

Summary of Current Document

Name of Issuing Party or Person	TD Asset Finance Corp.
Date of Document:	February 26, 2003
Summary of Order/Relief Sought or statement of purpose in filing	Application of TD Asset Finance Corp. for the determination of its priority and entitlement, vis a vis other claimants to the monies realized from the sale of the following assets and to the payment of monies realized from the sale of: 1. 744H Loader (DW744HX576952) \$192,500.00 2. 120 Excavator(P00120X031958) \$107,000.00 3. 200LC Excavator(FF0200X501500) \$91,834.00 4. 644H Loader (DW644HX574161) \$114,791.00 5. John Deere 792D Excavator (FF792DX010221) \$58,900.00 6. Timberjack 230A Forwarder (CT7296) \$25,000.00
Court Sub-File Number	7:47

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”)

AMENDED INTERLOCUTORY APPLICATION
(INTER PARTES)

TO THE SUPREME COURT OF NEWFOUNDLAND OR ONE OF THE HONOURABLE
JUDGES THEREOF

The Application of TD Asset Finance Corp. (TD) says as follows:

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.

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.
9. The TD Claim dealt with 29 pieces of equipment, 4 of which were identified as inventory remaining at the time of bankruptcy ("TD Units").
10. 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)

11. 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

12. 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 hereby makes 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	Net Proceeds
(Traded in for a Timberjack 61O Forwarder)	\$25,000.00

John Deere 792 D Excavator \$58,900.00
Serial # FF0792DX010221
(Traded in for a John Deere 270LC Excavator
Serial # FF270X070714)

The monies realized from the sale of the TD Trade In Units was in total \$83,900.00

13. On or about November 8th, 2002 PWC issued its Final Determination of the TD Claim and allowed the TD claim as a valid secured claim. An application has been made by PWC pursuant to s.16 of the Claims Plan to have this Honourable Court confirm this determination.
14. 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.
15. The Applicant applies to this Honourable Court, pursuant to paragraph 21 of the Claims Plan and section 68 of the PPSA for:
 - i) a determination of the priority and entitlement of TD, *vis-a vis* other claimants, and an
 - ii) order approving the payment to TD by the Receiver of the monies realized from the sale of the TD Units and 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..

DATED at the City of St. John's, in the Province of Newfoundland, this day of February,
A.D. 2003.

**WILLIAMS, ROEBOTHAN, MCKAY &
MARSHALL**

Solicitors for the Plaintiff

Whose address for service is:

209 Duckworth Street

St. John's, Newfoundland

A1C 5W1

Attn: D. Bradford L. Wicks

TO: See attached distribution list

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Name of Issuing Party or Person	TD Asset Finance Corp.
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TRIAL DIVISION

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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")

AMENDED AFFIDAVIT

I, D. Bradford L. Wicks, of the City of St. John's, in the Province of Newfoundland and Labrador, MAKE OATH AND SAY AS FOLLOWS:

1. I am solicitor for TD Asset Finance Corp. (TD), the applicant named in the foregoing application (inter partes) and as such I have knowledge of the matters referred to in the application and the matters to which I hereinafter depose, except where such knowledge is based on information and belief, in which case I have identified the sources and grounds of my information and belief and verily believe same to be true.
2. I am advised by Mark Reichling of TD Asset Finance Corp that between April 1998 and October 2000, Cyber Lease Corporation, entered into five equipment lease agreements with HEL and in some cases Labrador Equipment and Mining Supplies Ltd. (the "Equipment Leases"). These Equipment Leases were assigned to TD.

Lease 90-0946046-002 (lease 2) dated April 23rd, 1998 secured 4 assets.

Lease 90-0946046-3 (lease 3) dated November 11th, 1999 secured 4 assets.

Lease 90-0946046-4 (lease 4) dated January 14th, 2000 secured 3 assets.

Lease 90-0946046-5 (lease 5) dated September 5th, 2000 secured 11 assets.

Lease 90-0946046-5 (lease 6) dated October 15th, 2000 secured 7 assets.

