SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	**Mr. Justice Robert M. Hall**
Date of Document:	**2006 03 30**
Statement of purpose in filing:	**Reasons for Judgment on Application of ABN-AMRO Leasing, a Division of ABN-AMRO Bank N. V. Canada Branch, pursuant to paragraph 21 of the Claims Plan and s. 68 of the PPSA for determination of priority and entitlement to the proceeds from the sale of assets of Hickman Equipment (1985) Limited.**
Court Sub-File Number:	**9:14 (Re sub-file 7:24)**

CITATION: ***In Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2006 NLTD 60**
FILING DATE: 2006 03 30

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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**, RSNL 1990, c. J-4, as amended

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

Before: The Honorable Mr. Justice Robert M. Hall

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: October 14, 2005

Appearances: Gregory Smith for ABN-AMRO Leasing, a Division of ABN-AMRO Bank N.V. Canada Branch.
Geoffrey L. Spencer for 11422 Newfoundland Limited.

Authorities Cited:

Cases Considered: **Hickman Equipment (1985) Ltd.,** [2004] N.J. No. 286 (NLCA); **Alberta (Treasury Branches) v. MacLeod Dixon,** [2001] (A.J. No. 114) Alta. Q.B.; **Hickman Equipment (1985) Ltd.,** [2003] N.J. No. 86.
Texts Considered: *An Introduction to the New Brunswick Personal Property Security Act* by Professor Catherine Walsh (Faculty of Law, University of New Brunswick); *Secured Transactions in Personal Property in Canada*, Second Edition by Richard H. McLaren, Vol. 2 (Carswell); *Saskatchewan and Manitoba Personal Property Security Acts Handbook* by Professor Ronald C. Cuming and Roderick J. Wood (Carswell: 1994); *The Law of Contract in Canada* by G.H.L. Fridman, Q.C., Third Edition (Carswell: 1994)
Acts Considered: **Bankruptcy and Insolvency Act**, RSC 1985, c. B-3, as amended, **Personal Property Security Act,** SNL 1998, c. P-7.1, as amended; **Registration of Deeds Act**, RSNL 1990, c. R-10, as amended.

REASONS FOR JUDGMENT

Hall, J.

Background

[1] Hickman Equipment (1985) Limited ("HEL") was adjudged bankrupt on March 13, 2002 and a receiving order issued against it. PricewaterhouseCoopers Inc. ("PWC") was appointed Trustee of the bankrupt estate (the "Trustee"). On the same date PWC was appointed Receiver ("Receiver") of HEL (the "Receivership Order"). The Receivership Order gave PWC the overall mandate of developing a plan and procedural structure for the liquidation of the assets of HEL and also a plan for the determination of the rights of all creditors and claimants. As a result thereof, a Claims Plan was approved by this Court on May 14, 2002 (the "Claims Plan"). By para. 14 of the Claims Plan the Trustee was required to issue a Final Determination either allowing a claim of a creditor as a valid secured claim under s. 135(4) of the **Bankruptcy and Insolvency Act**, RSC 1985, c. B-3, as amended, ("**BIA**") or disallowing it as a valid secured claim. Paragraph 15 of the Claims Plan

provided that persons having claims disallowed by the Trustee under this process were afforded a 30 day right of appeal under the **BIA**. The Trustee was not required under the Claims Plan to make findings as to the priorities between the security interests in the assets of HEL as claimed by competing secured creditors.

[2] The applicant ABN-AMRO Leasing, a division of ABN-AMRO Bank N. V. Canada Branch, ("ABN") presented its security interest claim to the Trustee and the Trustee issued its Final Determination of the ABN claim and allowed the ABN claim as a valid secured claim.

[3] Canadian Imperial Bank of Commerce ("CIBC") presented its security interest claim to the Trustee and the Trustee issued its final determination of the CIBC claim and allowed the CIBC claim in part as a valid secured claim.

[4] General Motors Acceptance Corporation ("GMAC") also presented its security claim to the Trustee and the Trustee also issued its final determination of the GMAC claim and allowed the GMAC claim as a valid secured claim. In this matter both CIBC and GMAC had filed notices of objection to the application by ABN for the proceeds of certain listed equipment which had been realized upon by the Trustee. GMAC however did not appear at the hearing of this matter, although it did not withdraw, in any formal sense, its notice of objection. Furthermore, Hickman Motors Limited ("HML") did not present a security interest claim to the Trustee and the Trustee has not issued any determination respecting HML or allowed any claim of HML as a valid secured claim. Additionally, HML did not appear on this matter, nor argue with respect to it, notwithstanding it having filed notice of objection to the ABN proceeds application. The hearing of this matter therefore proceeded on the basis that the only interested parties were ABN and CIBC. At the commencement of the hearing of this matter counsel for CIBC indicated to the Court that CIBC had assigned all of its security interest in the assets of HEL to 11422 Newfoundland Limited ("11422") and that notwithstanding the fact that this corporation had not been added as a party to the application, he in fact was appearing to argue the interests of 11422. This was permitted by the Court.

[5] The Trustee, in its Final Determinations of the CIBC claim and the ABN claim, made the following determinations, which have not been appealed to this Court:

(a) The CIBC security interests were created by two security agreements, namely:

(i) A Debenture dated January 7, 1998 and Supplemental Debentures dated February 19, 1990, April 17, 1997, August 7, 1997 and July 9, l998 (collectively the "Debenture and Supplemental Debentures");

(ii) A General Security Agreement dated January 25, 2000 (the "GSA").

(b) The ABN security interest was created by secured transactions between ABN and HEL in the form of loans, secured by security agreements and chattel mortgages.

(c) The perfection dates for determining the priority of the CIBC security interest created by the Debenture and Supplemental Debentures are January 29, 1985 (the Debenture), February 22, 1990 (First Supplemental Debenture), April 30, 1997 (Second Supplemental Debenture), August 29, 1997 (Third Supplemental Debenture) and July 15, 1998 (Fourth Supplemental Debenture).

(d) The perfection date for determining the priority of the CIBC security interest created by the GSA is January 25, 2000.

(e) The perfection date for determining the priority of the ABN security interest is March 15, 2000.

