

<i>SUMMARY OF CURRENT DOCUMENT</i>	
Name of Issuing Party or Person:	John Deere Limited and John Deere Credit Inc.
Date of Document:	<u>7</u> February 2003
Summary of Order/Relief Sought or Statement of Purpose in filing:	Reply Memorandum of Fact and Law of John Deere Limited and John Deere Credit Inc. to the Interlocutory Application (Inter Partes) of TD Asset Finance Corp.
Court Sub-File Number:	7:47

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*,
RSC 1985, c. B-3, as amended

MEMORANDUM OF FACT AND LAW OF
JOHN DEERE LIMITED ("JDL") AND JOHN DEERE CREDIT INC. ("JDCI")
(collectively, "DEERE")

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MEMORANDUM OF FACT AND LAW OF
JOHN DEERE LIMITED ("JDL") AND JOHN DEERE CREDIT INC. ("JDCI")
(collectively, "DEERE")

1. Deere files this Memorandum of Fact and Law in response to the Interlocutory Application (Inter Partes) of TD Asset Finance Corp. ("TD"), (i) for a determination of its priority and entitlement, vis-à-vis other claimants, to the proceeds from the sale of the following assets of Hickman Equipment, and (ii) for an order that the Receiver pay the auction proceeds from the sale of the following assets (the "Claimed Units") of Hickman Equipment to TD:

	Make	Serial #	Proceeds
1.	744H Loader	DW744HX576952	\$192,500.00
2.	120 Excavator	P00120X031958	\$107,000.00
3.	200LC Excavator	FF0200X501500	\$91,834.00
4.	644H Loader	DW644HX574161	\$114,791.00
5.	792 Excavator	FF0792DX010221	\$58,900.00
6.	Timberjack 230A Forwarder	CT7296	\$25,000.00
TOTAL			\$590,025.00

2. A final determination has been issued by the Trustee in respect of the claims of TD (the “TD Final Determination”).

Reference: TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

3. JDL and JDCI each have a valid security interest in certain of the Claimed Units, as further described below, and asserts a right, in priority to TD, to receive the auction proceeds in respect thereof.

SUMMARY OF THE MAIN ASPECTS OF DEERE'S POSITION

TD Has Not Established a PMSI

4. Deere submits that, if TD wants to claim a purchase money security interest (“PMSI”) in any of the Claimed Units, whether as original collateral or as proceeds, the onus is on TD to prove entitlement to rely on section 35(2) of the Personal Property Security Act, SNL 1998, c. P-7.1 (the “PPSA”) to assert priority of its security interest over other creditors of Hickman Equipment.

Reference: Dubé v. Bank of Montreal (1986) 27 D.L.R. (4th) 718 (Sask. C.A.);

Canadian Imperial Bank of Commerce v. Marathon Realty Co. (1987), 40 D.L.R. (4th) 326 (Sask. C.A.).

5. In order to claim that a security interest is a PMSI, TD must first prove that the security interest meets the definition of purchase money security interest contained in s. 2 (hh) of the PPSA. Then, in order to avail itself of the special priority that is potentially available for a PMSI, TD must also establish that it has met the requirements of section 35(2) of the PPSA with respect to the security interest.

Reference: PPSA, sections 2(hh) and 35(2).

6. In respect of the Claimed Units, TD has provided no evidence whatsoever to demonstrate that its security interest meets the definition of “purchase money security interest” in section 2(hh) of the PPSA. In addition, TD has provided no evidence whatsoever that it complied with the requirements of section 35(2) of the PPSA. It is therefore submitted that TD cannot claim priority over these Claimed Units as the holder of a purchase money security interest.

Reference: PPSA, sections 2(hh) and 35(2).

Failure to Comply with Transition Registration Requirements

7. In respect of Claimed Unit #4, Deere submits that TD did not comply with the mandatory provisions of section 75 of the PPSA, and section 26(1) of the Personal Property Security Regulations, N.R. 103/99 (the “PPSA Regulations”).

Reference: PPSA, s. 75;

PPSA Regulations, s. 26(1).

8. To allow TD to assert priority on the basis of its pre-PPSA registrations would, on an objective basis, be seriously misleading.

Reference: Decision of Hall J., dated 3 January 2003, in Interlocutory Application by Wells Fargo Equipment Finance Company (2002 01 T 0352, Supreme Court of Newfoundland and Labrador);

9. TD's earliest registration under the PPSA which could apply to Claimed Unit #4 was on 29 January 2002. Deere submits that 29 January 2002 is the earliest date upon which TD can establish registration in respect of Claimed Unit #4.

Residual Priority Rules

10. Section 36(1) to 36(5) of the PPSA reads:

"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 sections 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.

