

<i>SUMMARY OF CURRENT DOCUMENT</i>	
Name of Issuing Party or Person:	John Deere Limited and John Deere Credit Inc.
Date of Document:	7 February 20031
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 Bombardier Capital Leasing Ltd.
Court Sub-File Number:	7:38

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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Date of Document:	7 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 Royal Bank of Canada
Court Sub-File Number:	7:27 and 7:43

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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 Royal Bank of Canada ("RBC"), (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 RBC:

	Make	Serial #	Proceeds
1.	CAT 320B Excavator	06CR04706	\$135,000.00
2.	CAT 320B Excavator	06CR05244	\$140,000.00
3.	CAT 320B Excavator	06CR05245	\$135,000.00
4.	IR XP825 Compressor	172821	\$9,656.00
5.	IR EXM350 Air Track	R10031	\$12,070.00
6.	CAT D8N Dozer	5TJ02858	\$165,149.00
7.	Terex Articulated Truck	74TDC7364	\$800.00
TOTAL			\$597,675.00

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

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

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

SUMMARY OF THE MAIN ASPECTS OF DEERE'S POSITION

RBC Has Not Established a PMSI in the Claimed Units

4. Deere submits that, if RBC 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 RBC 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, RBC 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, RBC 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, RBC 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, RBC has provided no evidence whatsoever that it complied with the requirements of section 35(2) of the PPSA. It is therefore submitted that RBC cannot claim priority over these Claimed Units as the 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 interests of JDCI and JDL, respectively, were perfected by the registration of financing statements on 14 December 1999. Unless RBC 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 RBC, and pursuant to section 36, JDCI and JDL (as the case may be) have priority over RBC.

JDCI's PMSI

9. JDCI has a valid purchase money security interest in Claimed Units #1, #2, #3 and #6 claimed by RBC.

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, s. 70(2).

11. JDCI has priority over all other creditors as a holder of a purchase money security interest in respect of Claimed Units #1, #2, #3 and #6.

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

JDL's Security Interest

12. JDL's security interest in all of the Claimed Units is in them as proceeds of original collateral JD 200 LC Excavator S/N FF0200X501676 and JD 850C Dozer S/N T0850CX896776.

Conclusion

13. 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 RBC 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: CAT 320B EXCAVATOR, S/N 06CR04706

RBC's Security Interest

14. RBC does not claim a security interest in Claimed Unit #1 as original collateral. Instead, RBC claims a security interest in Claimed Unit #1 as proceeds of a 200LC Excavator S/N FF0200X501676, which was RBC's original collateral (the "Claimed Unit #1 Original Collateral").
15. In order to assert a claim to proceeds, a secured creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

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

16. If RBC has a security interest at all in either Claimed Unit #1 or Claimed Unit #1 Original Collateral, the earliest date of perfection of RBC's security interest in either Claimed Unit #1 or Claimed Unit #1 Original Collateral is 14 March 2001.

Reference: Affidavit of A. Ross Backman, sworn 16 January 2003, Exhibit ARB#1, pages 6 - 7.

JDCI's Security Interest

17. JDCI's security interest in Claimed Unit #1 and the auction proceeds therefrom is pursuant to the Inventory Security Agreement dated 9 May 2000 and its Chattel Mortgage Agreement dated 2 May 2001.

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

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

18. JDCI has a valid purchase money security interest in Claimed Unit #1 (as original collateral).

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

19. 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 #1 as original collateral.
20. 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, s. 70(2).

JDL's Security Interest

21. JDL's security interest in Claimed Unit #1 as proceeds of Claimed Unit #1 Original Collateral 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 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".

22. JDL submits that Claimed Unit #1 Original Collateral was originally supplied to Hickman by JDL.

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

23. 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".

24. 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, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

25. 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 Original Collateral, and the proceeds thereof, including Claimed Unit #1.

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

26. If RBC has a security interest at all in Claimed Unit #1, the security interest of RBC in Claimed Unit #1 was not perfected until a financing statement was registered on 14 March 2001. 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.
27. It is therefore submitted that pursuant to each of sections 35 and 36, JDCI has a perfected security interest in Claimed Unit #1, which ranks ahead of RBC and the claims of any other secured creditor.

Reference: PPSA, section 35 and 36.

