

SUMMARY OF CURRENT DOCUMENT

Name of Issuing Party or Person:	MTC Leasing Inc.
Date of Document:	January 2003
Summary of Order/Relief Sought or Statement of Purpose in filing:	Interlocutory Application of MTC Leasing Inc. for payment to MTC Leasing Inc. of the proceeds from the sale by the Receiver of the equipment referenced in the Application
Court Sub-File Number:	7: 45

2002 01 T 0352

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

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*, R.S.N.L. 1990, c.J-4, as amended

AND IN THE MATTER OF the *Bankruptcy and
Insolvency Act*, Chapter B-3 of the Revised
Statutes of Canada, 1985, as amended (the "BIA")

INTERLOCUTORY APPLICATION

(Inter Partes)

The Application of MTC Leasing Inc. says as follows:

1. By Order of this Court dated March 13, 2002 and filed March 14, 2002, PricewaterhouseCoopers Inc. ("PWC") was appointed Receiver of the assets of Hickman Equipment (the "Receivership Order").
2. By further Order of this Court dated March 13, 2002 and filed March 14, 2002, Hickman Equipment was adjudged bankrupt and PWC was appointed as Trustee of the estate of the bankruptcy (the "Receiving Order").

3. By further Order of this Court dated May 14, 2002 and filed May 17, 2002, PWC's plan for the realization of the assets of Hickman Equipment was approved (the "Realization Plan Order").
4. The Realization Plan Order approved PWC's plan for the determination of the rights and entitlement of creditors and claimants to the assets of Hickman Equipment (the "Claims Plan").
5. Under paragraphs 6 and 7 of the Claims Plan, the determination of the rights and entitlement of creditors and claimants to the assets of Hickman Equipment involved a two stage process, as follows:
 - (a) A determination of whether a claimant had a valid, perfected and enforceable ownership or security interests in the assets of Hickman Equipment or the proceeds arising therefrom; and
 - (b) A determination of the priority of a claimant's interests vis-a-vis other claimants.
6. Under paragraph 20 of the Claims Plan, PWC proposed that the order of priority of claims to an asset of Hickman Equipment or to the proceeds arising therefrom be determined using the priority rules established by the *Personal Property Security Act*, S.N.L. 1998, c.P-7.1 ("PPSA") and other applicable law.
7. Under paragraph 21 of the Claims Plan, issues of priority and entitlement to collateral between secured claimants may, upon Application, be brought before this Court for determination, pursuant to the provisions of Section 68 of the PPSA.
8. MTC Leasing Inc. presented its security interest claim to PWC (the "MTC Leasing Claim").
9. The MTC Leasing Claim dealt with various assets as more particularly referenced in the Final Determination issued by PWC.
10. PWC sold a JD 653 Feller Buncher, serial number T0653GX880032 (the "Feller Buncher") as part of the realization of the assets of Hickman Equipment and received \$180,000.00 as proceeds therefrom.
11. PWC issued its Final Determination of the MTC Leasing Claim and allowed the MTC Leasing Claim as a valid secured claim.
12. PWC has not made any determination as to MTC Leasing Inc.'s priority or entitlement to the proceeds arising from the sale of the Feller Buncher.
13. MTC Leasing Inc. therefore applies, pursuant to paragraph 21 of the Claims Plan and Section 68 of the PPSA, (i) for a determination of the priority and entitlement of MTC Leasing Inc. vis-a-vis's other claimants, to the proceeds from the sale of the Feller Buncher, and (ii) for an order that PWC pay the proceeds from the sale of the Feller Buncher to MTC Leasing Inc.

DATED at St. John's, in the Province of Newfoundland and Labrador this 15th day of January, A.D., 2003.

MARTIN WHALEN HENNEBURY STAMP

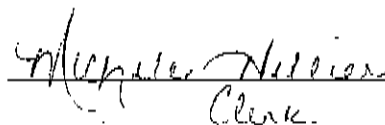


R. PAUL BURGESS

Solicitors for the Applicant
Whose address for service is:
15 Church Hill
St. John's, NL A1C 5X4

TO: Registry of the Supreme Court
Duckworth Street
St. John's, NL

ISSUED at St. John's, in the Province of Newfoundland and Labrador this 17th day of January, A.D., 2003.



Michael Nelson
Clerk.

