SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **ABN-AMRO LEASING/ABN-AMRO BANK CANADA ("ABN-AMRO")**

1. Introduction

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

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

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

2. Summary Final Determination

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

3. Defined Terms

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

"BSA"	-	*Bills of Sale Act*, R.S.N.L. 1990, c. B-3 (Rep.)
"CSA"	-	*Conditional Sales Act*, R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PMSI"	-	Purchase Money Security Interest
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. The Assets

15 pieces of heavy equipment. Note that ABN-AMRO has presented their claim on an asset by asset basis with respect to each of the 15 assets over which they are asserting a perfected security interest. In many cases, these are not the assets that were secured but are the proceeds arising therefrom. Those that are proceeds are indicated by "*". Of these 15 pieces, only #7, was not sold at the Trustee's auction.

1. Valmet 860 Forwarder (s/n 8608220)
2. Valmet 911C Harvester (s/n 911C4019)
3. JD 892 Excavator (s/n FF892EX011686)*
4. JD 892E Excavator (s/n FF892EX011283)*
5. Komatsu Excavator c/w PC200-6 Logmax Harvesting Head (C10514)
6. Poulin Screen Plant (s/n 804)
7. Poulin Radial Stack Conveyor (s/n 2SAAQQ19705139895)
8. Hitachi 270 Excavator (s/n 158-5928)*
9. JD 450H Dozer (s/n T0450HX874682)
10. Int'l TD15C Tractor/Dozer (s/n 6349)*
11. Tapio Harvesting Head*
12. JD 450G Dozer (T0450GX809815)*
13. JD 772CH Motor Grader (DW772CH567061)*
14. JD 892E Excavator (s/n FF892EX007239)*
15. Fabtek 544B Forwarder (s/n 544B-03-28858-99)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be

performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

Notwithstanding the findings in this Final Determination concerning the validity of the Claim as secured or otherwise, PricewaterhouseCoopers Inc. is not precluded by such determination from challenging the Claim as being reviewable or fraudulent pursuant to the provisions of the BIA or any applicable provincial legislation.
Except where a specific claim to proceeds has been made and material provided in support of that claim, the Trustee expresses no opinion with respect to claims to proceeds or claims involving tracing. An outline of the proceeds claims processes and issues are set out in s.13.

7. Overview of Claim

ABN-AMRO claims a security interest with respect to 15 pieces of HEL's inventory (as set out in the list above). This arises from a series of 18 different loans, secured by chattel mortgages and security agreements entered into with HEL.

The Proof of Claim dated 10 April 2002, and the documents attached thereto (more particularly described below) indicate a total claim of **$10,257,435.16.** This is comprised of an unsecured claim in the amount of $8,657,435.16 and a secured claim in the amount of **$1,600,000.00**. The claim breaks down as follows:

- Loan # 002 dated January 26, 1998 – Balance outstanding of $98,804.82
- Loan # 003 dated March 10, 1998 – Balance outstanding of $292,907.81
- Loan # 004 dated March 31, 1998 – Balance outstanding of $138,505.93
- Loan # 005 dated April 13, 1998 – Balance outstanding of $291, 505.25
- Loan # 007 dated November 12, 1998 – Balance outstanding of $211,975.07
- Loan # 009 dated January 21, 1999 – Balance outstanding of $551,283.19
- Loan # 010 dated June 1, 1999 – Balance outstanding of $1,085,672.50
- Loan # 011 dated June 1, 1999 – Balance outstanding of $183,186.08
- Loan # 012 dated November 03, 1999 – Balance outstanding of $356,998.96
- Loan # 013 dated March 15, 2000 – Balance outstanding of $1,375,537.47
- Loan # 014 dated April 14, 2000 – Balance outstanding of $620,068.18
- Loan # 015 dated June 12, 2000 – Balance outstanding of $1,399,101.40
- Loan # 016 dated June 29, 2000 – Balance outstanding of $434,370.69
- Loan # 017 dated February 26, 2001 – Balance outstanding of $439,440.92
- Loan # 018 dated May 30, 2001 – Balance outstanding of $180,489.53
- Loan # 019 dated September 10, 2001 – Balance outstanding of $2,257,435.16

Note that ABN-AMRO presented its claim on an asset by asset basis. Among the 15 assets claimed, 8 are in fact claims to assets that are trade-ins, arising from the disposition of assets originally secured.