28. JDL did not provide any "no interest" letter to RBC with respect to Claimed Unit #1, as seems to be alleged by RBC. However, JDL did provide a conditional subordination letter to RBC, dated 16 March 2001, with respect to Claimed Unit #1 Original Collateral and proceeds thereof (the "Claimed Unit #1 Original Collateral 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 A. Ross Backman, sworn 16 January 2003, Exhibit ARB#1, pages 8 – 10.

29. JDL submits that the Claimed Unit #1 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.).

30. JDL submits that the onus is on RBC to prove that it has met all the terms and conditions of the Claimed Unit #1 Original Collateral Conditional Subordination Letter (and that Claimed Unit #1 is in fact “proceeds” of Claimed Unit #1 Original Collateral) if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #1.
31. JDL submits that, in accordance with sections 29 and 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, RBC may have in Claimed Unit #1. JDL also submits that its security interest ranks in priority to the claim of any other secured creditor, except JDCI, subject to the rights, if any, of Canadian Imperial Bank of Commerce (“CIBC”), under the JDL/CIBC Priority Agreement

Reference: PPSA, sections 29, 36.

CLAIMED UNIT #2: CAT 320B EXCAVATOR, S/N 06CR05244**RBC's Security Interest**

32. RBC does not claim a security interest in Claimed Unit #2 as original collateral. Instead, RBC claims a security interest in Claimed Unit #2 as proceeds of a 200LC Excavator S/N FF0200X501676, which was RBC's original collateral (the "Claimed Unit #2 Original Collateral").
33. In order to assert a claim to proceeds, a secured creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

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

34. If RBC has a security interest at all in either Claimed Unit #2 or Claimed Unit #2 Original Collateral, the earliest date of perfection of RBC's security interest in either Claimed Unit #2 or Claimed Unit #2 Original Collateral is 14 March 2001.

Reference: Affidavit of A. Ross Backman, sworn 16 January 2003, Exhibit ARB#1, pages 6 - 7.

JDCI's Security Interest

35. JDCI's security interest in Claimed Unit #2 and the auction proceeds therefrom is pursuant to the Inventory Security Agreement dated 9 May 2000 and its Chattel Mortgage Agreement dated 2 May 2001.

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

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

36. JDCI has a valid purchase money security interest in Claimed Unit #2 (as original collateral).

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

37. 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 #2 as original collateral.

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

38. 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, s. 70(2).

JDL's Security Interest

39. JDL's security interest in Claimed Unit #2 as proceeds of Claimed Unit #2 Original Collateral 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".

40. JDL submits that Claimed Unit #2 Original Collateral was originally supplied to Hickman by JDL.

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

41. 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".

42. 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, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

43. 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 Original Collateral, and the proceeds thereof, including Claimed Unit #2.

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

44. If RBC has a security interest at all in Claimed Unit #2, the security interest of RBC in Claimed Unit #2 was not perfected until a financing statement was registered on 14 March 2001. The security interest of JDCI was perfected earlier, upon registration of JDCI's financing statement on 14 December 1999. JDL also perfected its security interest on 14 December 1999.
45. It is therefore submitted that pursuant to each of sections 35 and 36, JDCI has a perfected security interest in Claimed Unit #2, which ranks ahead of RBC and the claims of any other secured creditor.

Reference: PPSA, section 35 and 36.

46. JDL did not provide any "no interest" letter to RBC with respect to Claimed Unit #2, as seems to be alleged by RBC. However, JDL did provide a conditional subordination letter to RBC, dated 16 March 2001, with respect to Claimed Unit #2 Original Collateral and proceeds thereof (the "Claimed Unit #2 Original Collateral Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #2, 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 A. Ross Backman, sworn 16 January 2003, Exhibit ARB#1, pages 8 – 10.

47. JDL submits that the Claimed Unit #2 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.).

48. JDL submits that the onus is on RBC to prove that it has met all the terms and conditions of the Claimed Unit #2 Original Collateral Conditional Subordination Letter (and that Claimed Unit #2 is in fact “proceeds” of Claimed Unit #2 Original Collateral) if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #2.

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

Reference: PPSA, sections 29, 36.