[6] The Trustee, as authorized by Court order, subsequently commenced and completed liquidation of substantially all of the assets of HEL by means of an auction. Certain assets secured by ABN were sold at the auction and net amounts as indicated below were obtained thereon ("the ABN Units"):

Unit #	Stock #	Make	Serial #	Proceeds
4	A475	Tapio Harvesting Head	N/A	$3,500.00
7	C001290	Poulin Screen Plant	2SAAQQ19810285884	
8	C001291	Poulin Radial Stacker (both sold as one lot for $41,000.00)	CMR105	$41,000.00
9	C001567	Hitachi Excavator	1585928	$30,000.00
10	C000401	John Deere Dozer	T0450HX874682	$60,000.00
11	C001614	Int'l TD 15C Dozer	6349	$11,000.00
15	C001364	Komatsu Excavator and Logmax Harvesting Head (both sold as one lot for $65,000.00)	C10514 734	$65,000.00

[Note: The originating application (inter parties) filed by ABN in this matter on December 9, 2002 claimed 15 Units which had been sold by the Trustee. However, the claims of ABN and the competing creditors to all but the above listed Units have been resolved between the various parties, and this matter proceeded solely on a determination of the relevant priorities between ABN and CIBC/11422 with respect to the sale proceeds of the above listed Units.]

[7] In the Trustee's Final Determination of the ABN claim, the Trustee determined that ABN's claims relating to the disputed Units 4, 9 and 11 were claims to "proceeds" as defined in subsection

2(ff) of the **Personal Property Security Act,** SNL 1998, c. P-7.1, as amended, ("**PPSA**") arising from the assets originally secured. The Trustee further determined that ABN, pursuant to s. 29 of the **PPSA**, had an automatic and statutory interest in those Units as proceeds from the disposition of the assets originally secured by ABN.

[8] Paragraph 20 of the Claims Plan provided that the order of priority of claims to the sale proceeds arising from the sale of assets of HEL would be determined using the priority rules established by the **PPSA** and the applicable law. Paragraph 21 of the Claims Plan provided that issues of priority and entitlement to collateral between secured claimants may, upon application, be bought before the Court for determination pursuant to the provisions of s. 68 of the **PPSA**. Thus, ABN brought this present application for determination of the priority and entitlement of ABN, vis-à-vis other claimants to the sale proceeds of the ABN Units and an order that the Trustee pay the proceeds from the sale of the ABN Units to ABN.

Points in issue.

[9] The following points are in issue:

(a) Does ABN have priority over CIBC/11422 to the proceeds from the sale of Unit 4, based on CIBC's general subordination of its Debenture security interest contained within the Debenture?

(b) Does ABN have priority over CIBC/11422 to the proceeds arising from the sale of ABN Units 7, 8, 9, 10 and 11, based on no-interest letters from CIBC dated March 14, 2000?; and

(c) Does ABN have priority over CIBC/11422 to the proceeds arising from the sale of ABN Unit 15, based upon a super-PMSI?

[10] I will propose to deal with the arguments of counsel with respect to the various priority issues set out above in the order in which they presented those to me.

ABN Unit 15 - Does ABN's purchase money security interest in the inventory and proceeds relating to Unit 15 have priority over CIBC/11422's security interest in the same collateral by reason of a Super PMSI under s. 35 of the PPSA?

[11] Subsection 35(2) of the **PPSA** provides a method for determining the priority of a purchase money security interest over another competing security interest in the same collateral. A purchase money security interest that obtains priority using this method is sometimes called a Super PMSI. Subsection 35(2) of the **PPSA** reads:

> "35(2) Subject to section 29, a purchase money security interest in inventory or its proceeds has priority over another security interest in the same collateral given by the same debtor where
>
> (a) the purchase money security interest in the inventory is perfected when the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.
>
> **(b) the secured party gives a notice to another secured party who has registered, before the registration of the financing statement relating to the purchase money security interest in the inventory, a financing statement where the collateral description in the financing statement includes the same item or kind of collateral or includes accounts,** **(line 1) (line 2) (line 3) (line 4) (line 5) (line 6) (line 7) (line 8) (line 9)**
>
> **(c) the notice referred to in paragraph (b) states that the person giving the notice expects to acquire a purchase money security interest in inventory of the debtor, and describes the inventory by item or kind, and**
>
> (d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral which is earlier."
>
> [Line references in subsection (b) added.]

[12] Counsel have advised me that there is no dispute between them as to the actual delivery date of Unit 15 to HEL. Thus there is no dispute as to when HEL obtained possession of the collateral insofar as that is relevant to s. 35(2)(d) of the **PPSA**. Unit 15 came into the possession of HEL after all other steps required by s. 35(2) of the **PPSA** in order to acquire a Super PMSI had been completed. However, significant disputes still exist between the parties with respect to whether ABN has met the other requirements of s. 35(2) of the **PPSA** in order for its security interest in Unit 15 to qualify as a Super PMSI.

[13] Paragraph 35(2) of the **PPSA** establishes four Super PMSI requirements, as follows: (i)

notice to creditors; (ii) registration of financing statement; (iii) value given to acquire collateral; and (iv) possession of collateral. Where the Super PMSI requirements are met, the purchase money security interest will have priority over another competing security interest in the same collateral, regardless of the application of the residual priority rules under s. 36 of the **PPSA**.

[14] The dispute between ABN and CIBC/11422 centers around the question of when ABN was required under s. 35 to give notice to CIBC of its intended PMSI security. ABN is relying for its security interest upon its March 15, 2000 registration of its Financing Statement as the date of perfection of its claimed PMSI. ABN takes the position that the PMSI notices were sent out on April 15, 2000 and received on April 25, 2000. It is ABN's position that it is permitted to register its security interest before sending out its PMSI notice to prior secured creditors. CIBC/11422 on the other hand takes the position that the PMSI notices, not having been sent or received before registration of the Financing Statement, were not valid PMSI notices as required by ss. 35(2)(b) of the **PPSA** and that therefore such security notices fail and the claimed Super PMSI of ABN does not grant it the priority claimed over CIBC/11422. At this juncture it is useful for the reader to review again the wording of s. 35(2)(b) of the **PPSA**. To assist in comprehension of the arguments of the opposing counsel I have inserted at the end of each line of subsection 35(2)(b) (**as set out in para. 11**) words indicating "line 1", "line 2", etc. as I will be referring to the individual lines of the section in commenting thereon.