- (2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by the method by which it was originally perfected.*
- (3) For the purpose of subsection (1) and subject to section 29, the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of a security interest in its proceeds.*
- (4) A security interest in goods that are equipment and are of a kind that are prescribed as serial numbered goods is not registered or perfected by registration for the purpose of subsection (1), (7) or (8) or 35(1) unless a financing statement relating to the security interest that includes a description of the goods by serial number is registered.*
- (5) Subject to subsection (6), the priority which a security interest has under subsection (1) applies to all advances, including future advances.*

Reference: PPSA, sections 36(1) to 36(5).

11. The security interests of JDCI and JDL, respectively, were perfected by the registration of financing statements on 14 December 1999. Unless TD otherwise establishes an entitlement to rank ahead of either JDCI or JDL, the date of registration by JDCI and JDL is, in respect of all Claimed Units in which JDCI or JDL has a security interest, earlier than the date of registration of TD, and pursuant to section 36, either JDCI and JDL, or both of them, (as the case may be) has or have priority over TD.

JDCI's PMSI

12. JDCI has a valid purchase money security interest in Claimed Units #5 and #6.

Reference: Final Determination of the Trustee in respect of the Claims of JDCI (the “JDCI Final Determination”), in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, Exhibit “S”.

13. Purchase Money Security Interest notices (“PMSI notices”) were sent by registered mail by JDCI on 14 December 1999 to CIBC Equipment Finance Ltd., Bombardier Capital Leasing Ltd., ABN Amro Bank Canada, Canadian Imperial Bank of Commerce and General Motors Acceptance Corporation of Canada, Limited.

Reference: Affidavit of Ernest G. Reid, Q.C., dated 16 October 2002; PPSA, section 70(2).

14. JDCI has priority over all other creditors as a holder of a purchase money security interest in respect of Claimed Units #5 and #6.

Reference: PPSA, s. 2(hh) and s. 35(2).

JDL's Security Interest

15. JDL's security interest in Claimed Units #1, #2, #3, and #4 is in them as original collateral. JDL's security interest in Claimed Unit #5 is in it as proceeds of JDL's original collateral.

Conclusion

16. JDL and JDCI therefore each request that the Court declare that, for those Claimed Units in respect of which this Honourable Court determines that priority of security interest rests with JDL or JDCI (as the case may be), (1) the security interest of TD does not have priority, (2) the security interest of JDL or JDCI (as the case may be) has priority, and (3) JDL or JDCI, , (as the case may be) is entitled to payment of the auction proceeds therefrom.

CLAIMED UNIT #1: 744H LOADER, S/N DW744HX576952**TD's Security Interest**

17. TD claims a security interest in Claimed Unit #1 as original collateral. The earliest date of perfection of TD's security interest in Claimed Unit #1 is 1 September 2000.

Reference: TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

JDL's Security Interest

18. JDL's security interest in Claimed Unit #1 and the auction proceeds therefrom is pursuant to the John Deere Security Agreement – Inventory and those other security documents referenced in the Final Determination of the Trustee in respect of the claims of JDL (the "JDL Final Determination").

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C";

JDL Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "J".

19. JDL caused a financing statement, registration no. 5595, to be registered in the PPR on 14 December 1999. By this financing statement JDL perfected the security interest it has in Claimed Unit #1.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "I".

Priority

20. If TD has a security interest in Claimed Unit #1, the security interest of TD in Claimed Unit #1 was not perfected until a financing statement was registered on 1 September 2000. The security interest of JDL, however, was perfected earlier, upon registration of JDL's financing statement on 14 December 1999.
21. JDL provided a conditional subordination letter to TD dated 18 September 2000 in respect of Claimed Unit #1 (the "Claimed Unit #1 Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #1 and that JDL agreed to postpone its security interest provided that certain specific conditions were met and subject to the other specific terms of such letter.

Reference: Affidavit of D. Bradford Wicks, sworn 17 January 2003, paragraph 9(xiv) and Exhibit C.

22. JDL submits that the Claimed Unit #1 Conditional Subordination Letter must be construed in accordance with its terms and that in order to take advantage of any alleged subordination of security interest, the party alleging the subordination must show that the subordination was clear and unequivocal and made with full knowledge of the circumstances.

Reference: Re Sun Life Assurance Co. of Canada and Royal Bank of Canada et al. (1995), 129 D.L.R. (4th) 305 (Ont. Gen. Div.);
Bank of Montreal v. Kimberley Brewing Co. [1999] B.C.J. No. 2547 (B.C.S.C.);
Federal Business Development Bank v. Steinbock Development Corp. Ltd. (1983), 42 A.R. 231 (A.C.A.);
Engel Canada Inc. v. T.C.E. Capital Corp. [2002] O.J. No. 2361 (Ont. S.C.J.).

