

Summary of Current Document

Name of Issuing Party or Person	TD Asset Finance Corp.
Date of Document:	April 04, 2003
Summary of Order/Relief Sought or statement of purpose in filing	Memorandum of Fact and Law of TD Asset Finance Corp. in response to the Application of John Deere Credit Inc. for payment of proceeds from the sale by the Receiver of the equipment referenced in the Application for the determination of its priority and entitlement, vis a vis other claimants to the monies realized from the sale of the assets.
Court Sub-File Number	7:25

2002 01T 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 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")**

MEMORANDUM AND AUTHORITIES OF TD ASSET FINANCE CORP.

D. Bradford L. Wicks
Williams, Roebathan, McKay & Marshall
Solicitors for the Second Defendant and
Respondent
209 Duckworth Street
P.O. Box 5236
St. John's, NF A1C 5W1

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MEMORANDUM

PART I – STATEMENT OF FACTS

1. By order of this Honourable Court granted on the 13th day of March 2002 and filed with the Court on the 14th day of March 2002 it was ordered that Pricewaterhouse Coopers Inc. ("PWC") be appointed Receiver of Hickman Equipment Limited ("HEL") (the "Receivership Order").
2. By a Receiving Order (the "Receiving Order") made on the 13th day of March 2002, pursuant to the provisions of the BIA and filed with the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency on the 14th day of March, HEL was adjudged bankrupt and PWC appointed as trustee of the estate of the bankrupt in bankruptcy (the "Trustee").
3. By further Order of this Court dated May 14th, 2002 and filed May 17th, 2002 PWC's plan for realization of the assets of HEL 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 HEL (the "Claims Plan").
5. Under paragraphs 5 and 7 of the Claims Plan, the determination of the rights and entitlement of creditors and claimants to the assets of HEL involved a two stage process, as follows:
 - (a) A determination of whether a claimant had a valid, perfected and enforceable ownership or security interest in the assets of HEL or the proceeds arising therefrom:
and
 - (b) A determination of the priority of a claimant's interest *vis-a-vis* other claimants.

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6. Under paragraph 20 of the Claims Plan, PWC proposed that the order of priority of claims to an asset of HEL 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. TD presented its security interest claim to PWC (the "TD Claim") on or about April 10th, 2002. By Order of this Honourable Court dated February 4th, 2003, the Final Determination of the Receiver allowing the TD security interest claim as a valid secured claim was approved.
9. PWC has not made any determination as to TD's priority or entitlement to the monies realized from the sale of the TD Units, the TD Trade In Units or any other proceeds arising from the disposition of equipment subject to the TD Claim to which TD may be entitled at law.
10. The TD Claim dealt with 29 pieces of equipment, 4 of which were identified by PWC as inventory remaining at the time of bankruptcy ("TD Units") TD asserts that the remainder were sold out of trust by HEL prior to the bankruptcy.

(See Exhibit "A", p. 2 to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

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11. Pursuant to the Realization Plan, PWC commenced and completed the liquidation of substantially all the assets of HEL by auction or otherwise including the 4 remaining TD Units:

- (a) 744H Loader (DW744HX576952)
- (b) 120 Excavator(P00120X031958)
- (c) 200LC Excavator (FF0200X501500)
- (d) 644H Loader (DW644HX574161)

(See Exhibit "A", p. 18 to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

12. The monies realized from the sale of TD Units totaled \$506,125.00 the particulars of which include:

	<u>Proceeds</u>
(a) 744H Loader (DW744HX576952)	\$192,500.00
(b) 120 Excavator(P00120X031958)	\$107,000.00
(c) 200LC Excavator (FF0200X501500)	\$ 91,834.00
(d) 644H Loader (DW644HX574161)	\$114,791.00

(See Exhibit "A" p. 18 to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

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13. Pursuant to the Realization Plan Order, PWC liquidated inventory of HEL Equipment Limited which the records of HEL indicate had been traded in to HEL for pieces of equipment amongst the 29 which were subject to the T.D. Claim. This trade in equipment is identified in the PWC Final Determination with respect to TD dated November 8, 2002. TD has made a proceeds claim, inter alia, for the monies realized from the sale of any of the pieces of equipment traded in for equipment, which was subject to the TD Claim and for any other proceeds from the disposition of equipment subject to the TD Claim. This proceeds claim includes, but is not limited to the following trade in equipment identified in the aforementioned PWC Final Determination and sold at Auction by PWC on July 12, 2002, (the TD Trade In Units):

Timberjack 230A Forwarder Serial # CT7296 (Traded in for a Timberjack 61O Forwarder)	Net Proceeds \$25,000.00
John Deere 792 D Excavator Serial # FF0792DX010221 (Traded in for a John Deere 270LC Excavator Serial # FF270X0707141)	\$58,900.00

(See TD Proceeds Application Sub File No: 7:47)

14. TD claims a valid secured claim by way of Lease # 5 registered in the personal property security registry as No. 517565 on September 1, 2000 (better described in the TD Proceeds Application) over inter alia, the following equipment.