[15] ABN contends that subsection 35(2)(b) simply tells a creditor seeking Super PMSI "to whom" it must give notice. ABN contends that the timing of the giving of that notice is not addressed in subsection 35(2)(b) but rather is addressed in subsection 35(2)(d), wherein it is stipulated that the notice must be given before possession of the collatoral is obtained by the debtor. Counsel for ABN contends that if subsection 35(2)(d) tells a creditor when to give notice to prior creditors, what does subsection 35(2)(b) tell that creditor seeking a Super PMSI? ABN's counsel contends that subsection 35(2)(b) simply describes the class of secured creditor to whom ABN was required to give notice of its intent to acquire a Super PMSI. In support of its argument counsel for ABN states that if you simply strip out lines 3, 4 and 5 of subsection 35(2)(b) it is clear that the "financing statement" referred to in line 6 of the subsection is the financing statement of the prior secured creditor and not the financing statement of the party intending to obtain the Super PMSI. ABN's counsel contends that CIBC/11422 is arguing that the word "before" in line 3 relates to the financing statement of the party seeking to obtain the Super PMSI and giving the notice. However, ABN's counsel says that the word "before" in line 3 refers to "the other secured party who has registered" in line 2 because it follows the comma at the end of line 2 and therefore obviously references the "secured party" who "gives notice". Counsel for ABN contends that in order for the section to be interpreted in the manner in which counsel for CIBC/11422 wishes the Court to interpret it, the section ought to have been drafted as follows:

> "... the secured party gives notice to another secured party who has registered a financing statement where the collateral description in the financing statement includes the same item or kind of collateral or includes accounts, **before the registration of the financing statement relating to the purchase money security interest in the inventory**."

[16] Counsel for ABN encourages the Court to consider what he regards is a practical point of view, i.e. what is in fact the purpose of the notice? He contends that it is not necessary for ABN to give notice to subsequent registrants. ABN does not need a Super PMSI to defeat subsequent registrants. The priority provisions of s. 36 of the **PPSA** can deal with this. He contends that therefore the purpose of subsection 35(2)(b) notice is to defeat those who have come before him. He asks rhetorically "How can I know who is ahead of me if I haven't registered?" He argues that if ABN was required to give registered mail notice (which notice under the **Act** is deemed to be received 10 days after it is mailed) and that notice is required to be given prior to registration of the security interest claim of the party seeking the Super PMSI, the potential always exists that some additional creditor will perfect a security interest ahead of the party such as ABN seeking to obtain the Super PMSI. He argues that the earlier ABN registered its security interests the more it cut down on the number of potential creditors who could get ahead of it. He argues that if the **Act** required ABN to give notice to secured creditors before registration of its own financing statement, a situation would be created where an intended Super PMSI holder could never perfect its security interest. Additionally, he argues that if the interpretation sought by CIBC/11422 with respect to s. 35 is correct then subsection 35(2)(b) conflicts with subsection 35(2)(d).

[17] Counsel for CIBC/11422, in his rebuttal argument to the counsel of ABN on this issue, referenced Professor Catherine Walsh's text *An Introduction to the New Brunswick Personal Property Security Act* (Faculty of Law, University of New Brunswick), page 163, where she states in reference to subsection 34(2) of that Act (the equivalent of the Newfoundland and Labrador subsection 35(2)) as follows:

> "Advance notice, stating that the inventory financier expects to acquire a PMSI inventory and describing the inventory by item or kind must be given to any prior-registered secured party *before the PMSI is perfected by registration* and before the debtor obtains possession of the collateral." [Emphasis added.]

[18] Further CIBC/11422's counsel refers to *McLaren, Secured Transactions and Personal Property in Canada* in describing the requirements to obtain a valid PMSI under Ontario law where the author states at page 5-53:

> "*Before making its own registration,* the purchase-money party must search the registry system and give notice to all parties who have registered a financing statement classifying the collateral as inventory." [Emphasis added.]

[19] Relying therefore on these two learned authors, CIBC/11422 takes the position that ABN has not met the requirements of subsection 35(2) of the **PPSA** in that it registered its financing statement first before giving notice to CIBC and its PMSI interest in ABN Unit #15does not, therefore, rank in priority to the security of CIBC/11422.

[20] Counsel for CIBC/11422 also argues that the interpretation of subsection 35(2)(b) which he

espouses does not create any inconsistency between subsections 35(2)(b) and 35(2)(d). He states that subsection 35(2)(d) of the **PPSA** simply states that notice must be given before possession of the collateral was obtained by the debtor. He argues that if the Court were to agree with the argument proposed by counsel for ABN, then ABN could simply have given notice on the same day as the collateral was delivered to the debtor, mere minutes or hours before delivery but after a point in time when HEL could have walked into the offices of CIBC and got financing based upon an invoice already in its possession. He states in response to the rhetorical question of the counsel of ABN as to how would ABN know when to give notice, that this argument can be met by simply conducting a second search after notice has been given to CIBC and if a second registration by another creditor had occurred, then ABN should simply give a further notice to that second registered creditor. He contends that ABN, if it had followed this practice, would not have been prejudiced as it would not advance monies to purchase the collateral in question until it obtained a clear search.

[21] Counsel for ABN says that the Court must look at what is commercially sensible. Constant delays brought about by a requirement for repeated searches before the giving of notice to prior security holders by an intended Super PMSI creditor does not benefit either HEL or ABN. He contends that there is no prejudice to CIBC/11422 by reason of the notice being given to CIBC after the registration of the ABN security. He contends that the prejudice which might occur was theoretical and would occur because the debtor had been deceitful to CIBC. He argues that CIBC would have known that HEL frequently incurred third party debt. He questions whether CIBC would really have believed that HEL acquired this asset debt free and was therefore in a position to have it covered by the CIBC security. He argues that CIBC failed to ask HEL "Are you going to encumber that?". ABN counsel argues that if mere seconds occurred between the notice and the advance by ABN that would be fraud on CIBC/11422 and the **PPSA** cannot correct that. It would be necessary for the Court to look at the length of time to determine if the notice was reasonable on a fact specific basis. He argues that the **PPSA** legislation cannot be interpreted to protect CIBC/11422 against fraud. He says that the proper emphasis is to look at how the **PPSA** facilitates commerce. Counsel for ABN contends that the Court has to work hard to read in to the **PPSA** the interpretation of subsection 35(2)(b) which CIBC/11422 requests. He asks why should the Court have to do that? Why not go with the clearer and more practical interpretation which he espouses?