23. JDL submits that the onus is on TD to prove that it has met all the terms and conditions of the Claimed Unit #1 Conditional Subordination Letter if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #1.
24. JDL submits that, in accordance with section 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, TD may have in Claimed Unit #1. JDL also submits that its security interest ranks in priority to the claim of any other secured creditor, subject to the rights, if any, of Canadian Imperial Bank of Commerce ("CIBC"), under the Priority Agreement between JDL and CIBC, dated 5 July 1985 (the "JDL/CIBC Priority Agreement").

Reference: PPSA, section 36.

CLAIMED UNIT #2: 120 EXCAVATOR S/N P00120X031958**TD's Security Interest**

25. TD claims a security interest in Claimed Unit #2 as original collateral. The earliest date of perfection of TD's security interest in Claimed Unit #2 is 17 October 2000.

Reference: TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

JDL's Security Interest

26. JDL's security interest in Claimed Unit #2 and the auction proceeds therefrom is pursuant to the John Deere Security Agreement – Inventory and those other security documents referenced in the JDL Final Determination.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C";

JDL Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "J".

27. JDL caused a financing statement, registration no. 5595, to be registered in the PPR on 14 December 1999. By this financing statement JDL perfected the security interest it has in Claimed Unit #2.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "I".

Priority

28. If TD has a security interest in Claimed Unit #2, the security interest of TD in Claimed Unit #2 was not perfected until a financing statement was registered

on 17 October 2000. The security interest of JDL, however, was perfected earlier, upon registration of JDL's financing statement on 14 December 1999.

29. JDL submits that, in accordance with section 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, TD may have in Claimed Unit #2. JDL also submits that its security interest ranks in priority to the claim of any other secured creditor, subject to the rights, if any, of CIBC, under the JDL/CIBC Priority Agreement.

Reference: PPSA, section 36.

CLAIMED UNIT #3: 200LC EXCAVATOR S/N FF0200X501500**TD's Security Interest**

30. TD claims a security interest in Claimed Unit #3 as original collateral. The earliest date of perfection of TD's security interest in Claimed Unit #3 is 1 September 2000.

Reference: TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

JDL's Security Interest

31. JDL's security interest in Claimed Unit #3 and the auction proceeds therefrom is pursuant to the John Deere Security Agreement – Inventory and those other security documents referenced in the JDL Final Determination.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C";

JDL Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "J".

32. JDL caused a financing statement, registration no. 5595, to be registered in the PPR on 14 December 1999. By this financing statement JDL perfected the security interest it has in Claimed Unit #3.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "I".

Priority

33. If TD has a security interest in Claimed Unit #3, the security interest of TD in Claimed Unit #3 was not perfected until a financing statement was registered

on 1 September 2000. The security interest of JDL, however, was perfected earlier, upon registration of JDL's financing statement on 14 December 1999.

34. JDL provided a conditional subordination letter to TD dated 18 September 2000 in respect of Claimed Unit #3 (the "Claimed Unit #3 Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #3 and that JDL agreed to postpone its security interest provided that certain specific conditions were met and subject to the other specific terms of such letter.

Reference: Affidavit of D. Bradford Wicks, sworn 17 January 2003, paragraph 9(xiv) and Exhibit C.

35. JDL submits that the Claimed Unit #3 Conditional Subordination Letter must be construed in accordance with its terms and that in order to take advantage of any alleged subordination of security interest, the party alleging the subordination must show that the subordination was clear and unequivocal and made with full knowledge of the circumstances.

Reference: Re Sun Life Assurance Co. of Canada and Royal Bank of Canada et al. (1995), 129 D.L.R. (4th) 305 (Ont. Gen. Div.);
Bank of Montreal v. Kimberley Brewing Co. [1999] B.C.J. No. 2547 (B.C.S.C.);
Federal Business Development Bank v. Steinbock Development Corp. Ltd. (1983), 42 A.R. 231 (A.C.A.);
Engel Canada Inc. v. T.C.E. Capital Corp. [2002] O.J. No. 2361 (Ont. S.C.J.).

36. JDL submits that the onus is on TD to prove that it has met all the terms and conditions of the Claimed Unit #3 Conditional Subordination Letter if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #3.

37. JDL submits that, in accordance with section 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, TD may have in Claimed Unit #3. JDL also submits that its security interest ranks in priority to the claim of any other secured creditor, subject to the rights, if any, of CIBC, under the JDL/CIBC Priority Agreement.

Reference: PPSA, section 36.