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AND IN THE MATTER OF the *Bankruptcy and
Insolvency Act*, Chapter B-3 of the Revised
Statutes of Canada, 1985, as amended (the "BLA")

NOTICE

You are hereby notified that the foregoing application will be heard by a Judge of the Court of the Supreme Court sitting at St. John's, Newfoundland and Labrador on the ¹¹ day of *Sch.*, 2003 at 10:00 a.m. or so soon thereafter as the Application can be heard.

MARTIN WHALEN HENNEBERRY STAMP


R. PAUL BURGESS

Solicitors for the Applicant
Whose address for service is:
15 Church Hill
St. John's, NL A1C 5X4

TO: Registry of the Supreme Court
Duckworth Street
St. John's, NL

SCHEDULE "A"

DISTRIBUTION LIST

TO:

ABN Amro Bank Canada/ ABN Amro Leasing & Tarmac Equipment Ltd.	Aubrey L. Bonnell, Q.C. Brian Winsor David Timms Brent Keenan	709-722-7521 416-868-0673
Bombardier Capital Leasing & Culease Financial Services	J. Vernon French, Q.C.	709-754-2701
Caterpillar Equipment	Colin D. Grant	905-849-5512
CAT Finance	James Smyth, Q.C. Phillip Warren	709-754-5662
Cedarrapids	Les Baumbach Francoise Belzil	319-399-4760 780-413-3152
CIBC	R. Wayne Myles Geoffrey Spencer	709-579-2647
CIBC Equipment Finance Ltd./ CIT Financial Ltd.	Gregory W. Dickie	709-722-9210
Contract Funding Group Inc.	Mark G. Klar	416-218-1831
DaimlerChrysler Financial Services/ DaimlerChrysler Capital Services/ Mercedes-Benz of Canada Inc.	Philip Buckingham Peter O'Flaherty Elaine Gray	709-722-4720 416-863-3527
Fabtek Corp.	Linc A. Rodgers Rhodie E. Mercer, Q.C.	416-863-2653 709-726-5705
GE Capital	Harvey Chaiton Frederic Scalabini	416-218-1849 905-319-4855
GMAC	Thomas R. Kendell, Q.C.	709-722-1763
Group Holdings Ltd./Hickman	Robert Stack/	709-726-2992

Equipment/Hickman Holdings Ltd.	Griffith D. Roberts	
Ingersoll-Rand Canada Inc.	R. Barry Learmonth Jonathan Wigley	709-739-8151 416-863-6275
John Deere Ltd./ John Deere Credit Inc.	Neil L. Jacobs / Bruce Grant/Maureen Ryan	709-722-4565
ORIX Financial Services Canada Ltd.	Donald Yack	416-236-3010
Goodman Associates	Paul G. Goodman	902-425-3777
Merrick Holm	Carl Holm, Q.C.	902-429-8215
Royal Bank of Canada	Thomas O. Boyne, Q.C.	902-463-7500
TD Asset Financial Corp.	D. Bradford L. Wicks	709-753-5221
Wells Fargo Equipment Finance Co.	Richard Jones	416-361-6303
Patterson Palmer Hunt Murphy	Frederick. J. Constantine	709-722-0483

2002 01T 0352

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
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the Rules of the Supreme Court, 1986 under
the *Judicature Act*, R.S.N.L. 1990, c.J-4, as amended

AND IN THE MATTER OF the *Bankruptcy and
Insolvency Act*, Chapter B-3 of the Revised
Statutes of Canada, 1985, as amended (the "BIA")

AFFIDAVIT

I, Edmund Dias, of Burlington, in the Province of Ontario
make oath and say that:

1. I am Vice President, Credit, with MTC Leasing Inc., the Applicant in the Interlocutory Application, and as such have personal knowledge of the matters set forth herein, except where otherwise noted.
2. By a receiving Order dated March 13, 2002 and filed March 14, 2002 (the "Receiving Order") Hickman Equipment (1985) Limited ("HEL") was adjudged bankrupt and PrincewaterhouseCoopers Inc. ("PWC") was appointed Trustee in Bankruptcy in accordance with the BIA.
3. MTC Leasing Inc. filed a Proof of Claim in the bankruptcy of HEL dated April 17, 2002.
4. By Final Determination dated November 13, 2002 (the "Final Determination"), PWC has allowed, *inter alia*, the claims of MTC Leasing Inc. in respect of certain units as more particularly set forth therein (the "MTC Leasing Inc.'s Units"). A true copy of the Final Determination is attached as Exhibit "A" to this Affidavit.
5. MTC Leasing Inc. has been advised by PWC and as is set forth at page 12, paragraph 15 of PWC's Final Determination with respect to MTC Leasing Inc. that PWC has received as proceeds of the liquidation of JD 653G Feller Buncher (serial number T0653GX880032) proceeds in the amount of \$180,000.00.
6. MTC Leasing Inc. has a first ranking security interest in the JD 653G Feller Buncher referenced in paragraph 5 above by virtue of the security and other documents referenced

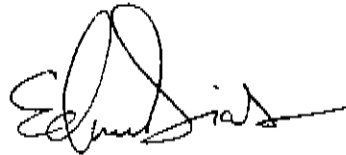
by PWC in the Final Determination as it relates to MTC Leasing Inc.