CLAIMED UNIT #3: CAT 320B EXCAVATOR, S/N 06CR05245

RBC's Security Interest

50. RBC does not claim a security interest in Claimed Unit #3 as original collateral. Instead, RBC claims a security interest in Claimed Unit #3 as proceeds of a 200LC Excavator S/N FF0200X501676, which was RBC's original collateral (the "Claimed Unit #3 Original Collateral").
51. In order to assert a claim to proceeds, a secured creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

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

52. If RBC has a security interest at all in either Claimed Unit #3 or Claimed Unit #3 Original Collateral, the earliest date of perfection of RBC's security interest in either Claimed Unit #3 or Claimed Unit #3 Original Collateral is 14 March 2001.

Reference: Affidavit of A. Ross Backman, sworn 16 January 2003, Exhibit ARB#1, pages 6 - 7.

JDCI's Security Interest

53. JDCI's security interest in Claimed Unit #3 and the auction proceeds therefrom is pursuant to the Inventory Security Agreement dated 9 May 2000 and its Chattel Mortgage Agreement dated 2 May 2001.

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

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

54. JDCI has a valid purchase money security interest in Claimed Unit #3 (as original collateral).

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

55. 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 #3 as original collateral.

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

56. 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, s. 70(2).

JDL's Security Interest

57. JDL's security interest in Claimed Unit #3 as proceeds of Claimed Unit #3 Original Collateral 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".

58. JDL submits that Claimed Unit #3 Original Collateral was originally supplied to Hickman by JDL.

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

59. 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".

60. 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, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

61. 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 Original Collateral, and the proceeds thereof, including Claimed Unit #3.

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

62. If RBC has a security interest at all in Claimed Unit #3, the security interest of RBC in Claimed Unit #3 was not perfected until a financing statement was registered on 14 March 2001. 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.
63. It is therefore submitted that pursuant to each of sections 35 and 36, JDCI has a perfected security interest in Claimed Unit #3, which ranks ahead of RBC and the claims of any other secured creditor.

Reference: PPSA, section 35 and 36.

64. JDL did not provide any "no interest" letter to RBC with respect to Claimed Unit #3, as seems to be alleged by RBC. However, JDL did provide a conditional subordination letter to RBC, dated 16 March 2001, with respect to Claimed Unit #3 Original Collateral and proceeds thereof (the "Claimed Unit #3 Original Collateral 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 A. Ross Backman, sworn 16 January 2003, Exhibit ARB#1, pages 8 – 10.

65. JDL submits that the Claimed Unit #3 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.).

66. JDL submits that the onus is on RBC to prove that it has met all the terms and conditions of the Claimed Unit #3 Original Collateral Conditional Subordination Letter (and that Claimed Unit #3 is in fact “proceeds” of Claimed Unit #3 Original Collateral) if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #3.
67. JDL submits that, in accordance with sections 29 and 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, RBC may have in Claimed Unit #3. JDL also submits that its security interest ranks in priority to the claim 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 #4: IRXP825 COMPRESSOR, S/N 172821**RBC's Security Interest**

68. RBC does not claim a security interest in Claimed Unit #4 as original collateral. Instead, RBC claims a security interest in Claimed Unit #4 as proceeds of a 850C Dozer, S/N T0850CX896776 which was RBC's original collateral (the "Claimed Unit #4 Original Collateral").
69. In order to assert a claim to proceeds, a secured creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

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

70. If RBC has a security interest at all in either Claimed Unit #4 or Claimed Unit #4 Original Collateral, the earliest date of perfection of RBC's security interest in either Claimed Unit #4 or Claimed Unit #4 Original Collateral is 2 April 2001.

Reference: Affidavit of A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 6 - 7.

JDL's Security Interest

71. JDL's security interest in Claimed Unit #4 as proceeds of Claimed Unit #4 Original Collateral 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".

72. JDL submits that Claimed Unit #4 Original Collateral was originally supplied to Hickman by JDL.

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

73. 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".

74. 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, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

75. 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 Original Collateral, and the proceeds thereof, including Claimed Unit #4.

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

76. If RBC has a security interest at all in Claimed Unit #4, the security interest of RBC in Claimed Unit #4 was not perfected until a financing statement was registered on 2 April 2001. The security interest of JDL, however, was perfected earlier, upon registration of JDL's financing statement on 14 December 1999.
77. It is submitted that in accordance with sections 29 and 36 of the PPSA, JDL has a perfected security interest in Claimed Unit #4, as proceeds of the Claimed Unit #4 Original Collateral, which ranks ahead of RBC and the claims of any other secured creditor, subject to the rights, if any, of CIBC, under the JDL/CIBC Priority Agreement..