- i) Timberjack 61O Forwarder Serial #993353
- ii) John Deere 270LC Excavator Serial # FF270X070714

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(Collectively referred to as the "Original Collateral".)

(See TD Proceeds Application Sub-File No: 7:47)

15. An assignment of Lease 5 was given by Cyberlease to TD on September 5, 2002.

(See Exhibit "C" to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

16. The Final Determination of the Receiver with respect to TD discloses the following:

- i) The Timberjack 610 Excavator Serial #993353 referenced above was sold to Burton's Cove Logging and Lumber Limited. The Timberjack 230A Forwarder Serial #CT7296 referenced above was accepted as a trade in for the Timberjack 610 Forwarder.
- ii) The JD 270LC Excavator Serial # FF0270X070714 referenced above was sold to Arthur Fowlow Ltd. The 792 D Excavator Serial # FF792DX010221 referenced above was, inter alia, accepted as a trade in for the JD 270LC Excavator.

(See Exhibit "A", p. 8 to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

17. John Deere Credit Inc.(JDCI) also claims priority to the "TD Trade In Units" in the within application.
18. The Receiver's Final Determination with respect to JDCI, dated November 27th, 2002, has allowed the claim of JDCI as a valid perfected interest.
19. On September 5, 2000 Marianne Curic, wholesale account representative of John Deere Credit Inc. executed the following letter dated August 31, 2000 on behalf of JDCI in favour of Cyberlease disclaiming any interest in the Original Collateral which was later traded for the TD Trade-In Units:

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Re: Hickman Equipment (1985) Limited

We are in the process of arranging lease financing for the above company. Our searches indicate that financing statements have been filed by or on behalf of John Deere Credit Inc., indicating that you have a security interest in certain assets or undertakings of the above company.

Please confirm by signing below and return by fax to my attention at 613-226-8091, indicating that you have no security interest, lien or encumbrance of any kind on the equipment described as follows:

1	Model 610 Forwarder Full 16' Logwodd Deck with Serco Loader	Unit # C00773	s/n 993353
1	Model 1410 8 Wheel Forwarder	Unit # C00762	s/n 17DD0279
1	160 LC Excavator	Unit # C00810	P00160X041475
1	160 LC Excavator	Unit # C00864	P00160X041476
1	160 LC Excavator	Unit # C00865	P00160X041477
1	450 LC Base Excavator	Unit # C00862	FF0450X090545
1	S10 SE Backhoe Loader	Unit # C00856	T0310SE891140
1	200 LC Excavator	Unit # C00861	FF0200X501521
1	270 LC Excavator	Unit # C00835	FF0270X070714
1	200 LC Excavator	Unit # C00854	FF0200X501500
1	744H Loader	Unit # C00860	DW744HX576952

Your prompt reply is greatly appreciated.

Yours truly,

Susan McAllister

John Deere Credit Inc.

[Marianne Curic]
Signature

[Wholesale Account Rep]
title

[Sept. 05/02]
Date

(See Exhibit "C" to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

20. TD says that it has priority over the claim of JDCI to the TD Trade In Units (and any other equipment in respect of which TD has a valid perfected security interest) in respect of which payment of the proceeds of the sale by the Receiver thereof is claimed by JDCI.

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21. TD repeats the contents of its application (The "TD Proceeds Application") for payment to it of the proceeds of the sale of the equipment of Hickman Equipment (1985) Limited which is subject to a TD security interest claim including, inter alia, the TD Trade In Units bearing Court Sub-File # 7:47.

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PART II – LIST OF ISSUES

22. Does TD have priority over the claim of JDCI to the Proceeds of the sale of the TD Trade In Units?

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PART III – ARGUMENT

23. It is submitted that TD holds a valid secured claim approved by this Honourable Court in respect of Lease # 5 (better described in the TD Proceeds Application) over inter alia, the following equipment.

- i) Timberjack 610 Forwarder Serial #993353
- ii) John Deere 270LC Excavator Serial # FF270X070714

(Collectively referred to as the “Original Collateral”.)

24. The Final Determination of the Receiver with respect to TD discloses the following:

- iii) The Timberjack 610 Excavator Serial #993353 referenced above was sold to Burton's Cove Logging and Lumber Limited. The Timberjack 230A Forwarder Serial #CT7296 referenced above was accepted as a trade in for the Timberjack 610 Forwarder.
- iv) The JD 270LC Excavator Serial # FF0270X070714 referenced above was sold to Arthur Fowlow Ltd. The 792 D Excavator Serial # FF792DX010221 referenced above was, inter alia, accepted as a trade in for the JD 270LC Excavator.