7. MTC Leasing Inc. therefore applies to this Honourable Court for an Order approving the payment to MTC Leasing Inc. by the Receiver of the proceeds in the amount of \$180,000.00.

SWORN TO at Burlington, Ontario .
this, 7th day of January, 2003 before me:

A handwritten signature in cursive script, appearing to read "G. Herridge", written over a horizontal line.

Gordon James Herridge, a Commissioner, etc.,
Regional Municipality of Halton,
for MTC Leasing Inc., MTC Leasing America Inc. and
Clarica Trust Company Limited.
Expires October 31, 2003.

A handwritten signature in cursive script, appearing to read "Edmund Dias", written over a horizontal line.

EDMUND DIAS
V-P-CREDIT
MTC LEASING INC
BURLINGTON, ON .

SCHEDULE "A"

FINAL DETERMINATION

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

Secured Party: **MTC LEASING INC. ("MTC")**

1. Introduction

PWC as Receiver continues to hold the Assets of HEL under the terms of the Receivership Order granted on March 13, 2002. The Claims Plan is intended to provide a mechanism by which Claimants assert Claims to these Assets.

Pursuant to paragraph 14 of the Claims Plan a Final Determination is to be made by the PWC as Trustee either allowing or disallowing a Claim as a valid secured claim under section 135(4) of the BIA. This is the Trustee's Final Determination in respect of MTC.

Capitalized terms used in this Final Determination shall have the meaning ascribed to them in the Claims Plan unless otherwise defined herein.

2. Summary Final Determination

The claim is allowed as a valid secured claim. The Trustee claims no interest in the assets that are the subject of the claim.

3. Defined Terms

For ease of Reference in this Final Determination, the Trustee has applied the following definitions/ abbreviations:

"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"PMSI"	-	Purchase Money Security Interest
"PPSA" or "Act"	-	<i>Personal Property Security Act</i> , S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	Serial Number

4. The Assets

10 pieces of HEL inventory. All but one (indicated by "") were disposed of and did not form part of the Trustee's Opening Inventory.

1. 624H 4WD Loader (DW624HX576488)
2. 624H 4WD Loader (DW624HX576494)
3. 653G Feller Buncher (T0653GX880032)*
4. 310E Backhoe Loader (T0310EX888301)
5. Valmet 840/6 12 ton Forwarder(840F6078)
6. 450 LC Base Excavator(FF0450X090455) - STD Mainframe & CWT 900 MM Track Shoes, Standard Boom 3.9 Arm 450 LC, Mye Bucket
7. 160 LC Excavator (P00160X041169) 700-MM Triple Semi-G Shoes Boom 5.01 M 1 PC, Nye Bucket Arm 3.1 M 10'2" Assembly Vandal Protection, Cab Ether Starting Aid
8. 200 LC Excavator(FF0200X501038) Shoe 800 MM 32" Triple Boom 1PC w/ Arm Cyl & PLU Arm 2.9 (9'6") with Bkt C Cab w/ Air 200L
9. 270 LC Excavator(FF0270X070607) Base Shoes 800 M 32' Triple Boom One Piece W/CYL/Plum Arm 3.75 M (12'4") w/ BKT
10. 200 LC Excavator (F0200X501664)

5. Assumptions

In preparing this Final Determination, the Trustee has made the following assumptions:

- i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;
- ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;
- iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;
- iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and
- v) the accuracy and currency of the indices and filing systems maintained in

relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

Since there is no title registration system in the Province relating to personal property, any opinion respecting title is based solely upon the relevant Documentation.

For the purpose of determining the validity under prior law of security interests created and registered before the implementation of the PPSA and transitioned by registration in the PPR, the Trustee has only reviewed the security agreements and their registrations referenced in the PPR search report section entitled: "Pre-PPSA registration information continued by this registration", endorsements, if any, on the security agreements reviewed and the pre-PPSA legislation and the applicable common law relating to their registration.