[22] There have been, in this bankruptcy matter, numerous applications filed by various creditors seeking payment to them of proceeds from the sale of certain equipment by the Trustee over which those creditors claimed priority security interest. One of those applications was an application by John Deere Credit Inc. In that application counsel for John Deere had filed an affidavit, attached to which were two letters dealing with the very issue of the proper interpretation of s. 35 of the **PPSA**. One of those letters came from Professor Catherine Walsh, the author of *An Introduction to New Brunswick Personal Property Security Act* in which she stated:

> "I write in reference to the following excerpt from pp. 162 - 163 of my text entitled *An Introduction to the New Brunswick Personal Property Security Act* (New Brunswick, New Brunswick Geographic Information Corporation, 1995):

> Under s. 34(2), superpriority extends to PMSI's in inventory. But in this case, there is no grace period for registration. Rather, the inventory financier must perfect before the debtor (or a third party at the request of the debtor) obtains possession of the collateral. Moreover, an advance notice, stating that the inventory financier expects to acquire a PMSI in inventory and describing the inventory by item or kind, must be given to any prior-registered secured party before the PMSI is perfected by registration [underlining supplied] and before the debtor obtains possession of the collateral. If these conditions are not met, the PMSI loses its status as such and ranks as an ordinary security interest under the first in time rule in s. 35(1).
>
> The prior-registered secured parties entitled to notice are those who have registered a financing statement covering collateral of the same item or kind as the inventory or covering accounts. Prior registered secured parties in the first category may also be financing the debtor's ongoing acquisition of inventory by making periodic advances against incoming allotments. In the absence of a notice requirement, the prior secured party might be misled into making an advance against inventory in ignorance of the fact that it is collateral under a purchase money financing arrangement entered into with another secured party. Prior-registered accounts financiers are also entitled to notice because the secured party's superpriority in the inventory also extends to any proceeds of the inventory that take the form of accounts.

You have advised me that certain parties have read these pages of my text, and in particular, the underlined words "before the PMSI is perfected by registration," as indicating that it is my view that advance notice must be given by the holder of a PMSI in inventory to prior secured parties before the registration of its own financing statement in order to avail itself of the priority benefits of section 35(2)(b) of the Newfoundland and Labrador *Personal Property Security Act*, which is similar to section 34(2)(b) of the New Brunswick *Personal Property Security Act*. This is not the case and I regret any misunderstanding that my phraseology may have created. My view is that, while both steps - *i.e.* perfection of the PMSI by registration and the giving of advance notice - must be completed, the order in which they are completed in irrelevant. What matters is that both steps are competed before delivery of possession of the inventory against which the PMSI holder is claiming superpriority. ..."

(Note: The above cited section of Professor Walsh's text referred to in her letter had been relied upon and cited by CIBC/11422's counsel in this application.)

[23] Also in the John Deere application the other letter previously referred to was one from

Professor Ronald C. Cuming who together with Roderick J. Wood have authored *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Toronto; Carswell, 1994) where at pp. 277 - 279 Professors Cuming and Wood had dealt with this same issue insofar as it relates to the Saskatchewan and Manitoba Acts. While the text of Professors Cuming and Wood was not cited to me in this present application it had been cited in the John Deere application and apparently expressed conclusions similar to those expressed by Professor Walsh in her text. This prompted counsel for John Deere in the other application to seek clarification from Professor Cuming. In a letter addressed to the John Deere counsel dated January 5, 2005 Professor Cuming stated:

> "Pursuant to your request I have examined those provisions of Canadian Personal Property Security Acts that deal with the requirements that must be met before the super-priority of purchase money security interests over prior registered security interests that attach to after-acquired property can be established. The comments set out below focus on the issue of timing of the steps that must be taken by holders of the purchase money security interests.
>
> It is my firm view that the policy rationale for the notice requirement in the sections of the Acts dealing with purchase money security interest super-priority is to allow a holder of a purchase money security interest in inventory to obtain priority while at the same time protecting the prior secured party from advancing funds against new inventory that comes into the debtor's possession without being aware that the purchase money security interest holder will be in a position to assert the statutory super-priority in such inventory. It is the time when the debtor acquires possession of the inventory purchased with the purchase money credit that is critical. This conclusion is fully supported by the unambiguous wording of the relevant sections.
>
> There is no possible prejudice to the prior secured party if the purchase money security interest is registered before or after the notice is given since the registration standing alone does not give the purchase money security interest holder super-priority. It is the advance notice plus the registration that does this and, until the advance notice is given, the prior secured party need not worry about advancing funds against new inventory since the super-priority cannot be claimed until both steps are completed.
>
> To reiterate, it is my view that both steps must be completed before the debtor obtains possession of the inventory against which the holder of the purchase money security interest is claiming super-priority, but the order is irrelevant for purposes of achieving the policy goal. No discernable policy is served by requiring that the notice be given before the purchase money security interest is registered. Nor is there any basis in the wording of the Acts for this requirement.
>
> I have reviewed section 35(2) of the Newfoundland and Labrador *Personal Property Security Act*, and see no reason why the above policy rationale ought not apply or

> why this section should be interpreted in this respect differently from its counterparts in other Canadian Personal Property Security Acts."

Conclusion respecting security priority over ABN Unit #15.