CLAIMED UNIT #4: 644H LOADER S/N DW644HX574161**TD's Security Interest**

38. TD claims a security interest in Claimed Unit #4 as original collateral. The earliest date of perfection of TD's security interest in Claimed Unit #4 is 29 January 2002.

Reference: TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

39. The registration made by TD on 29 January 2002, as number 1572417 under the PPSA, does not effectively transition any security filing by TD under prior registration law (as that term is defined in the PPSA) because the mandatory requirements of section 75 of the PPSA and section 26 of the PPSA Regulations were not complied with. TD cannot rely on the filing made at the Registry of Bills of Sale, Conditional Sales and Chattel Mortgages, in respect of Claimed Unit #4 under prior registration law as the date for determination of priority.

Reference: PPSA, section 75;

PPSA Regulations, section 26;

Decision of Hall J., dated 3 January 2003, in Interlocutory Application by Wells Fargo Equipment Finance Company (2002 01 T 0352, Supreme Court of Newfoundland and Labrador);

Kelln (Trustee of) v. Strasbourg Credit Union Ltd. [1992]. 3 W.W.R. 310 (Sask C.A.);

Re Lambert, [1994] 7 P.P.S.A.C (2nd) (Ont. C.A.);

Drake v. Snook, The Royal Bank of Canada and Martin (1985) 53 Nfld. P.E.I.R. 359 (Nfld. S.C.C.A.);

Adelaide Capital Corp. v. Integrated Transportation Finance Inc. [1994] CarswellOnt. 256 (Ont. Gen. Div.);

Central Guarantee Trust Co. v. Red Coach Rentals Corp., [1995] CarswellOnt 57 (Ont. Gen. Div.);

TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

40. In addition, the security interest of TD in Claimed Unit #4 arose through a sale and lease back transaction which occurred prior to the implementation of the PPSA.
41. In accordance with section 74(4) of the PPSA, the validity of a prior security interest is governed by prior law. A prior law security interest may only be continued under the PPSA if the requirements of prior registration law were complied with.

Reference: PPSA, sections 74(4) and 75(4).

42. TD made no registration of a bill of sale in respect of Claimed Unit #4 under the Bills of Sale Act.

Reference: Bills of Sale Act, R.S.N.L. 1990 B-3, as amended, (the "Bills of Sale Act").

43. It is submitted that TD did enter, and intended to enter, into a sale and leaseback arrangement with Hickman Equipment, in circumstances in which there was no actual or continued change in possession of the collateral. TD has provided no evidence that it ever took possession of Claimed Unit #4 and, in fact, for TD to have taken possession of Claimed Unit #4 would have been contrary to the intent of the sale/leaseback arrangement, whereby TD would finance Claimed Unit #4 and Hickman Equipment would maintain possession.

44. The bill of sale in respect of Claimed Unit #4 was not evidenced by a registered bill of sale and is therefore void as against a creditor and as against a subsequent purchaser or mortgagee claiming from or under Hickman Equipment in good faith for valuable consideration without notice whose conveyance or mortgage has been registered or is valid without registration.

Reference: Bills of Sale Act, section 5(1).

45. A “sale” under the Bills of Sale Act, and to which section 5(1) applies, is stated to include “a sale, assignment, transfer, conveyance, declaration of trust without transfer, or other assurance of chattels ***not intended to operate as a mortgage***, or an agreement, whether or not intended to be followed by the execution of another instrument, by which a right in equity to chattels is conferred, but does not include... (ii) a transfer or sale of goods in the ordinary course of a trade or calling” (emphasis added)

Reference: Bills of Sale Act, section 2(o).

46. A “mortgage” under the Bills of Sale Act, and to which section 5(1) applies, is stated to include “an assignment, transfer, conveyance, declaration of trust without transfer, or other assurance of chattels, ***intended to operate as a mortgage or pledge***, or a power or authority or licence to take possession of chattels as security, or an agreement, whether or not intended to be followed by the execution of another instrument, by which a right in equity to a charge on chattels is conferred...” (emphasis added)

Reference: Bills of Sale Act, section 2(j).

47. It is submitted that the sale and lease documents in respect of Claimed Unit #4 (together referred to herein as the “Financing Documents”) should not be characterized as “sales” under the Bills of Sale Act that are not intended to

operate as a mortgage. On the contrary, the purpose of the Financing Documents was so that TD would have a charge over Claimed Unit #4, such that, upon payment of the amounts contemplated in the lease (including the nominal option purchase price) and fulfilling the other obligations secured, title would revert back to Hickman Equipment. The Financing Documents taken as a whole were intended to act as a mortgage. It is therefore submitted that the bill of sale in respect of Claimed Unit #4, for the purposes of sections 2 (j) and 5(1) of the Bills of Sale Act, ought to be characterized as a “mortgage” in respect of which registration was required so as to be valid against creditors or subsequent purchasers or mortgagees of Hickman Equipment.