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

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

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

Pursuant to the terms of the Court Order establishing the Claims Plan, this Final Determination determines the validity of security claimed and whether such security has been properly perfected. For the assistance of readers, the Trustee has sometimes provided comments concerning the priority of such security vis-à-vis other parties but such priority-related comments are made without prejudice to any position which may be taken at any future date by any other party in regards to priorities.

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

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

7. Overview of Claim

MTC claims that it holds a perfected security interest in the 10 assets listed above. This arises from 4 lease contracts from 2000 and 2001. MTC takes the position that it has satisfied all of the requirements to attach and perfect a security interest, including registration of the security interest in the PPR.

The Proof of Claim dated 11 March 2002 and the documents attached thereto (more particularly described below) indicate a total claim in the amount of **\$1,927,942.17**. This is exclusively a secured claim. This claim breaks down, on a lease by lease basis, as follows:

- **Lease No. 67279** dated June 1, 2000 (securing 5 assets, #1-5 in the List above). Balance outstanding of \$800,725.49.
- **Lease No. 62375**, dated January 1, 2000 (securing 2 assets, # 6-7 in the List above). Balance outstanding of \$509,727.69.
- **Lease No. 78235** dated March 1, 2001. (securing 1 asset, #10 in the List above). Balance outstanding of \$215,146.51.
- **Lease No. 63485**, dated February 1, 2000 (securing 2 assets, # 8 - 9 in the List above). Balance outstanding of \$402,342.48.

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

8. Documentation

In preparing this final determination, the Trustee has considered and relied upon only the following information provided to it from all sources:

- i. PPR Search conducted in the name of the debtor on March 21, 2002.
- ii. Proof of Claim dated April 16, 2002.
- iii. Untitled Schedule setting out what appears to be costs with respect to various pieces of equipment (equipment identified by s/n).
- iv. Unidentified computer printout with respect to invoice no. 046877, dated December 14, 1999, with respect to the 450 LC Excavator, s/n FF0450X090455.
- v. The leases are related to documents as follows:
 - a. **Lease # 67279** (assets # 1-5 above)
 - Copy of lease. HEL is the Lessee and supplier.
 - Correspondence dated June 6, 2000 from John Deere Credit addressing priorities.

- Invoice dated June 2, 2000 to MTC for the 5 assets.
- Invoice dated June 6, 2000 to T & L Logging Ltd. for Harvester (P0653GX880032).
- Invoice dated June 8, 2000 to St. John's Municipal Council for 2 Loaders (DW624HX576488 & DW624HX576494).
- Invoice dated June 2, 2000 to J. Tuach Geological Consultants Inc. for Backhoe (T0310EX888301).
- Invoice dated March 3, 2001 to Anderson Logging Ltd. for the Feller Buncher (T0653GX880032); Excavator (FF892EX011705); Dozer (T0850CX834577); and Forwarder (CT7296).
- Invoice dated April 25/01 to Stuckless & Stuckless Inc. for 2 Harvesters (911C4048 & 911C4055); and Forwarder (840F6078).
- Correspondence dated May 29, 2000 from Cyberlease to HEL enclosing documents for signature.
- Correspondence dated May 30, 2000 from Cyberlease to MTC including various documents with respect to financing.
- Invoice dated May 30, 2000 from Cyberlease to MTC in the amount of \$32,116.05, stamped "Paid".
- Invoice from Complete Goods to HEL for the sale of a 744H 4WD Loader.
- Invoice from Cyberlease to MTC dated May 30, 2000 in the amount of \$250.00, stamped "Paid".
- Invoice dated May 30, 2000 from HEL to MTC for the sale of the five units, stamped "Paid".
- Invoice dated May 5, 2000 from Valmet to HEL for the sale of the Forwarder.
- Complete Goods invoice dated May 15, 2000 from Complete Goods to HEL for the sale of the Feller Buncher.
- Complete Goods invoice dated 18 May 2000 to HEL for the sale of the 310E Backhoe Loader.
- Copy of a wire transfer receipt dated 2 June 2000 from MTC to HEL in the amount of \$1,078,111.75.

b. **Lease #62375** (assets #6-7 above)

- Copy of lease. HEL is the Lessee and supplier.
- Correspondence dated January 11, 2000 between Cyberlease and John Deere Credit addressing priorities.
- Invoice dated January 25, 2000 to MTC for the 2 Excavators.
- Invoice dated December 6, 2000 to Wilson Contracting Ltd. for Excavator (P00160X041169). Trade in was a used Rottna Harvester (R40506).
- Cyberlease invoice to MTC in the amount of \$25,410.95, stamped "Paid".
- Copy of wire transfer receipt dated January 13, 2000 from MTC to HEL in the amount of \$718,148.53.