[24] Counsel for ABN and CIBC/11422 were in agreement that all of the requirements of subsection 35(2) of the **PPSA** had been met by ABN to obtain a priority PMSI interest over the security of CIBC if the Court accepted the position of ABN that the **PPSA** did not require ABN to deliver notice under subsection 35(2)(b) to CIBC prior to registering its Financing Statement. Therefore the only issue for me to decide with respect to determining the priority of the ABN security over the CIBC security is to determine whether, in my view, the creditor seeking the PMSI interest must give notice to prior registered creditors before registering its own security interest. I cannot accept that notice to prior secured creditors is required to be given by an intended PMSI secured creditor prior to the registration of its Financing Statement or other security interests. Such an interpretation is impractical and does not facilitate commerce. Professor Cuming in the section of his letter quoted succinctly determines:

> "There is no possible prejudice to the prior secured creditor if the purchase money security interest is registered before or after the notice if given since the registration standing along does not give the purchase money security interest holder super-priority. It is the advance notice plus the registration that does this and, until the advance notice is given, the prior secured creditor need not worry about advancing funds against new inventory since the super-priority cannot be claimed until both steps are completed."

And

> "... No discernable policy is served by requiring that the notice be given before the purchase money security interest is registered. Nor is there any basis in the wording of the Acts for this requirement.
>
> I have reviewed section 35(2) of the Newfoundland and Labrador *Personal Property Security Act*, and see no reason why the above policy rationale ought not apply or why this section should be interpreted in this respect differently from its counterparts in other Canadian Personal Property Security Acts."

[25] I therefore find ABN has priority over CIBC/11422 to the sale proceeds of the auction conducted by the Trustee with respect to ABN Unit 15. In the summary of this judgment I will deal with the specific orders to the Trustee with respect to the payment of such proceeds.

History of ABN Units 4, 7, 8, 9, 10 and 11 as "Proceeds".

[26] "Proceeds" are defined in s. 2(ff) of the **PPSA** as follows:

> "(i) identifiable or traceable personal property that is derived directly or indirectly

> from any dealing with collateral or proceeds of collateral and in which the debtor acquires an interest..."

[27] ABN Units 7, 8 and 10 are the Original Equipment charged by HEL in favour of ABN under its security documents found by the Trustee to be valid and enforceable. They were sold by the Receiver under the Receivership Order and are now in the form of "proceeds". ABN Units 4, 9 and 11 were equipment obtained by HEL as a trade-in on the retail purchase of the Original Equipment secured by ABN. Again these security documents were found by the Trustee to be valid and enforceable. These Units have also been sold by the Receiver and are in the form of "proceeds".

[28] As will be discussed later in this judgment, 11422 argues that neither the general subordination contained in para. 2.2 of the CIBC Debenture, nor various Waiver Letters given by CIBC to ABN, waived any interest on the part of CIBC in "proceeds". 11422 extends this argument by saying that because Original Equipment had been rendered into "proceeds," by reason of the Receiver having realized upon same pursuant to the Receivership Order, ABN no longer has a claim to those "proceeds" of Original Equipment realized upon by the Receiver.

[29] This argument is without merit. The Receiver is an Officer of the Court. In realizing upon the assets of HEL, such realizations were not in the course of the ordinary commerce of HEL but were the actions of a Court Officer. It was never the intention of the Receivership Order or the auction authorized thereunder that, by selling Original Equipment and turning it into "proceeds", the claims to priority in relation to that Original Equipment by the various competing secured creditors would be altered by the action of the Receiver. I therefore dismiss absolutely that this argument has any effect upon the competing priority claims between ABN and 11422 to the various ABN Units and the "proceeds" thereof realized by the Receiver by virtue of the auction in which the assets of HEL were disposed of.

ABN Unit No. 4.

[30] The competing creditors in this application have agreed that there are two issues with respect to this piece of equipment and the proceeds thereof. ABN Unit No. 4 was a trade-in on Original Equipment financed by ABN.

[31] HEL entered into a demand debenture (the "Debenture") with CIBC on the 7th of January, 1985. The Trustee has, in its final determination of the CIBC security, determined that this is a valid and enforceable security as between CIBC and HEL. As mentioned earlier in this judgment, the benefit of this security has been assigned by CIBC to 11422. Section 2.2. of the Debenture contained the following general subordination by CIBC to creditors providing funds for the purchase of property as follows:

> "2.2. Until the Security becomes enforceable, the Company may dispose of or deal with the subject matter of the floating charge in the ordinary course of its business and for the purpose of carrying on the same provided that the Company will not, without the prior written consent of the Bank, create, assume or have outstanding, except to the Bank, any mortgage, charge or other encumbrance on any part of the

> Charged Premises ranking or purporting to rank or capable of being enforced in priority to or pari passu with the Security, other than any mortgage, lien or other encumbrance upon property, created or assumed to secure all or any part of the funds required for the purchase of such property or any extension or renewal or replacement thereof upon the same property if the principal amount of the indebtedness secured thereby is not increased, or any inchoate liens for taxes or assessments by public authorities." [Emphasis added.]

[32] There would be no valid dispute between ABN and 11422 as to the priority of the ABN security over the assigned CIBC security if Unit No. 4 were the Original Equipment over which ABN took its security interest. Unfortunately for ABN, Unit No. 4 is a trade-in made by a purchaser from HEL of the Original Equipment secured by ABN. 11422 argues that the effect of the underlined words in s. 2.2 of the Debenture limits the priority granted by CIBC to other lenders such as ABN to only the property purchased originally by the provision of funds by such a lender and not to any "proceeds" thereof whether such "proceeds" are in the form of cash or traded-in equipment.

[33] ABN's security over ABN Unit No. 4 is a collateral mortgage which was registered after the CIBC Debenture but before the perfection date of the General Security Agreement of CIBC, which perfection date was January 25, 2000. Unfortunately for ABN, its security over ABN Unit No. 4 was not transitioned properly when the **PPSA** came into effect, with the result that the collateral mortgage of ABN had a new perfection date assigned to it by reason the operation for the **PPSA** which perfection date was after the date of the CIBC GSA. However, ABN's PMSI interest in the Original Equipment over which it had security, of which ABN Unit No. 4 is "proceeds", was created before the General Security Agreement. It has already been held in earlier decisions relating to HEL that para. 2.2 of the CIBC Debenture, generally subordinated CIBC's Debenture security interest to unperfected purchase money security interests which arose before the perfection date of the CIBC GSA. In this regard, see **Hickman Equipment (1985) Ltd.,** [2004] N.J. No. 286 (NLCA) at paras. 17 to 21 where Rowe, J. sets out the effect of s. 2.2 of the CIBC Debenture as follows:

> "17 Paragraph 2.2 of the Debenture reads:
>
> > 'Until the Security becomes enforceable, the Company may dispose of or deal with the subject matter of the floating charge in the ordinary course of its business and for the purpose of carrying on the same provided that the Company will not, without the prior written consent of the Bank, create, assume or have outstanding, except to the Bank, any mortgage, charge or other encumbrance on any part of the Charged Premises **ranking or purporting to rank** or capable of being enforced **in priority to or pari passu with the Security, other than any** mortgage, lien or other **encumbrance upon property**, created or assumed to secure all or any part of the funds **required for the purchase of such property** or any extension or renewal or replacement thereof upon the same property if the principal amount of the indebtedness secured thereby is not increased, or any inchoate liens for taxes or assessments by public authorities. [emphasis added]'

> 18 Paragraph 2.2 expressly contemplates that Hickman Equipment "in the ordinary course of its business" would create "encumbrance[s] upon property ... required for the purchase of such property" and that such encumbrances would have priority over CIBC's floating charge under the Debenture.
>
> 19 Based on the wording of paragraph 2.2 of the Debenture, it is clear that purchase money security interests (sometimes also called purchase money security liens) would rank in priority to CIBC's security interest pursuant to the Debenture.
>
> 20 This interpretation, clear on the face of the provision, is in line with case law in other provinces: see *Savin Canada Inc. v. Protech Office Electronics Ltd.* (1984), 8 D.L.R. (4th) 225 (B.C.C.A.) and *Toronto Dominion Bank v. Hayworth Equipment Sales Ltd.* (1987), 76 A.R. 69 (Alta. C.A.).
>
> *(ii) Post-PPSA*
>
> 21 Did this change with the coming into force of the *PPSA*? I do not see how, given the wording of paragraph 2.2. As the Debenture continued to contain express wording of subordination to purchase money security interests, the result remains the same. See s. 41 of the *PPSA*. (In 2004 NLCA 48, this Court has decided that the Debenture and Supplementary Debentures maintained their priority under the *PPSA* following the transition period.) ”

[34] Section 41 of the **PPSA** provides the following with respect to voluntary subordination by a secured party:

> “41. (1) A secured party may subordinate, in a security agreement or otherwise, the secured party’s security interest to 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.” [Emphasis added.]

[35] Counsel for ABM argues that s. 2.2 of the Debenture permits a mortgage upon “property” and that word can be interpreted to imply after acquired property as opposed to merely Original Equipment purchased with the funds provided by ABM. Counsel for ABM argues if the subordination wording of s. 2.2 were limited to subordinating the CIBC Debenture only in favour over security over Original Equipment, as opposed to Original Equipment and proceeds, the creditor seeking the benefit of the subordination would be limited only to repossession rights if the Original Equipment had remained in the possession of HEL. He argues that this is an impractical commercial interpretation and that it goes without saying that if you subordinate “property” you also subordinate to claims to “proceeds”.

[36] In **Alberta (Treasury Branches) v. MacLeod Dixon,** [2001] (A.J. No. 114) Alta. Q.B., Sullivan J. considered an appeal by Alberta Treasury Branches from a decision of a Master who held

that Merisel Canada Inc**.** had a priority claim over Alberta Treasury Branches to an account receivable owed by MacLeod Dixon to a supplier of certain computer equipment. Central to the dispute was a postponement agreement entered into between Alberta Treasury Branches and Merisel wherein it was provided that Merisel "...hereby agreed to subordinate, postpone and defer all rights, claims and security interest that it now has or may hereafter have in the Collateral of the Debtor listed in Schedule "A" here [sic] to the rights, claims and security interest that ALBERTA TREASURY BRANCHES now has or may in the future have in the said Collateral." Schedule "A" to the postponement agreement listed the Collateral of the Debtor to which ATB had security and to which Merisel subordinated as being "ALL PRESENT AND AFTER ACQUIRED PERSONAL PROPERTY OF THE DEBTOR."

[37] At the original hearing of the matter the Master held that in drafting the postponement subordination agreement, Alberta Treasury Branches did not provide for the subordination of Merisel's priority position in proceeds and that the fight between Merisel and Alberta Treasury Branches was a fight for proceeds. The Master held that there was nothing vague or uncertain about the collateral described as "all present and after acquired personal property." The Master seems to accept that "proceeds" does not fall within the security definition of the security held by Alberta Treasury Branches, namely "all present and after acquired personal property."

[38] The Court of Queen's Bench on appeal of the Master's decision overturned the decision of the Master and at para. 32 of his judgment, Sullivan, J. stated:

> "In interpreting an agreement, the objective of the Court is to discover the intention of the parties as determined in accordance with the plain or ordinary and popular meaning of the words used by them. In the absence of ambiguity, the natural or literal meaning of the words set out in the contract should be adopted. In addition, no terms may be implied which are inconsistent with or contrary to the express terms of the contract. See, e.g.: *Gainers Inc. v. Pocklington Financial Holdings Inc*., (2000), 255 A.R. 373 at 378 (CA). It should be noted that it is acceptable to look at the commercial setting of the agreement to help ascertain the intention of the parties although extrinsic evidence of the parties' intentions is not admissible. *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd. [1999*] 5 WWR 726 at 736 (Alta. CA) "

[39] Later at paras. 37 to 40 inclusive, Sullivan, J. states:

> "37 "Proceeds" are defined in s. 1(1)(gg) of the PPSA to mean identifiable or traceable personal property, including fixtures and crops, derived directly or indirectly from any dealing with collateral or the proceeds of the collateral, and in which the debtor acquires an interest. It is clear that the Account Receivable owed by Macleod Dixon to Merisel constitute proceeds.
>
> 38 As ATB points out, the Postponement Agreement is a private contract between Merisel and ATB. To require private parties to adhere to the same test as is required for PPSA registration and perfection is unreasonable. The Postponement Agreement,

> as a private contract, should be interpreted according to the general contractual principles set out above. Therefore, the terminology used in the Postponement Agreement should be given its plain meaning.
>
> 39 "Personal property" is all property other than real property. See Henry Campbell Black, Black's Law Dictionary, 6th ed. (St. Paul, Minn.: West Publishing, 1990) at 1217 and Dukelow and Huse, The Dictionary of Canadian Law, 2nd ed. (Toronto: Carswell, 1995) at 891. It is clear that proceeds are not real property and therefore, the plain meaning of the phrase "all present and after-acquired personal property" includes proceeds.
>
> 40 Therefore, I am of the view that the phrase "all present and after-acquired personal property" in Schedule "A" to the Postponement Agreement includes proceeds. The result is that ATB, by virtue of the Postponement Agreement, has priority to the Account Receivable owed by Macleod Dixon to Quantum."