Reference: PPSA, sections 29, 36.

78. JDL did not provide any "no interest" letter to RBC with respect to Claimed Unit #4, as seems to be alleged by RBC. However, JDL did provide a conditional subordination letter to RBC, dated 3 April 2001, with respect to Claimed Unit #4 Original Collateral and proceeds thereof (the "Claimed Unit #4 Original Collateral 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 A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 8 – 10.

79. JDL submits that the Claimed Unit #4 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.).

80. JDL submits that the onus is on RBC to prove that it has met all the terms and conditions of the Claimed Unit #4 Original Collateral Conditional Subordination Letter (and that Claimed Unit #4 is in fact “proceeds” of Claimed Unit #4 Original Collateral) if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #4.

81. JDL submits that, in accordance with sections 29 and 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, RBC 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, sections 29, 36.

CLAIMED UNIT #5: IREXM350 AIR TRACK, S/N R10031**RBC's Security Interest**

82. RBC does not claim a security interest in Claimed Unit #5 as original collateral. Instead, RBC claims a security interest in Claimed Unit #5 as proceeds of a 850C Dozer, S/N T0850CX896776, which was RBC's original collateral (the "Claimed Unit #5 Original Collateral").
83. In order to assert a claim to proceeds, a secured creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

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

84. If RBC has a security interest at all in either Claimed Unit #5 or Claimed Unit #5 Original Collateral, the earliest date of perfection of RBC's security interest in either Claimed Unit #5 or Claimed Unit #5 Original Collateral is 2 April 2001.

Reference: Affidavit of A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 6 - 7.

JDL's Security Interest

85. JDL's security interest in Claimed Unit #5 as proceeds of Claimed Unit #5 Original Collateral 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".

86. 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 "B".

87. 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".

88. 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, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

89. 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

90. If RBC has a security interest at all in Claimed Unit #5, the security interest of RBC in Claimed Unit #5 was not perfected until a financing statement was registered on 2 April 2001. The security interest of JDL, however, was perfected earlier, upon registration of JDL's financing statement on 14 December 1999.
91. JDL did not provide any "no interest" letter to RBC with respect to Claimed Unit #5, as seems to be alleged by RBC. However, JDL did provide a conditional subordination letter to RBC, dated 3 April 2001, with respect to Claimed Unit #5 (the "Claimed Unit #5 Original Collateral Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #5, 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 A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 8 – 10.

92. JDL submits that the Claimed Unit #5 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.).

93. JDL submits that the onus is on RBC to prove that it has met all the terms and conditions of the Claimed Unit #5 Original Collateral Conditional Subordination Letter (and that Claimed Unit #5 is in fact “proceeds” of Claimed Unit #5 Original Collateral) if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #5.

94. JDL submits that, in accordance with sections 29 and 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, RBC may have in Claimed Unit #5. 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, sections 29, 36.

CLAIMED UNIT #6: CAT D8N DOZER, S/N 5TJ02858

RBC's Security Interest

95. RBC does not claim a security interest in Claimed Unit #6 as original collateral. Instead, RBC claims a security interest in Claimed Unit #6 as proceeds of a 850C Dozer, S/N T0850CX86776, which was RBC's original collateral (the "Claimed Unit #6 Original Collateral").
96. In order to assert a claim to proceeds, a secured creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

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

97. If RBC has a security interest at all in either Claimed Unit #6 or Claimed Unit #6 Original Collateral, the earliest date of perfection of RBC's security interest in either Claimed Unit #6 or Claimed Unit #6 Original Collateral is 2 April 2001.

Reference: Affidavit of A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 6 - 7.

JDCI's Security Interest

98. 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 its Chattel Mortgage Agreement dated 3 April 2001.

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

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

99. JDCI has a valid purchase money security interest in Claimed Unit #6 (as original collateral).

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

100. 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 as original collateral.

101. 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, s. 70(2).

JDL's Security Interest

102. JDL's security interest in Claimed Unit #6 as proceeds of Claimed Unit #6 Original Collateral 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".

103. JDL submits that Claimed Unit #6 Original Collateral was originally supplied to Hickman by JDL.

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

104. 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".