(See Exhibit “A”, p. 8 to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

25. TD submits that pursuant to the PPSA (NL), TD's interest in the Original Collateral, which, by assignment from Cyberlease on September 5, 2000, perfected by registration of a financing statement in the personal property security registry as No. 517565 on

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September 1, 2000 (Lease #5). Therefore TD has a perfected security interest in the Original Collateral.

(See Exhibit "C" to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

26. It is submitted that pursuant to s. 29(3) of the PPSA a security interest in proceeds is continuously perfected where the interest in the Original Collateral is perfected by registration of a financing statement under s.26 of the Act that meets one of the three following criteria:

29(3) a security interest in proceeds is a continuously perfected security interest where the interest in the original collateral is perfected by 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**
- 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 institution.**

Personal Property Security Act SNL 1998 P-7.1 Tab [1]

27. It is submitted that TD perfected its security interest in the Original Collateral of Lease 5 and has met the requirements of s. 29 (3) (b) above and as a result holds a continuously

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perfected interest in the TD Trade In Units and the traceable proceeds of sale thereof, the proceeds of sale of which are also claimed by JDCL

28. Notwithstanding the valid perfected security interest held by JDCL effective December 14, 1999 as set out in the Final Determination of the Receiver with respect to JDCL, TD submits that it is entitled to the benefit of a letter between JDCL and Cyberlease dated August 31, 2000 disclaiming any interest in the aforesaid Original Collateral in favour of Cyberlease (and subsequently by assignment TD), which states the following:

Re: Hickman Equipment (1985) Limited

We are in the process of arranging lease financing for the above company. Our searches indicate that financing statements have been filed by or on behalf of John Deere Credit Inc., indicating that you have a security interest in certain assets or undertakings of the above company.

Please confirm by signing below and return by fax to my attention at 613-226-8091, indicating that you have no security interest, lien or encumbrance of any kind on the equipment described as follows:

2	Model 610 Forwarder Full 16' Logwodd Deck with Serco Loader	Unit # C00773	s/n 993353
2	Model 1410 8 Wheel Forwarder	Unit # C00762	s/n 17DD0279
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1	160 LC Excavator	Unit # C00864	P00160X041476
1	160 LC Excavator	Unit # C00865	P00160X041477
1	450 LC Base Excavator	Unit # C00862	FF0450X090545
1	S10 SE Backhoe Loader	Unit # C00856	T0310SE891140
1	200 LC Excavator	Unit # C00861	FF0200X501521
1	270 LC Excavator	Unit # C00835	FF0270X070714
1	200 LC Excavator	Unit # C00854	FF0200X501500
1	744H Loader	Unit # C00860	DW744HX576952

Your prompt reply is greatly appreciated.

Yours truly,

Susan McAllister

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John Deere Credit Inc.

[Marianne Curic]
Signature

[Wholesale Account Rep]
title

[Sept. 05/02]
Date

(See Exhibit "C" to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

29. The above noted letter was signed by Marianne Curic, wholesale account representative of JDCI on September 5th, 2000.

(See Exhibit "C" to Affidavit of D. Bradford L. Wicks in support of TD Proceeds Application Sub-File No: 7:47)

30. TD submits that the aforesaid letter by virtue of the operation of Section 41 of the PPSA subordinates the interest of JDCI in the Original Collateral and the traceable proceeds of same, namely the TD Trade In Units to that of TD. TD therefore further submits that it is entitled to priority over the claim of JDCI to the traceable proceeds from the sale by the Receiver of the TD Trade In Units. Section 41 of the PPSA is as follows:

- "41(1) A secured party may subordinate, in a security agreement or otherwise, the secured party's security in any other interest.**
(2) A subordination is effective according to its terms between the parties and may be enforced by a third party if the third party is the person or one of the class of persons for whose benefit the subordination was intended.

Personal Property Security Act SNL 1998 P-7.1 Tab [1]

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31. It is submitted that pursuant to s. 41 of the PPSA a secured party may subordinate or vary its security interest and the subordination may be enforced by a third party if the third party is one of a class of persons for whose benefit the subordination was intended.

Personal Property Security Act SNL 1998 P-7.1 [Tab 1]

Euroclean Canada Inc. v. Forest Glade Investments Ltd.(1985), 16 D.L.R. (4th) (Ont. C.A.) Leave to SCC refused June 3rd, 1985. [Tab 2]

Chiips Inc. v. Skyview Hotels Ltd. (1994) 166 D.L.R.4th385(Alb. C.A.) [Tab 3]

32. The Court in **Euroclean** concluded that the s.39 subordination section under the Ontario legislation (equivalent to s.41 of the Newfoundland PPSA) was intended to confer a statutory right on a secured party to waive the priority given under the PPSA and to confer a corresponding right on the beneficiary of such a waiver to enforce it, even though he is not a party to the agreement which created it. It is submitted that the benefits of any letter of waiver between JDC and Cyberlease was assigned to TD with the assignment of its interest in Lease 5 by Cyberlease to TD referenced above. TD is one of the classes of persons or beneficiaries for whom the agreement was meant to benefit although TD was not a party to the agreement.