8. Documentation

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

i. PPR search conducted in the name of HEL on March 21, 2002.
ii. Proof of Claim dated 10 April, 2002.
iii. Bundles of documents provided by ABN-AMRO supporting their claim to each of the 15 assets noted above, as follows:

1. **Valmet 860 Forwarder (8220).**
    - Invoice from Sisu Logging dated December 18, 1997.
    - **Loan #2** and chattel mortgage dated January 26, 1998.
    - ABN-AMRO General Security Agreement dated 15 March 2000 covering "all equipment now or hereafter sold, leased, supplied, or financed by ABN-AMRO to the debtor …" (the "GSA").
    - Affidavit of Bona Fides executed by Hubert Hunt dated December 30th, 1997.
    - Copy of a wire transfer dated January 28, 1998 payable to O'Reilly, Noseworthy.
    - Copy of a letter dated January 29, 1998 from O'Reilly, Noseworthy indicating receipt of the wire transfer and further indicating payment of the monies to the manufacturer/supplier of the equipment.

2. **Valmet 911C Harvester (911C4019).**
    - Sisu Logging Invoice dated January 16, 1998.
    - **Loan #4** and chattel mortgage dated 31 March 1998.
    - Correspondence dated April 17, 1998 between ABN-AMRO and CIBC addressing priorities.
    - Correspondence dated April 13, 1998 between John Deere Credit and ABN-AMRO addressing priorities.
    - Copy of a wire transfer dated April 3, 1998 payable to Stewart McKelvey.
    - Affidavit of Bona Fides regarding the chattel mortgage sworn by Neil Jacobs on March 31, 1998.

3. **JD 892 Excavator (FF892EX011686).**
    - **Loan #5** and chattel mortgage dated April 13, 1998.
    - Correspondence between ABN-AMRO and CIBC dated April 17, 1998 addressing priorities.
    - Correspondence dated April 13, 1998 between John Deere Credit and ABN-AMRO addressing priorities.
    - Invoice from HEL dated June 1, 1998 for a sale to Johnson Construction.
    - Complete Goods Invoice dated 27 March 1998.
    - Copy of a wire transfer dated January 20, 1999 payable to Stewart McKelvey.
    - Affidavit of Bona Fides regarding the chattel mortgage sworn by Neil Jacobs on the 13th of January, 1999.

4. **JD 892E Excavator (FF892EX011283).**

- Canada Post Confirmations respect to registered mail notices sent to other creditors providing notice of PMSI Claim.
- Correspondence to the following creditors giving notice of ABN-AMRO's intention to take a PMSI: GMAC Leasco Limited; Daimler Chrysler Financial Services; Charter Financial Company; GMAC; Newcourt Financial Limited; National Leasing Group Inc.; GE Capital Canada Equipment Financing Inc.; Bombardier Capital Leasing Ltd.; CIBC Equipment Finance Limited; Contract Funding Group Inc.; MTC Leasing Inc.; CIBC; TD Asset Finance Corp.; John Deere Limited; John Deere Credit Inc.;
- Complete Goods Invoice dated May 24, 2000.
- Copy of a cheque from ABN-AMRO to John Deere Limited dated June 14, 2000 in the amount of $1,605,930.11.
- invoice dated June 16, 2000 from HEL to Cougar Engineering & Construction Limited
- **Loan #15** and security agreement dated 12 June 2000 with respect to the following 4 assets:

  2000 Tigercat Harvester (845H0772)
  JD 550LC Excavator (FF0550X950022)
  JD 330LC Excavator (FF0330X080802)
  JD 330LC Excavator (FF0330X080781)

- Copy of a cheque dated June 14, 2000 payable to John Deere Limited in the amount of $1,605,930.11.

5. **Komatsu Excavator complete with PC200-6 Log Max Harvesting Head (C10514).**

- Invoice dated May 28, 2001 to HEL for the sale of the asset.
- **Loan #18** (conditional sales agreement) dated May 30, 2001.
- Copy of a cheque dated February 14, 2001 payable to John Deere Limited in the amount of $426,862.94.

6. **Poulin Screen Plant (804).**

- Poulin Invoice dated March 29, 1999.
- **Loan #13** and related Security Agreement dated March 15, 2000
- Correspondence dated March 22, 2000 between John Deere Credit and ABN-AMRO addressing priorities.
- Correspondence dated March 14, 2000 between CIBC and ABN-AMRO addressing priorities.
- Copy of a wire transfer dated March 21, 2000 payable to Stewart McKelvey and attached fax cover sheet.
- Copy of a trust subsidiary report indicating that a cheque was made payable to HEL in the amount of $1,695,766.60.