- c. **Lease #78235** (asset #10 above)
- Copy of lease. HEL is the Lessee and supplier.
 - Copy of invoice from HEL to MTC dated February 15, 2001 for Asset #10, in the amount of \$226,031.56.
 - Correspondence dated February 16, 2001 from John Deere Limited addressing priorities.
 - Invoice dated January 5, 2001 to Jamar Transport Ltd. for Excavator (FF0200X501664). Trade in was a JD 120 Excavator (P00120X030801).
 - Copy of cheque #056704, dated February 23rd, 2001 in the amount of \$226,031.56 from MTC, payable to HEL.
 - Invoice from HEL to MTC dated February 15, 2001 for the sale of the 200LC Excavator, stamped "Paid".

- d. **Lease #63485** (assets # 8-9 above)
- Copy of Lease. HEL is the Lessee and supplier.
 - Correspondence dated February 4, 2000 from John Deere Credit addressed to Cyberlease releasing its interest in the 2 assets.
 - Invoice dated Feb.28/00 to MTC for the 2 excavators.
 - Invoice dated Dec.20/00 to Garrison Construction for Excavator (FF0200X501038). Trade in was a JD 690E Excavator (DW690EL538314).
 - Invoice dated July 26, 2000 to Marine Contractors Inc. for Wheel Loader (DW544HX577412); Excavator (048532); Excavator (FF0270X070607); Excavator (FF0330X080850). Trade ins were as follows: JD 590D Excavator (FF590DX002664), JD 792D Excavator (FF792DX010033) and JD 892E Excavator (FF892EX011705).
 - Invoice dated Feb. 28/00 to Hickman Leasing Ltd. for 4 Excavators (FF0270X070608; FF0270X070607; FF0200X501010 & FF0200X501038).
 - Invoice from HEL to MTC dated February 8, 2000 for the sale of the two excavators, stamped "Paid".
 - Copy of a wire transfer receipt from MTC to HEL dated February 10, 2000 in the amount of \$550,803.97.

- (vi) Correspondence from Cyberlease to MTC dated January 13, 2000 submitting a lease transaction for funding.
- (vii) Cyberlease Corporation invoice dated May 30, 2000 to MTC in the amount of \$32,116.05.
- (viii) Complete Goods invoice to HEL for a 200LC Excavator, s/n FF0200X500968.

9. The Classification of the Assets

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

10. Application of the PPSA

As indicated by the above-noted documentation the secured transactions between MTC and HEL were in the form of equipment leases. These leases, which secured specific pieces of heavy equipment (broken down above), were all for a term of more than one year and were, in essence, financing leases as opposed to true leases. Section 4 of the PPSA confirms that such secured transactions are governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

Not applicable in this instance as all transactions took place subsequent to the coming into force of the PPSA in the Province.

12. Perfection

Section 20 of the PPSA holds that there are two required elements to a perfected security interest in collateral, regardless of the order of occurrence. There must be:

(i) **attachment** in accordance with section 13, which requires:

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.¹
2. The debtor must have rights in the collateral; and
3. There must be a security agreement that meets the requirements of s. 11.

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

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

Is there attachment?

- (i) Value given?

YES As indicated in the List of Documents above, the Trustee has been provided with copies of cheques and wire transfer receipts that provide the necessary evidence of value passing from MTC to HEL. It is the opinion of the Trustee that this is sufficient evidence of value in accordance with s. 13 of the PPSA and that MTC's security has attached.

- (ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13². HEL held possession of the assets. Furthermore, HEL held the assets under 4 lease agreements and s. 13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when she obtains possession of them under the lease.

Note: For the purposes of expressing a position with respect to HEL's rights in the collateral, the Trustee has not made any determination with respect to HEL's title in the collateral at issue nor with respect to the lawfulness of HEL's possession thereof.

- (iii) Have the evidentiary requirements of s. 11 been met?

YES The evidentiary requirements of s. 11, required for attachment, are established by the 4 leases. Specifically, in accordance with s.11(1) (b), the 4 leases are in writing, they have been signed by HEL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?

a. Lease No. 67279(for assets # 1-5 above)

YES.