Reference: Grand River Motors Ltd. (Trustee of) v. Commercial Finance Corp., [1933] S.C.R. 591, 1933 CarswellOnt 49 (S.C.C.).

48. In the alternative, it is submitted that a sale to a finance company, accompanied by a lease back to the seller is not a sale in the ordinary course of the trade or calling of a dealer of heavy equipment, such as Hickman Equipment. Whether a transaction is in the ordinary course of a trade or calling is a question of fact and will therefore depend on all the circumstances of the sale.

Reference: Fairline Boats Ltd. v. Leger et al. (1980) 1 P.P.S.A.C. 218 (Ont. S.C., H.C.J.);

Misener Financial Corporation v. General Home Systems Ltd. et al. (1984) 27 B.L.R. 247 (Ont. S.C., H.C.J.).

49. It is submitted that, if the buyer is not an ordinary customer, but a financial institution, this may take the sale out of the ordinary course of business. It is further submitted that sales of equipment to finance companies by dealers, followed by the lease by the finance company to a third party (as in the Misener case) ought to be distinguished from the fact scenario in respect of

Claimed Unit #4. In respect of Claimed Unit #4, the Financing Documents resulted in a mortgage, and were intended to operate as a mortgage, to TD with no change in possession of the Claimed Unit #4. Claimed Unit #4 remained on the premises of Hickman Equipment in its inventory.

Reference: Misener Financial Corporation v. General Home Systems Ltd. et al. (1984) 27 B.L.R. 247 (Ont. S.C., H.C.J.).

50. It is submitted that, if this Honourable Court determines that the bill of sale in relation to Claimed Unit #4 is not a “mortgage” but a “sale” under the Bills of Sale Act, then the bill of sale is not in the ordinary course of the trade or calling of Hickman Equipment and was required to be registered under the Bills of Sale Act in order to be validly asserted against creditors, or subsequent purchasers or mortgagors of Hickman Equipment.
51. It is further submitted that TD has therefore not established that the security agreements upon which it relies to assert a security interest in Claimed Unit #4 are valid.

JDL's Security Interest

52. JDL's security interest in Claimed Unit #4 and the auction proceeds therefrom is pursuant to the John Deere Security Agreement – Inventory and those other security documents referenced in the JDL Final Determination.

Reference: Affidavit of Bruce C. Grant , sworn 7 February 2003, Exhibit “C”;

JDL Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit “J”.

53. JDL caused a financing statement, registration no. 5595, to be registered in the PPR on 14 December 1999. By this financing statement JDL perfected the security interest it has in Claimed Unit #4.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "I".

Priority

54. If TD has a security interest in Claimed Unit #4, the security interest of TD in Claimed Unit #4 was not perfected until a financing statement was registered on 1 September 2000. The security interest of JDL, however, was perfected earlier, upon registration of JDL's financing statement on 14 December 1999.

55. JDL provided a conditional subordination letter to TD dated 12 October 2000 in respect of Claimed Unit #4 (the "Claimed Unit #4 Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #4 and that JDL agreed to postpone its security interest provided that certain specific conditions were met and subject to the other specific terms of such letter.

Reference: Affidavit of D. Bradford Wicks, sworn 17 January 2003, paragraph 7(xiii) and Exhibit B.

56. JDL submits that the Claimed Unit #4 Conditional Subordination Letter must be construed in accordance with its terms and that in order to take advantage of any alleged subordination of security interest, the party alleging the subordination must show that the subordination was clear and unequivocal and made with full knowledge of the circumstances.

Reference: Re Sun Life Assurance Co. of Canada and Royal Bank of Canada et al. (1995), 129 D.L.R. (4th) 305 (Ont. Gen. Div.);

Bank of Montreal v. Kimberley Brewing Co. [1999] B.C.J. No. 2547 (B.C.S.C.);

Federal Business Development Bank v. Steinbock Development Corp. Ltd. (1983), 42 A.R. 231 (A.C.A.);

Engel Canada Inc. v. T.C.E. Capital Corp. [2002] O.J. No. 2361 (Ont. S.C.J.).

57. JDL submits that the onus is on TD to prove that it has met all the terms and conditions of the Claimed Unit #4 Conditional Subordination Letter if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #4.
58. JDL submits that, in accordance with section 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, TD may have in Claimed Unit #4. JDL also submits that its security interest ranks in priority to the claim of any other secured creditor, subject to the rights, if any, of CIBC, under the JDL/CIBC Priority Agreement.