[40] Interestingly both counsel for ABN and 11422 argue this case in support of their position. Counsel for ABN takes the position that the decision of Sullivan, J. of the Alberta Queen's Bench, as set out in paras. 37 to 40 thereof above, conclude that "proceeds" is contained within the meaning of the word "property" and that therefore s. 2.2 of the CIBC Debenture granting the right for creditors to take security over "property" which is acquired by HEL from the funds which that creditor supplied, is also giving the right to that creditor to have security over whatever constitutes the "proceeds" of that original security.

[41] On the other hand, counsel for 11422 argues that it is clear that the decision of Sullivan, J. was based upon the fact that the security interest of Alberta Treasury Branches to which Merisel had subordinated was all present and "after-acquired personal property" and that emphasis should be placed upon the "after-acquired" portion of this judgment. He argues that this is the emphasis made by Sullivan, J. and the basis on which he finds that Alberta Treasury Branches has interests in proceeds of the Original Equipment secured because of course "proceeds" falls within "after acquired" personal property. Thus he distinguishes the rationale of Sullivan, J. in this case from the fact situation insofar as it relates to s. 2.2 of the CIBC Debenture. He points to the requirement contained in s. 2.2 of the CIBC Debenture that the funds for which security is taken must have been required for the purchase of "such property" and that when "such property" is converted into proceeds, either by way of being converted into cash, or by a trade-in being accepted thereon, there is no security any longer held by ABN in priority to the CIBC Debenture because the property then in the possession of HEL is not the equipment for which the funds were provided. As additional support he points to the subsequent wording in s. 2.2 of the Debenture which allows for extension or renewal of the security and permits priority to a lender for "... any extension or renewal or replacement thereof upon the same property ..." Counsel for 11422 argues that this shows a clear intention on the part of CIBC in drafting this Debenture that it is only the original security property over which it is postponing its security and that once converted to proceeds, either by way of sale and rendering into cash, or by way of accepting a trade-in thereof, "such property" is no longer owned by HEL and any postponement created by s. 2.2 of the Debenture in favour of creditors such as ABN ceases to have any effect. As additional support for this position, counsel for 11422 cites

The Law of Contract in Canada by G.H.L. Fridman, Q.C., Third Edition (Carswell) at p. 454 where, in dealing with the interpretation of express terms in a contract, the learned author states:

> "There is no doubt that the cases emphasize this fundamental government of the written word, and in particular, the plain, literal and ordinary meaning of the written word in contract. The golden rule is that the literal meaning must be given to the language of the contract, unless this would result in absurdity. Words of ordinary use in a contract must be construed in their ordinary and natural sense. The paramount test of the meaning of words in a contract is the intention of the parties. That is to be determined in the operative sense by reference to the surrounding circumstances at the time of signing the contract." [Footnotes omitted.]

Conclusion re effect of s. 2.2 of CIBC Debenture.

[42] I cannot accept the argument of counsel for ABN that it is entitled to a subordination of the assigned security of CIBC as argued. I am satisfied that the clear and literal meaning of the words contained in s. 2.2 of the CIBC Debenture was that CIBC was only postponing its prior security charge created by the Debenture to any charges over the originally purchased equipment or property for which funds were supplied by the competing creditor. To conclude as requested by counsel for ABN is to ignore the effect of the adjective "such" modifying the word "property" and to give it no meaning at all. I am not satisfied that that was the intention of the drafters of s. 2.2. I am fortified in that conclusion by the subsequent reference to the renewal or extension or replacement of security. Later in s. 2.2 the reference is made to extensions or renewals or replacements being permitted provided that they are upon the "same" property. Clearly this is intended to refer back to "such property" and to support the interpretation that only the originally purchased equipment is the equipment over which the lender who is seeking priority over CIBC/11422 provided the purchase funds for. I am not satisfied, in the context of s. 2.2 of the Debenture, that the word "property" was intended to cover "proceeds" in any form.

The effect of Waiver Letters from CIBC to ABN.

[43] The second issue argued by counsel for ABN with respect to ABN Unit No. 4 dealt with a Waiver Letter obtained by ABN from CIBC. That letter was dated November 10, 1998. This Waiver Letter, as well as subsequent Waiver Letters received by ABN from CIBC with respect to ABN Units 7, 8, 9 10 and 11 were all in the same wording as follows:

> "We are the secured party under certain registrations made by the Debtor [HEL] under the *Registration of Deeds Act* (RDA). We are advised that you propose to establish certain credit facilities in favour of the Debtor and that you have requested this letter as a condition to the establishment of such credit facilities.
>
> In consideration of the establishment of your financing arrangements with the Debtor, we, our successors and assigns, confirm that we have no interest in the property charged by your Chattel Mortgage as more particularly described in Schedule "A".

> This letter may be relied upon by you and your successors and assigns but not by any other party."

[44] The Schedule "A" to the Waiver Letters signed by CIBC contained a description of a particular piece of equipment and gave its serial number. There is no reference in Schedule "A" to a "security interest". Schedule "A" contains simply a description of the equipment itself.

[45] Because these Waiver Letters are identical in form and relate to all Units, i.e. 4, 7, 8, 9, 10 and 11, I would propose to deal with the effect of the Waiver Letters all together with respect to the various Units.

[46] I have earlier dismissed the argument of counsel for 11422 to the effect that if the Waiver Letters do not cover proceeds, ABN cannot gain priority over 11422 where Original Equipment still in the possession of HEL at the time of the receivership was converted by the Trustee into "proceeds". This dismisses one of the two arguments of 11422 with respect to Units 7, 8 and 10 which were the Original Equipment Units realized upon by the Trustee.