Registration number 328591 dated June 6/00 contains the following information

Description: Equipment.

The description of the collateral as "Equipment" does not meet the requirements set out in ss. 23-24 of the Regulations. However, this registration was amended on February 7, 2002 to add the following description:

- 1 - 624H 4WD Loader (DW624HX576488)
- 1 - 624H 4WD Loader (DW624HX576494)
- 1 - 653G Feller Buncher (T0653GX880032)
- 1 - 310E Backhoe Loader (T0310EX888301)
- 1 - Valmet 840/6 12 ton Forwarder (840F6078)

² Ibid. at 84.

And any proceeds therefrom

b. Lease No. 62375(for assets # 6-7 above)

YES.

Registration number 78766 dated Jan.28/00 contains the following information:

Description: Equipment.

The description of the collateral as "Equipment" does not meet the requirements set out in ss. 23-24 of the Regulations. However, this registration was amended on February 7, 2002 to add the following description:

*1 - 450 LC Base Excavator (FF0450X090455)
STD Mainframe & CWT
900 MM Track Shoes, Standard Boom
3.9 Arm 450 LC, Mye Bucket*

*1 - 160 LC Excavator (P00160X041169)
700 MM Triple Semi-G Shoes
Boom 5.01 M 1 PC, Nye Bucket
Arm 3.1 M 10'2" Assembly
Vandal Protection, Cab Ether Starting Aid*

And any proceeds therefrom

c. Lease No. 63485(for assets # 8-9 above)

YES.

Registration number 1589144 dated February 7/02 contains the following information:

*1 - 200 LC Excavator (FF0200X501038)
Shoe 800 MM 32" Triple Boom 1PC w/ Arm Cyl & PLU
Arm 2.9 (9'6") with Bktt C
Cab w/ Air 200L*

*1 - 270 LC Excavator (FF0270X070607)
Base Shoes 800 M 32' Triple
Boom One Piece WICYLPlum
Arm 3.75 M (12'4") w/ BKT*

And any proceeds therefrom

d. Lease No. 78235(for asset # 10 above)

YES.

Registration number 816934 dated February 26/01 contains the following information:

"200 LC Excavator serial #FF0200X501664".

This was amended on Feb.7/02 to include:

and any proceeds therefrom

What constitutes an appropriate description of collateral, comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions in the above-noted financing statements satisfy these requirements.

13. Proceeds

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

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

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.³

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

- (a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;
- (b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

³ Ibid. at p.140.

- (c) Includes a description of the original collateral, where the proceeds consist of money, cheques or deposit accounts in a bank, credit union, or similar financial institutions.

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

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as MTC may be entitled to claim a super-priority status (ref: s. 35(2)). MTC has not provided evidentiary support for such an entitlement.
- In the case of leases # 67279 and 62375, descriptions of collateral as "equipment" may not be sufficient descriptions to meet the requirements set out in the regulations above. This would require a determination of whether such a description is a seriously misleading defect, irregularity, omission or error, in accordance with s. 44 (7) of the PPSA. Nevertheless, the description was amended to provide better particulars of the assets by item and kind, as indicated above (ref .ss.23-24 of the Regulations). As such, the relevant date of perfection could be, either June 6, 2000 (for lease #328591) and January 28, 2000 (for lease #62375) or the date of amendment being February 7, 2002. While this will not affect enforcement of the security agreement, it could affect priorities among competing creditors. Whether this description constitutes a seriously misleading error requires a finding by the Court. However, the Trustee notes the following test from the Alberta Personal Property Security Handbook for errors in collateral descriptions in financing statements: "The same test should be applied in each of these cases: Whether a hypothetical searching party would have been misled by

⁴ Ibid. at 140.

the error or omission...Thus the use of a prohibited description (such as "consumer goods" without more) should invalidate the legislation (sic)..."⁵

- In accordance with the residual (general) priority rules established by s.36 of the PPSA, the relevant dates for the determination of the priority of MTC's interest in the equipment are:

- **Lease # 67279:** Feb 7 /02
- **Lease # 62375:** Feb 7 /02
- **Lease # 78235:** Feb 26 /01
- **Lease # 63485:** Feb 7 /02

15. Auction Results

What follows is a list of the assets secured by MTC that were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia, and the net amount obtained (bid amount less LVG buyer's premium):

JD 653G Feller Buncher (s/n T0653GX880032)	\$180,000.00.
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⁵ R. Cuming & R. Wood, (Toronto: Carswell, 1998) at 416.