105. 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, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

106. 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 #6 Original Collateral, and the proceeds thereof, including Claimed Unit #6.

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

107. If RBC has a security interest at all in Claimed Unit #6, the security interest of RBC in Claimed Unit #6 was not perfected until a financing statement was registered on 2 April 2001. 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.
108. It is therefore submitted that pursuant to each of sections 35 and 36, JDCI has a perfected security interest in Claimed Unit #6, which ranks ahead of RBC and the claims of any other secured creditor.

Reference: PPSA, section 35 and 36.

109. JDL did not provide any "no interest" letter to RBC with respect to Claimed Unit #6, as seems to be alleged by RBC. However, JDL did provide a conditional subordination letter to RBC, dated 3 April 2001, with respect to Claimed Unit #6 Original Collateral and proceeds thereof (the "Claimed Unit #6 Original Collateral Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #6, 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 A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 8 – 10.

110. JDL submits that the Claimed Unit #6 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.).

111. JDL submits that the onus is on RBC to prove that it has met all the terms and conditions of the Claimed Unit #6 Original Collateral Conditional Subordination Letter (and that Claimed Unit #6 is in fact “proceeds” of Claimed Unit #6 Original Collateral) if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #6.

112. JDL submits that, in accordance with sections 29 and 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, RBC may have in Claimed Unit #6. JDL also submits that its security interest ranks in priority to the claim 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 #7: TEREX ARTICULATED TRUCK, S/N 74TDC7364**RBC's Security Interest**

113. RBC does not claim a security interest in Claimed Unit #7 as original collateral. Instead, RBC claims a security interest in Claimed Unit #7 as proceeds of a 850C Dozer, S/N T0850CX896776, which was RBC's original collateral (the "Claimed Unit #7 Original Collateral").
114. In order to assert a claim to proceeds, a secured creditor must meet the requirements of sections 2(ff) and 29 of the PPSA.

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

115. If RBC has a security interest at all in either Claimed Unit #7 or Claimed Unit #7 Original Collateral, the earliest date of perfection of RBC's security interest in either Claimed Unit #7 or Claimed Unit #7 Original Collateral is 2 April 2001.

Reference: Affidavit of A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 6 - 7.

JDL's Security Interest

116. JDL's security interest in Claimed Unit #7 as proceeds of Claimed Unit #7 Original Collateral 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".

117. JDL submits that Claimed Unit #7 Original Collateral was originally supplied to Hickman by JDL.

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

118. 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".

119. 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, Affidavit of Bruce C. Grant, sworn 7 February 2003, Exhibit "C".

120. 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 #7 Original Collateral, and the proceeds thereof, including Claimed Unit #4.

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

121. If RBC has a security interest at all in Claimed Unit #7, the security interest of RBC in Claimed Unit #7 was not perfected until a financing statement was registered on 2 April 2001. The security interest of JDL, however, was perfected earlier, upon registration of JDL's financing statement on 14 December 1999.

122. JDL did not provide any "no interest" letter to RBC with respect to Claimed Unit #7, as seems to be alleged by RBC. However, JDL did provide a conditional subordination letter to RBC, dated 3 April 2001, with respect to Claimed Unit #7 Original Collateral and proceeds thereof (the "Claimed Unit #7 Original Collateral Conditional Subordination Letter"). Such letter makes it clear that JDL retained its security interest in Claimed Unit #7, 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 A. Ross Backman, sworn 16 January 2003, Exhibit ARB#2, pages 8 – 10.

123. JDL submits that the Claimed Unit #7 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.).


124. JDL submits that the onus is on RBC to prove that it has met all the terms and conditions of the Claimed Unit #7 Original Collateral Conditional Subordination Letter (and that Claimed Unit #7 is in fact “proceeds” of Claimed Unit #7 Original Collateral) if it wishes to rely on it to assert priority over the security interest of JDL in Claimed Unit #7.
125. JDL submits that, in accordance with sections 29 and 36 of the PPSA, its security interest ranks in priority to the security interest, or any other claim or interest, RBC may have in Claimed Unit #7. 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, sections 29, 36.

Conclusion

126. 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 RBC does not have priority, (2) that 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 27th day of February 2003.


Michael F. Harrington, Q.C.
Stewart McKelvey Stirling Scales
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 John Deere Credit Inc.
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