7. **Poulin Radial Stack Conveyor (2FAAQQ19705139895)**.
   - Poulin Invoice dated March 29, 1999.
   - **Loan #13** and related Security Agreement dated March 15, 2000
   - Correspondence dated March 14, 2000 between ABN-AMRO and CIBC addressing their relative priorities.
   - Correspondence dated March 22, 2000 between ABN-AMRO and John Deere Credit setting out their relative priorities.
   - Copy of a wire transfer dated March 21, 2000 payable to Stewart McKelvey and attached fax cover sheet.
   - Copy of a trust subsidiary report indicating that a cheque was made payable to HEL in the amount of $1,695,766.60.

8. **Hitachi 270 Excavator (1585928)**.
   - Complete Goods Invoice dated July 26, 1999.
   - **Loan #13** and related Security Agreement dated March 15, 2000
   - Correspondence dated March 14, 2000 from CIBC to ABN-AMRO addressing priorities.
   - John Deere Customer Purchase Order dated October 16, 2001 between Kelly Construction and HEL.
   - Correspondence from John Deere addressing priorities.
   - Correspondence from CIBC addressing priorities.
   - Copy of a wire transfer dated March 21, 2000 payable to Stewart McKelvey and attached fax cover sheet.
   - Copy of a trust subsidiary report indicating that a cheque was made payable to HEL in the amount of $1,695,766.60.

9. **JD 450H Dozer (T0450HX874682).**
   - Complete Goods Invoice dated 27 August 1999.
   - **Loan #13** and related Security Agreement dated March 15, 2000
   - Correspondence dated March 14, 2000 between ABN-AMRO and CIBC addressing priorities.
   - Correspondence dated March 22, 2000 between John Deere Credit and ABN-AMRO Leasing addressing priorities.
   - Copy of a wire transfer dated March 21, 2000 payable to Stewart McKelvey and attached fax cover sheet.
   - Copy of a trust subsidiary report indicating that a cheque was made payable to HEL in the amount of $1,695,766.60.

10. **International TD153 Tractor Dozer (6349)**
   - Complete Goods invoice dated December 8, 1999
   - **Loan #13** and related Security Agreement dated March 15, 2000
   - Correspondence dated March 14, 2000 from CIBC to ABN-AMRO addressing priorities.
   - Correspondence dated March 22, 2000 between John Deere Credit and ABN-AMRO addressing priorities.

- Invoice dated November 22, 2001 from HEL to Barker's Construction.
- Copy of a wire transfer dated March 21, 2000 payable to Stewart McKelvey and attached fax cover sheet.
- Copy of a trust subsidiary report indicating that a cheque was made payable to HEL in the amount of $1,695,766.60.

11. **Tapio Harvesting Head**
    - Invoice dated 5 October 1998
    - **Loan #007** dated 12 November 1998
    - Chattel mortgage dated 12 November 1998, registered in the Old Registry (#261670)
    - Invoice for sale to Baytona Forest Products Ltd., registered at the Old Registry (# 713498).
    - The GSA.
    - Copy of a wire transfer dated November 12, 1998 payable to Stewart, McKelvey.
    - Affidavit of Bona Fides regarding the chattel mortgage sworn by Neil Jacobs on the 12th of November, 1998.

12&13. **JD 450G Dozer (T0450GX809815) <u>&</u> JD 772CH Motor Grader (DW772CH567061).**
    - Complete Goods Invoices dated 8 February 2000 and 30 January 2001.
    - copy of a cheque dated February 14, 2001 to John Deere Limited from ABN-AMRO for $426,862.94.
    - A John Deere Customer Purchase Order dated February 1, 2001.
    - **Loan #17** dated 13 February 2001 in the amount of $427,262.94, and a security agreement covering the 2 assets:

14. **John Deere 892E Excavator (FF892EX007239)**.
    - Complete Goods Invoice dated 17 June 1998
    - **Loan #009** dated January 21, 1999
    - Chattel Mortgage dated January 21, 1999 registered at the Old Registry (# 269698).
    - Copy of a wire transfer dated April 13, 1998 payable to Stewart McKelvey.
    - Affidavit of Bona Fides regarding the chattel mortgage sworn by Neil Jacobs on the 9th of April, 1998.

15. **Fabtek 544B Forwarder (544B-03-28858-99).**
    - Fabtek Invoice dated January 20, 1999.
    - **Loan #10** and chattel mortgage dated 1 June 1999, registered at the Old Registry (#281845).