Reference: PPSA, section 36.

CLAIMED UNIT #5: JOHN DEERE 792D EXCAVATOR. S/N FF792DX010221**TD's Security Interest**

59. TD does not claim a security interest in Claimed Unit #5 as original collateral. Instead, TD claims a security interest in Claimed Unit #5 as proceeds of a 270 LC Excavator, S/N FF0270X070714 which is TD's original collateral (the "Claimed Unit #5 Original Collateral").
60. In order to assert a claim to proceeds, a second creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

Reference: PPSA, sections 2(ff) and 29.

61. If TD has a security interest at all in either Claimed Unit #5 or Claimed Unit #5 Original Collateral, the earliest date of perfection of TD's security interest in either Claimed Unit #5 or Claimed Unit #5 Original Collateral is 1 September 2000.

Reference: TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

JDCI's Security Interest

62. JDCI's security interest in Claimed Unit #5 and the auction proceeds therefrom is pursuant to the Inventory Security Agreement dated 9 May 2000 and its Chattel Mortgage Agreement dated 15 September 2000.

Reference: Affidavit of Bruce C. Grant, sworn, 7 February 2003, Exhibit "O";

Affidavit of David R. Bugaresti, sworn 6 February 2003, Exhibit "A".

63. JDCI has a valid purchase money security interest in Claimed Unit #5.

Reference: JDCI Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "S";

64. JDCI has caused a financing statement, registration no. 5504, to be registered in the PPR on 14 December 1999. By this financing statement, JDCI perfected the security interest it has in Claimed Unit #5.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "R".

65. PMSI notices were sent by registered mail by JDCI on 14 December 1999 to CIBC Equipment Finance Ltd., Bombardier Capital Leasing Ltd., ABN Amro Bank Canada, Canadian Imperial Bank of Commerce and General Motors Acceptance Corporation of Canada, Limited.

Reference: Affidavit of Ernest G. Reid, Q.C., sworn 16 October 2002; PPSA, section 70(2).

JDL's Security Interest

66. JDL's security interest in Claimed Unit #5 as proceeds of Claimed Unit #5 Original Collateral is pursuant to the John Deere Security Agreement – Inventory and those other security documents referenced in the JDL Final Determination.

Reference: JDL Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "J".

67. JDL submits that Claimed Unit #5 Original Collateral was originally supplied to Hickman by JDL.

Reference: Affidavit of Douglas A. Dicker, sworn 7 February 2003, Exhibit "A".

68. The security interest granted to JDL in the John Deere Security Agreement – Inventory, between JDL and Hickman Equipment, dated 26 January 1993, extends to collateral in Hickman's possession, and all proceeds derived directly or indirectly from any dealing with such collateral.

Reference: Paragraphs 2 and 3 of the John Deere Security Agreement – Inventory, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

69. The term "collateral" is defined in the John Deere Security Agreement – Inventory. Among other things, it includes Hickman's entire stock of goods which form part of Hickman's inventory and which were either supplied to Hickman by JDL or supplied to Hickman by others and financed by JDL. Included in "collateral" are complete machines, new and used goods sold by JDL to Hickman and financed by JDL or taken by JDL as additional security for the indebtedness, and new or used goods owned by Hickman and financed by JDL or taken by JDL as additional security of the indebtedness.

Reference: Paragraph 2 of the John Deere Security Agreement – Inventory, of the Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

70. JDL caused a financing statement, registration no. 5595, to be registered in the PPR on 14 December 1999. By this financing statement JDL perfected the security interest it has in Claimed Unit #5 Original Collateral, and the proceeds thereof, including Claimed Unit #5.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "I";

JDL Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "J".

Priority

71. If TD has a security interest in Claimed Unit #5, the security interest of TD in Claimed Unit #5 was not perfected until a financing statement was registered on 1 September 2000. The security interest of JDCI, however, was perfected earlier, upon registration of JDCI's financing statement on 14 December 1999. JDL also perfected its security interest on 14 December 1999.
72. JDL did not provide any "no interest" letter to TD with respect to Claimed Unit #5, as seems to be alleged by TD. However, JDL did provide a conditional subordination letter to CyberLease, dated 18 September 2000, with respect to the Claimed Unit #5 Original Collateral (the "JDL Original Collateral Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #5 Original Collateral, and that JDL agreed to postpone its security interest *provided* that certain specific conditions were met and subject to the other specific terms of such letter. The Claimed Unit #5 Original Collateral Conditional Subordination Letter is not addressed to TD and does not state that it can be assigned by the addressee, CyberLease.

Reference: Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, paragraph 9(xiv) and Exhibit C.