Euroclean Canada Inc. v. Forest Glade Investments Ltd.(1985), 16 D.L.R. (4th) (Ont. C.A.) Leave to SCC refused June 3rd, 1985. Page 10 [Tab 2]

33. The court in **Euroclean Canada Inc.** also concluded that registration was not necessary for the enforcement of a subordination agreement. The court states that lack of perfection

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does not affect the subordination of the Bank, because they had agreed to the PMSI holder's security in advance with the subordination agreement. This viewpoint was also adopted in **Transamerica Commercial Financing**.

Euroclean Canada Inc. v. Forest Glade Investments Ltd.(1985), 16

D.L.R. (4th) (Ont. C.A.) Leave to SCC refused June 3rd, 1985. [Tab 2]

Transamerica Commercial Financing Corp., Canada v. Imperial T.V.

& Stereo Centre Ltd.[1993] A.J. No. 740. [Tab 4]

34. Case law has also determined that if a subordination agreement exists and bankruptcy occurs, the subordination continues and the original security holder would hold the security interest in trust for the third party.

Grove Packaging Inc., (2001) 31 C.B.R. (4th) 37 (Ont. Sup. CJ). [Tab 5]

Bank of Montreal v. Dynex Petroleum Ltd. (1997) 145 D.L.R.(4th) 499, 46

C.B.R (39) 36 (Alb. Q.B.). [Tab 6]

35. TD further submits that upon signing the aforesaid letter of waiver in favour of Cyberlease, (by assignment) JDCI was submitting to the entire interest claimed by TD in the Original Collateral, including the claim to the proceeds thereof. The claim for proceeds is not a new claim but instead flows from the claim in the Original Collateral.
36. The collateral at issue has been classified by PWC as inventory pursuant to the PPSA in its the Final Determination of TD's security interest claim.

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37. It is submitted that an inventory financier is normally taken to have authorized the debtor to deal with the collateral free of the security interest in the ordinary course of business. A contrary rule would rob the inventory of any value in the debtor's hands and defeat the purpose of the finance arrangement. As a result of this commercial reality the PPSA has codified under s.29 the right to claim proceeds of original collateral.

Flintoft v. Royal Bank of Canada, [1964] S.C.R. 631. [Tab 7]

38. Accordingly, TD submits that the TD Security Interest claim over the TD Trade In Units (or the traceable proceeds of sale thereof) has priority over any interest claimed by JDCL.

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PART IV – RELIEF SOUGHT

39. In all of the foregoing, the Applicant respectfully requests an order that TD is entitled to priority over the claim of JDCI to the traceable proceeds from the sale by the Receiver of the TD Trade In Units. Accordingly, the claim of JDCI to these proceeds of sale ought to be subordinated to that of TD and the Receiver shall pay to TD the monies realized from the sale of the TD Trade In Units and any other proceeds from the disposition of equipment subject to the TD Security Interest Claim to which TD may be entitled at law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at St. John's, in the Province of Newfoundland and Labrador this day of *4th*

April, 2003.



WILLIAMS, ROEBOTHAN, MCKAY & MARSHALL

Solicitors for the Respondent

Whose address for service is:

209 Duckworth Street

St. John's, NF

A1C 5W1

Attention: D. Bradford L. Wicks

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PART V - AUTHORITIES**TAB**

Personal Property Security Act SNL 1998 P-7.1	1
<u>Euroclean Canada Inc. v. Forest Glade Investments Ltd.</u> , (1985), 16 D.L.R. (4 th) (Ont. C.A.) Leave to SCC refused June 3 rd , 1985.	2
<u>Chiips Inc. v. Skyview Hotels Ltd.</u> (1994) 166 D.L.R. 4 th 385 (Alb. C.A.).	3
<u>Transamerica Commercial Financing Corp., Canada v. Imperial T.V. & Stereo Centre Ltd.</u> [1993] A.J. No. 740.	4
<u>Grove Packaging Inc.</u> , (2001) 31 C.B.R. (4 th) 37 (Ont. Sup. CJ).	5
<u>Bank of Montreal v. Dynex Petroleum Ltd.</u> (1997) 145 D.L.R.(4 th) 499, 46 C.B.R. (39) 36 (Alb. Q.B.).	6
<u>Flintoft v. Royal Bank of Canada</u> , [1964] S.C.R. 631.	7