3. The assets were held by HEL for lease and thus qualify as inventory under s. 2(x) of the PPSA.
4. In February 2002 it was determined that of the 29 pieces of equipment leased by TD to HEL, HEL had sold 25 pieces to third parties without the knowledge and/or consent of

TD, contrary to the terms and conditions of the Equipment Leases. HEL remained in possession of the following 4 pieces of equipment (TD Units):

Unit 1: 744H Loader (DW744HX576952)

Unit 2 : 120 Excavator(P00120X031958)

Unit 3 : 200LC Excavator (FF0200X501500)

Unit 4 : 644H Loader (DW644HX574161)

5. PWC sold the TD units as part of its liquidation of the assets of HEL.
6. That the PWC Final Determination with respect to TD (a copy of which is attached hereto as Exhibit “A”) and the Receivers’ report with respect to the July 12, 2002 Auction of the HEL equipment demonstrate that certain pieces of equipment subject to the TD SecuRity Interest Claim were sold out of trust and trade ins received by HEL in partial payment thereof. The trade in equipment was sold at Auction pursuant to the Realization Plan Order. The particulars of same are as follows:

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 # FF270X0707 <u>14</u>)	\$58,900.00

7. TD’s right and entitlement to the proceeds arising from the sale of TD Unit 4 is based inter alia, on the following sources and grounds:

TD UNIT 4 (LEASE 3)

- (i) Copy of lease between HEL as Supplier, HEL and LEMS as Lessees and Cyber lease as Lessor dated November 11, 1999.
 - (ii) Delivery and Acceptance Certificate dated November 10th, 1999.
 - (iii) Letter of Undertaking dated November 10, 1999.
 - (iv) Certificate of Incumbency dated November 10, 1999.
 - (v) Copy of wire transfer dated November 16, 1999 from TD to HEL in the amount of \$ 784,221.20.
 - (vi) Copy of cheque dated November 15th, 1999 from TD to Cyberlease in the amount of \$25,237.14.
 - (vii) "Direction to Pay" dated November 11, 1999 from Cyberlease to TD authorizing transfer to HEL of \$784,289.72.
 - (viii) Assignment of Lease or Security Agreement dated November 11th, 1999.
 - (ix) Bill of Sale dated November 11, 1999.
 - (x) Invoice dated November 11, 1999 from HEL to Cyberlease for the sale of four assets.
 - (xi) Notice of assignment and acknowledgement.
 - (xii) Correspondence dated January 20, 2000 between John Deere Limited and TD setting out priorities with respect to assets.
 - (xiii) Correspondence dated October 12, 2000 between Cyberlease and John Deere Limited setting out priorities with respect to assets.
 - (xiv) Correspondence dated January 26, 2000 between Cyberlease and John Deere Credit setting out priorities with respect to assets.
 - (xv) HEL authorization to debit their account dated November 10th, 1999.
 - (xvi) Invoice dated November 11, 1999 from Cyberlease to TD in the amount of \$25,237.14.
 - (xvii) Copy of cheque dated November 11, 1999 from Cyberlease to TD in the amount of \$18,495.07.
8. Marked as Exhibit "B" to this my Affidavit are copies of the various documents relating to TD Lease 3 and referred to in paragraph 7 of this Affidavit.
9. TD's right and entitlement to the proceeds arising from the sale of TD Units 1 and 3 and the TD Trade In Units is based inter alia, on the following sources and grounds:

TD UNITS 1 & 3 and the TD Trade In Units (LEASE 5)

- (i) Copy of Lease dated September 5, 2000 between HEL as supplier and Lessee and Cyberlease as the Lessor.
 - (ii) Notice of Assignment and Acknowledgement dated September 5th, 2000.
 - (iii) Pre-authorized Payment Authorization for payment directly into the bank account.
 - (iv) Delivery and Acceptance Certificate.
 - (v) Copy of Cheque from TD to HEL dated September 11, 2000 in the amount of \$ 2,952,806.91.
 - (vi) "Direction to Pay" in the amount of \$2,952,806.91 from Cyberlease to TD authorizing payment to HEL.
 - (vii) Notice of Assignment and Acknowledgement.
 - (viii) Assignment of lease or Security Agreement dated September 5, 2000.
 - (ix) Bill of Sale date September 5, 2000.
 - (x) Correspondence between John Deere Credit and Cyberlease dated August 31, 2000 wherein John Deere credit confirms it has no interest in the ten pieces of equipment.
 - (xi) Delivery and Acceptance Certificate dated September 5, 2000.
 - (xii) Letter of undertaking dated September 5, 2000.
 - (xiii) Invoice dated August 31, 2000 from HEL and Cyberlease for the sale of 11 pieces of equipment.
 - (xiv) Correspondence dated September 18, 2000 from John Deere Limited to Cyberlease setting out priorities with respect to the 9 pieces of equipment.
 - (xv) Invoice dated September 5, 2000 from Cyberlease to TD in the amount of \$ 91,675.45.
 - (xvi) Copy of Cheque from Cyberlease to TD dated September 5, 2000 in the amount of \$ 69,997.21.
 - (xvii) Copy of Cheque from HEL to Cyberlease dated September 1, 2000 in the amount of \$ 70,247.21.
 - (xviii) Copy of Cheque from TD to Cyberlease dated September 1, 2000 in the amount of \$ 91,675.45.
10. Marked as Exhibit "C" to this my Affidavit are copies of the various documents relating to TD Lease 5 and referred to in paragraph 9 of this Affidavit.
11. TD's right and entitlement to the proceeds arising from the sale of TD Unit 2 is based on the following sources and grounds:

TD UNIT 2 (LEASE 6)

- (i) Copy of Lease dated October 15, 2000 between HEL as supplier and Lessee and Cyberlease as Lessor.
 - (ii) Letter of Undertaking dated October 15, 2000.
 - (iii) Delivery and Acceptance certificate dated October 15, 2000.
 - (iv) Copy of cheque dated October 16, 2000 from TD to HEL in the amount of \$21,802.66.
 - (v) Wire transfer dated October 20, 2000 from TD to HEL in the amount of \$726,812.22.
 - (vi) Direction to Pay dated October 13, 2000 from Cyberlease to TD authorizing transfer to HEL of \$726,812.22.
 - (vii) Invoice dated October 12th, 2000 from HEL to Cyberlease for the sale of 7 pieces of equipment.
 - (viii) Notice of Assignment and Acknowledgement dated October 15, 2000.
 - (ix) Assignment of Lease or Security Agreement dated October 15, 2000.
 - (x) Bill of Sale dated October 15, 2000.
 - (xi) Correspondence dated October 12, 2000 from John Deere Credit releasing its interest in the 7 pieces of equipment.
 - (xix) Copy of Cheque from HEL to Cyberlease dated October 12, 2000 in the amount of \$ 17,417.33.
 - (xx) Invoice dated October 13, 2000 from Cyberlease to TD in the amount of \$ 21,802.66
 - (xxi) Copy of Cheque from Cyberlease to TD dated October 13, 2000 in the amount of \$ 17,167.33.
12. Marked as Exhibit “D” to this my Affidavit are copies of the various documents relating to TD Lease 6 and referred to in paragraph 11 of this Affidavit.
13. That the Final Determination of the Receiver with respect to TD attached hereto as Schedule “A” sets out the particulars of the PPSA registrations with respect to the pieces of equipment secured by the TD Leases and the proceeds thereof and prior Act registrations relied upon by the Receiver in relation to the formation of its opinion that TD has a valid secured claim.

14. Efforts have been made to obtain documents to demonstrate the chronology of the acquisition by HEL of the pieces of equipment which were subject to the Equipment Leases. Requests have been made for the Trustee and Receiver to search for and produce any documents of HEL in its possession relevant to the acquisition by HEL of the pieces of equipment which were subject to the Equipment Leases.
15. That I have read the contents of the attached application and they are true and correct to the best of my knowledge, information and belief.
16. That I make this affidavit in support of the attached application.

SWORN TO at the City of St. John's,
in the Province of Newfoundland and
Labrador, this day of February,
A.D. 2003, before me:

D. BRADFORD L. WICKS

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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 "BIA")**

NOTICE TO THE DEFENDANTS

You are hereby notified that the foregoing Application will be heard by the Supreme Court of
Newfoundland and Labrador, or a Judge thereof sitting at 287 Duckworth Street, St. John's,
Newfoundland, on the day of , 2003 at 10:00 o'clock in the
forenoon, or so soon thereafter as the Application can be heard.

TO:
See Attached Distribution List

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AMENDED AFFIDAVIT

I, D. Bradford L. Wicks, of the City of St. John's, in the Province of Newfoundland and Labrador, MAKE OATH AND SAY AS FOLLOWS:

1. That I am partner in the firm of Williams, Roebathan, McKay, Marshall, solicitors for TD Asset Finance Corp. (TD), the applicant named in the foregoing application (inter partes) and as such I have knowledge of the matters referred to in the application.
2. That I have read the contents of the attached application and they are true and correct to the best of my knowledge, information and belief.
3. That I make this affidavit in support of the attached application.

SWORN TO at the City of St. John's
in the Province of Newfoundland and
Labrador, this day of February,
A.D. 2003, before me:

D. BRADFORD L. WICKS