73. JDL submits that the Claimed Unit #5 JDL Original Collateral Conditional Subordination Letter must be construed in accordance with its terms and that, in order to take advantage of any alleged subordination of security interest, the

party alleging the subordination must show that the subordination was clear and unequivocal and made with full knowledge of the circumstances.

Reference: Re Sun Life Assurance Co. of Canada and Royal Bank of Canada et al. (1995), 129 D.L.R. (4th) 305 (Ont. Gen. Div.);
Bank of Montreal v. Kimberley Brewing Co. [1999] B.C.J. No. 2547 (B.C.S.C.);
Federal Business Development Bank v. Steinbock Development Corp. Ltd. (1983, 42 A.R. 231 (A.C.A.);
Engel Canada Inc. v. T.C.E. Capital Corp. [2002] O.J. No. 2361 (Ont. S.C.J.).

74. JDL submits that if TD wishes to rely on the Claimed Unit #5 JDL Original Collateral Conditional Subordination Letter to assert priority over the security interest of JDL in Claimed Unit #5, then the onus is on TD to prove that it is entitled to rely on the Claimed Unit #5 Original Collateral Subordination Letter and, if so entitled, that it has met all the terms and conditions of such letter (and that Claimed Unit #5 is in fact “proceeds” of Claimed Unit #5 Original Collateral).
75. JDCI did not provide a “no interest” letter to TD with respect to Claimed Unit #5, as seems to be alleged by TD. However, JDCI did provide a “*holds no interest in*” letter to CyberLease in respect of Claimed Unit #5 Original Collateral, dated 31 August 2000 (the “Claimed Unit #5 JDCI Original Collateral No Interest Letter”).

Reference: Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, paragraph 9(x) and Exhibit C.

76. The Claimed Unit #5 JDCI Original Collateral No Interest Letter simply confirms that, as at the date of the letter, JDCI held no interest in Claimed

Unit #5 Original Collateral. JDCI submits that the Claimed Unit #5 JDCI Original Collateral No Interest Letter must be construed in accordance with its terms. JDCI further submits that the Claimed Unit #5 JDCI Original Collateral No Interest Letter does not prevent JDCI from asserting the security interest in Claimed Unit #5 which JDCI *subsequently* acquired after the date of the letter, being 31 August 2000. Further, the Claimed Unit #5 JCI Original Collateral No Interest Letter was not addressed to TD and did not state that it could be assigned by the addressee, CyberLease.

77. JDCI also submits that, in order to take advantage of any alleged subordination of a security interest, the party alleging the subordination must show that the subordination was clear and unequivocal and made with the full knowledge of the circumstances.

Reference: Re Sun Life Assurance Co. of Canada and Royal Bank of Canada et al. (1995), 129 D.L.R. (4th) 305 (Ont. Gen. Div.);
Bank of Montreal v. Kimberley Brewing Co. [1999] B.C.J. No. 2547 (B.C.S.C.);
Federal Business Development Bank v. Steinbock Development Corp. Ltd. (1983, 42 A.R. 231 (A.C.A.);
Engel Canada Inc. v. T.C.E. Capital Corp. [2002] O.J. No. 2361 (Ont. S.C.J.).

78. TD has not established, and cannot establish, that JDCI did or intended to subordinate future security interests which JDCI obtained at a later date (indeed, approximately one month later) in a different unit (Claimed Unit #5).

79. It is submitted that, in accordance with each of sections 35 and 36 of the PPSA, JDCI has a perfected security interest in Claimed Unit #5, which ranks ahead of TD and the claims of any other secured creditor.

Reference: PPSA, sections 35, 36.

80. JDL submits that, in accordance with sections 29 and 36 of the PPSA, JDL has a perfected security interest in Claimed Unit #5, as proceeds of Claimed Unit #5 Original Collateral, which ranks ahead of TD. JDL also submits that its security interest ranks in priority to the claims of any other secured creditor, except JDCI, subject to the rights, if any, of CIBC, under the JDL/CIBC Priority Agreement.

Reference: PPSA, sections 29, 36.

CLAIMED UNIT #6: TIMBERJACK 230A FORWARDER, S/N CT7296**TD's Security Interest**

81. TD does not claim a security interest in Claimed Unit #6 as original collateral. Instead, TD claims a security interest in Claimed Unit #6 as proceeds of a Timberjack 610 Forwarder, S/N 993353 which is TD's original collateral (the "Claimed Unit #6 Original Collateral").
82. In order to assert a claim to proceeds, a second creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

Reference: PPSA, sections 2(ff) and 29.

83. If TD has a security interest at all in either Claimed Unit #6 or Claimed Unit #6 Original Collateral, the earliest date of perfection of TD's security interest in either Claimed Unit #6 or Claimed Unit #6 Original Collateral is 1 September 2000.