[47] The other argument of 11422 with respect to these pieces of Original Equipment is that the Waiver Letters reference that CIBC is a secured party under certain registrations made under the **Registration of Deeds Act**, RSNL 1990, c. R-10. 11422 points out that at the time of the Waiver Letters given with respect to Units 7, 8, 9, 10 and 11, CIBC also held security under a General Security Agreement registered under the **PPSA** (and not registered under the **Registration of Deeds Act**), the **PPSA** then having been in force and effect. 11422 argues that the effect of this wording in the Waiver Letters is to say that CIBC was only postponing any security interest which it had in the equipment by virtue of the registrations made against HEL under the **Registration of Deeds Act** and not under the **PPSA** security held by it in the form of a GSA. I am not satisfied that the first sentence of the Waiver Letter wherein CIBC references itself as a secured party under the **Registration of Deeds Act** plays any part in the interpretation of the effect of the waiver contained in the second paragraph of the various Waiver Letters. It is clear that this sentence is only intended to identify CIBC as a secured party holding security over the assets of HEL. Nowhere else in the letter is there any reference to any particular type of security. In order for the Waiver Letters to be interpreted in the manner suggested by 11422, in my view, it would be necessary for the second paragraph of the letter to go on and state "We ... confirm that we have no interest in the property under certain registrations *under the Registration of Deeds Act*." Rather than such specific language it is clear that para. 2 of the Waiver Letters is an absolute waiver of any interest in the property which is to be described by the Chattel Mortgage to be entered into between ABN and HEL. Therefore with respect to Units 7, 8 and 10 I have no difficulty in finding that the ABN security has priority over the CIBC security, i.e. both the Debenture and the GSA and that ABN is entitled to the proceeds thereof in accordance with the Claims Plan. Later in this judgment I will deal with the effect of that.

[48] Units 4, 9 and 11 however were trade-in Units and thus were "proceeds" of the equipment originally secured under the various ABN forms of security. 11422 argues that the words "... as more particularly described in Schedule 'A'." contained at the end of the second paragraph of the

various Waiver Letters modifies the words that go before and should be interpreted to mean that CIBC was only declaring that it had no interest in the specific equipment. 11422 argues that if there had been a period inserted after the words "Chattel Mortgage" contained in the second paragraph of the Waiver Letters and the words "as more particularly described in Schedule 'A'." had not been contained in that paragraph, it would be clear, if the ABN security in fact charged proceeds, that CIBC was postponing to all interests created by the Chattel Mortgage and thus would be postponing to any ABN interest in proceeds. However, 11422 argues that the form of Waiver Letter was drafted by counsel for ABN (not the counsel in this present hearing) and that the *contra proferentem* rule ought to be applied in the interpretation of it and if there is any ambiguity with respect to what property is being referred to in para. 2 of the Waiver Letters, that ambiguity ought to be interpreted against the interest of ABN. However, counsel for 11422 additionally argues that the paragraph is clear and that what is being referenced in the paragraph is the actual equipment and not the security interest claimed by ABN.

[49] On the other hand, ABN argues that the words "as more particularly described in Schedule 'A'." only serves not to interpret the meaning of the waiver but to reference the particular equipment originally charged and secured by ABN.

[50] Counsel for ABN has encouraged me not to adopt an interpretation which defeats the intention of the parties and their objective in entering into a commercial transaction in the first place but rather to adopt an interpretation which promotes a sensible commercial result. He argues that it is not a sensible commercial result for ABN to have sought a waiver from CIBC which was only a waiver over the Original Equipment over which it took security and not the proceeds thereof when the actual security document entered into between ABN and HEL secured a claim to the proceeds of the sale of such Original Equipment. In that regard he refers me to my decision in another Hickman Equipment file in which certain creditors were opposing the claims of General Motors Acceptance Corporation over "vehicles" as used in a GMAC security agreement. This decision is found in **Hickman Equipment (1985) Ltd,** [2003] N.J. No. 86, filed April 4, 2003. In para. 20 thereof I indicated that I was satisfied that extrinsic evidence was admissible to provide a factual background in determining the true intent of the parties to an agreement in using the word "vehicles". However, that extrinsic evidence consisted of various agreements between GMAC and HEL, as well as a priority agreement entered into at the same time between CIBC, GMAC and HEL. It did not include extrinsic evidence in the form of contracts between HEL and other parties. I am not satisfied that it is proper for me to utilize the Chattel Mortgage documentation entered into between HEL and ABN to interpret what is meant by the various Waiver Letters between ABN and CIBC where CIBC was not presented with a copy of those various chattel mortgages at the time that the Waiver Letters were executed. In my view I have to find the intent of the parties to the Waiver Letter within the words of the Waiver Letter itself unless they are ambiguous or unclear. There is no extrinsic evidence for me to consider.

[51] Based upon all of these considerations I am not satisfied that the Waiver Letters were intended by CIBC to waive its interest in proceeds. If that was the intent of the Waiver Letters more precise language could have been and should have been used. In other examples of Waiver Letters that were presented to me, there was specific language indicating that CIBC was waiving any claim, not only to the Original Equipment but to any proceeds either from sales or leases thereof. Where

ABN is the author of the Waiver Letter and there is ambiguity in it, that ambiguity ought to be construed as against ABN. However I am satisfied that the Waiver Letters are not ambiguous and that it is clear on the wording of them that the only thing that is postponed is any interest in the specific equipment as listed in Schedule "A" to the Waiver Letter and not to any proceeds thereof. I therefore dismiss the clam of ABN to the sale proceeds of Units 4, 9 and 11.

Summary of conclusions.

[52] The Receiver is authorized to pay to 11422 the sale proceeds of Units 4, 9 and 11 in the gross amount of $44,500 less the Receiver's hold-back of 15% of the said proceeds in accordance with the Claims Plan.

[53] The Receiver is ordered to pay to ABN the sale proceeds of Units 7, 8, 10 and 15 in the gross amount of $166,000 less the Receiver's hold-back of 15% in accordance with the Claims Plan.

[54] Where ABN has been approximately four times more successful in its claims in this matter on a dollar basis than 11422, ABN shall be entitled to its costs of this application.

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Justice

Richard A. McLaren in Secured Transactions and Personal Property in Canada, 2d ed., looseleaf updated to 2004-Rel. 1 (Toronto: Carswell, 1989
1.