventory will have to establish that it perfected its security interest and sent the PMSI notices *before* the debtor took possession of the inventory. Therefore, JDCI cannot claim a PMSI ranking above the interests of CIBC in any inventory that HEL took possession of before December 25, 1999, the date on which JDCI submits that its PMSI notices were received.
60. CIBC submits that JDCI has not met the requirements of s.35(2) of the PPSA with respect to any of the units referenced in the Application and its interest does not rank in priority to CIBC.

**Unperfected purchase money security liens do not rank above CIBC’s interests**

61. CIBC repeats and relies upon its arguments as set out in the Memorandum of Fact and Law filed in support of the Appeal and dated the 24<sup>th</sup> day of February, 2003, and its oral arguments made in relation thereto in support of its position that CIBC’s interest in the equipment referenced in the Application is not subordinated to the interests of unperfected purchase money liens.

62. In the alternative, if this Honourable Court finds that CIBC's interest is subordinated to the interests of unperfected purchase money liens, then CIBC submits that JDCI has not established that it holds an unperfected purchase money lien in any of the equipment referenced in the Application.

### **Conclusion**

63. In conclusion, CIBC submits that with respect to all units of equipment referenced in the Application, i) JDCI has failed to establish that it holds a valid, perfected PMSI in any of these units and ii) CIBC's interests have priority to the interests of JDCI based on the general residual priority rules in s.36 of the PPSA;

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this                      day  
of April, 2003.

**BENSON•MYLES**

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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	722-0483

	Carl Holm	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