

<b><i>SUMMARY OF CURRENT DOCUMENT</i></b>	
<b>Name of Issuing Party or Person:</b>	<b>John Deere Limited and John Deere Credit Inc.</b>
<b>Date of Document:</b>	<b>7 February 2003</b>
<b>Summary of Order/Relief Sought or Statement of Purpose in filing:</b>	<b>Reply Memorandum of Fact and Law of John Deere Credit Inc. to the Interlocutory Application (Inter Partes) of MTC Leasing Inc.</b>
<b>Court Sub-File Number:</b>	<b>7:45</b>

**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 CREDIT INC. ("JDCI" OR "DEERE")**

**Michael F. Harrington, Q.C.**  
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**MEMORANDUM OF FACT AND LAW OF**  
**JOHN DEERE CREDIT INC. ("JDCI" OR "DEERE")**

1. Deere files this Memorandum of Fact and Law in response to the Interlocutory Application (Inter Partes) of MTC Leasing Inc. ("MTC"), (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 asset (the "Claimed Unit") of Hickman Equipment to MTC:

Make	Serial #	Proceeds
JD 653 Feller Buncher	T0653BX880032	\$180,000.00

2. A Final Determination has been issued by the Trustee in respect of the claims of MTC (the "MTC Final Determination").

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

3. JDCI has a valid security interest in the Claimed Unit described below, and asserts a right, in priority to MTC, to receive the auction proceeds in respect thereof.

### **SUMMARY OF THE MAIN ASPECTS OF DEERE'S POSITION**

#### **MTC Has Not Established a PMSI in the Claimed Unit**

4. Deere submits that, if MTC wants to claim a purchase money security interest ("PMSI") in the Claimed Unit, whether as original collateral or as proceeds, the onus is on MTC 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. (4<sup>th</sup>) 718 (Sask. C.A.);

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

5. In order to claim that a security interest is a PMSI, MTC 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, MTC 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 Unit, MTC 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, MTC has provided no evidence whatsoever that it complied with the requirements of section 35(2) of the PPSA. It is therefore submitted that MTC cannot claim priority over the Claimed Unit as a holder of a purchase money security interest.

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

### **Residual Priority Rules**

7. 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).

8. The security interest of JDCI was perfected by the registration of a financing statement on 14 December 1999. Unless MTC otherwise establishes an entitlement to rank ahead of JDCI, the date of registration by JDCI is, in respect of the Claimed Unit, earlier than the date of registration of MTC, and pursuant to section 36, JDCI has priority over MTC.

**JDCI's PMSI**

9. JDCI has a valid purchase money security interest in the Claimed Unit.

**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, sworn 7 February 2003, Exhibit "S".

10. 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).

11. JDCI has priority over all other creditors as a holder of a purchase money security interest in respect of the Claimed Unit.

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

**Conclusion**

12. JDCI therefore requests that the Court declare that, for the Claimed Unit, (1) the security interest of MTC does not have priority, (2) the security interest of JDCI has priority, and (3) JDCI is entitled to payment of the auction proceeds therefrom.

**CLAIMED UNIT: FELLER BUNCHER, S/N T0653GX880032****MTC's Security Interest**

13. MTC claims a security interest in the Claimed Unit as original collateral. The earliest date of perfection of MTC's security interest in the Claimed Unit is 7 February 2002.

**Reference:** Affidavit of Edmund Dias, sworn 17 January 2003, Exhibit A, pages 8, 9.

**JDCI's Security Interest**

14. JDCI's security interest in the Claimed Unit and the auction proceeds therefrom is pursuant to the Inventory Security Agreement dated 9 May 2000 and its Chattel Mortgage Agreement dated 15 November 2000 and its 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 "A" and "B".

15. JDCI has a valid purchase money security interest in the Claimed Unit.

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

16. 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 the Claimed Unit.

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

17. 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).

**Priority**

18. If MTC has a security interest in the Claimed Unit, the security interest of MTC in the Claimed Unit was not perfected until a financing statement was registered on 7 February 2002. The security interest of JDCI, however, was perfected earlier, upon registration of JDCI's financing statement on 14 December 1999.
19. The MTC Final Determination did not conclude that MTC held a purchase money security interest in the Claimed Unit. The security interest of MTC in the Claimed Unit arises from a sale and lease back transaction, which means that the security interest, if any, of MTC does not meet the requirements of section 2(hh) of the PPSA and is therefore not a purchase money security interest.

**Reference:** MTC Final Determination, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "Y".  
PPSA, section 2(hh).

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

**Reference:** PPSA, sections 35, 36.

21. JDCI did not provide a “no interest” letter to MTC with respect to the Claimed Unit, as seems to be alleged by MTC. However, JDCI did provide a “*holds no interest in*” letter to MTC in respect of the Claimed Unit, dated 2 June 2000 (the “Claimed Unit JDCI No Interest Letter”).

22. The Claimed Unit No Interest Letter simply confirms that, as at the date of the letter, JDCI held no interest in the Claimed Unit. JDCI submits that the Claimed Unit No Interest Letter must be construed in accordance with its terms as of its date. JDCI submits that it is not estopped by the Claimed Unit No Interest Letter from asserting a security interest in the Claimed Unit which JDCI *subsequently* acquired after the date of the letter, being 2 June 2000.

23. 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. MTC has not established, and cannot establish, that JDCI did or intended to subordinate future security interests which JDCI obtained at a later date (indeed one and one-half years later).

**Reference:** Re Sun Life Assurance Co. of Canada and Royal Bank of Canada et al. (1995), 129 D.L.R. (4<sup>th</sup>) 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.).

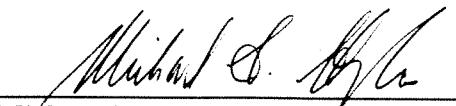
24. It is therefore submitted that pursuant to each of sections 35 and 36, JDCI has a perfected security interest in the Claimed Unit, which ranks ahead of MTC and the claims of any other secured creditor.

**Reference:** PPSA, section 35 and 36.

**Conclusion**

25. JDCI therefore requests that the Court declare that, for the Claimed Unit, (1) the security interest of MTC does not have priority, (2) the security interest of JDCI has priority, and (3) JDCI is entitled to payment of the auction proceeds therefrom.

**DATED AT** St. John's, in the Province of Newfoundland and Labrador, this <sup>1<sup>st</sup></sup> day of February 2003.

  
\_\_\_\_\_  
**Michael F. Harrington, Q.C.**  
**Stewart McKelvey Stirling Scales**  
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