Reference: TD Final Determination, Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, Exhibit A.

JDCI's Security Interest

84. JDCI's security interest in Claimed Unit #6 and the auction proceeds therefrom is pursuant to the Inventory Security Agreement dated 9 May 2000 and a Floor Plan Note, dated 7 January 2002.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "O";

Affidavit of David R. Bugaresti, sworn 6 February 2003,
Exhibit "B".

85. JDCI has a valid purchase money security interest in Claimed Unit #6.

Reference: JDCI Final Determination, in particular, sections 2, 9B and 17, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "S".

86. JDCI has caused a financing statement, registration no. 5504, to be registered in the PPR on 14 December 1999. By this financing statement, JDCI perfected the security interest it has in Claimed Unit #6.

Reference: Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "R".

87. PMSI notices were sent by registered mail by JDCI on 14 December 1999 to CIBC Equipment Finance Ltd., Bombardier Capital Leasing Ltd., ABN Amro Bank Canada, Canadian Imperial Bank of Commerce and General Motors Acceptance Corporation of Canada, Limited.

Reference: Affidavit of Ernest G. Reid, Q.C., sworn 16 October 2002; PPSA, section 70(2).

Priority

88. If TD has a security interest in Claimed Unit #6, the security interest of TD in Claimed Unit #6 was not perfected until a financing statement was registered on 1 September 2000. The security interest of JDCI, however, was perfected earlier, upon registration of JDCI's financing statement on 14 December 1999.

89. JDCI did not provide a “no interest” letter to TD with respect to Claimed Unit #6, as seems to be alleged by TD. However, JDCI did provide a “*holds no interest in*” letter to CyberLease in respect of Claimed Unit #6 Original Collateral, dated 31 August 2000 (the “Claimed Unit #6 JDCI Original Collateral No Interest Letter”).

Reference: Affidavit of D. Bradford L. Wicks, sworn 17 January 2003, paragraph 9(x) and Exhibit C.

90. The Claimed Unit #6 JDCI Original Collateral No Interest Letter simply confirms that, as at the date of the letter, JDCI held no interest in Claimed Unit #6 Original Collateral. JDCI submits that the Claimed Unit #6 JDCI Original Collateral No Interest Letter must be construed in accordance with its terms. JDCI further submits that the Claimed Unit #6 JDCI Original Collateral No Interest Letter does not prevent JDCI from asserting the security interest in Claimed Unit #6 which JDCI *subsequently* acquired after the date of the letter, being 31 August 2000. Further, the Claimed Unit #6 JCI Original Collateral No Interest Letter was not addressed to TD and did not state that it could be assigned by the addressee, CyberLease.

91. JDCI also submits that, in order to take advantage of any alleged subordination of a security interest, the party alleging the subordination must show that the subordination was clear and unequivocal and made with the full knowledge of the circumstances.

Reference: Re Sun Life Assurance Co. of Canada and Royal Bank of Canada et al. (1995), 129 D.L.R. (4th) 305 (Ont. Gen. Div.);
Bank of Montreal v. Kimberley Brewing Co. [1999]
B.C.J. No. 2547 (B.C.S.C.);
Federal Business Development Bank v. Steinbock
Development Corp. Ltd. (1983, 42 A.R. 231 (A.C.A.);

Engel Canada Inc. v. T.C.E. Capital Corp. [2002] O.J. No. 2361 (Ont. S.C.J.).

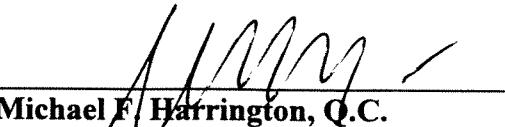
92. TD has not established, and cannot establish, that JDCI did or intended to subordinate future security interests which JDCI obtained at a later date (indeed, approximately one month later) in a different unit (Claimed Unit #6).
93. It is submitted that, in accordance with each of sections 35 and 36 of the PPSA, JDCI has a perfected security interest in Claimed Unit #6, which ranks ahead of TD and the claims of any other secured creditor.

Reference: PPSA, sections 35, 36.

Conclusion

94. JDL and JDCI therefore each request that the Court declare that, for those Claimed Units in respect of which this Honourable Court determines that priority of security interest rests with JDL or JDCI, as the case may be, (1) the security interest of TD does not have priority, (2) the security interest of JDL or JDCI (as the case may be) has priority, and (3) JDL or JDCI (as the case may be) is entitled to payment of the auction proceeds therefrom.

DATED AT St. John's, in the Province of Newfoundland and Labrador, this 7 day of February 2003.



Michael F. Harrington, Q.C.
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