- Copy of a wire transfer dated June 1, 1999 payable to Stewart McKelvey and attached fax cover sheet.
- Affidavit of Bona Fides regarding the chattel mortgage sworn by Neil Jacobs on the 31st day of May, 1999.

iv. We have also been provided with a number of invoices:
    1. 24 May 2000 from Complete Goods to HEL for a JD 330LC Excavator (FF0330X080802).
    2. 8 February 2000 from Complete Goods to HEL for 450H Crawler Dozer (T0450HX883089).
    3. 30 January 2001 from Complete Goods to HEL for 772CH Motor Grader (DW772CH579123).
    4. June 19, 2000 from HEL to Springdale Forest Resources Inc for a JD 230 LC Excavator (FF0230X600204). Trade ins were a JD 790B Excavator (CK790DL007983) and a CAT D6C Tractor (76A3939).
    5. 26 May 2000 from Complete Goods to HEL of a 550 LC Base Excavator (FF0440X950022).
    6. October 31, 2001 from HEL to Lesage Transport Limited dated for the sale of:
        JD 770 CH Motor Grader (DW770CH581091)
        JD TC54H Tool Carrier (DWTC54H575868)
        Ingersoll-Rand Air Compressor (0006050303)
    7. October 27, 2000 to Premier Construction for the sale of the following assets:
        JD 450LC Excavator (FF0450X090542)
        JD 450LC Excavator (FF0450X090556)
        JD 450LC Excavator (Ff0450X090545)
        JD 330LC Excavator (FF0330X080076)
        Terex Dump Truck (A7001320-16)
        Terex Dump Truck (A7581118)
        JD 892ELC Excavator (FF892EX012534)
        JD 744HMH 4WD Loader (DW744HM572769)
        JD 200LC Excavator (FF0200X501390)
        JD 200LC Excavator (FF0200X501393)
        JD 644H Wheel Loader (DW644HX577276)
        JD 744H 4WD Loader (DW744HX569129)
        JD 850C Crawler Dozer (T0850CX850222)
        50 Ton Trailer (2J9J7A1F7YK001167)
        Ingersoll-Rand Roller (160665)

v. Certificate of Delivery, Inspection and Acceptance – Conditional Sales Contract – dated May 30, 2001 signed by John King. There is no indication as to what equipment this Certificate relates.
vi. ABN-AMRO Conditional Sales Contract document checklist dated May 30, 2001.
vii. Retail Installment Contract between HEL and P & W Logging Company, dated November 24, 1998 for the purchase of: JD 160 Excavator (P00160X040627),

Fabtek Harvesting Head (1298132), Valmet 644 Forwarder (644F9164). Trade-in was a Timberjack 230 Forwarder.

viii. Lease Agreement dated October 29, 1999between HEL and Humber Valley Paving Limited for the purchase of a JD 744H Loader (DW744HX572946) and a JD 270 Excavator (FF0270X070370).

ix. Retail Installment Contract dated June 2000 between HEL and Springdale Forest Resources Inc. for the sale of a JD 230 Excavator (FF0230X600204). Trade ins were a JD 790D Excavator and a Caterpillar D6C Tractor.

x. Retail Lease Agreement dated July 20, 1999 between Humber Valley Paving Limited and HEL for the sale of a JD 744H Loader and a JD 310E Backhoe Loader.

xi. JD Credit Commercial Lease Agreement (No. 867347) between Lesage Transport Limited as Lessee and HEL as Dealer for the lease of a John Deere Grader (DW770CH581091), a JD Tool Carrier (DWTC54H575868) and Ingersoll-Rand Air Compressor (0006050303), dated September 28, 2001.

Note: we have also been provided with copies of Loans #3, 11, 12, 14, 16, as referenced in the Proof of Claim. However, as these loans do not relate to the 15 assets claimed by ABN-AMRO, they have not been considered, or addressed by the Trustee in preparation of this Final Determination.

9. Classification of the Assets

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

10. Application of the PPSA

As indicated by the above-noted documentation the secured transactions between ABN-AMRO and HEL were in the form of loans, secured by security agreements and chattel mortgages. Section 4 of the PPSA confirms that such secured transactions are governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13,2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest relates and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such

secured parties to claim a date of perfection that extends back to the date of the pre-ppsa registration for purposes of priority. There are a number of conditions set out in the Act. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for a number of the financings noted above. Specifically, the Chattel Mortgage associated with Loans #2, 4, 5, 7, 9 and 10 were all subject to pre-PPSA registrations.

The Trustee has searched the Old Registry and reviewed the documentation registered there for each of Loan # 2, 4, 5, 7, 9 and 10. In each case, the chattel mortgage, loan instrument and affidavit of bona fides has been registered:

Loan #2 – chattel mortgage, promissory note and affidavit of bona fides all dated January 26, 1998, registered in the Old Registry on January 30, 1998, reg# 232750.

Loan #4 - chattel mortgage, loan agreement and affidavit of bona fides all dated March 31, 1998, registered in the Old Registry on April 9, 1998, reg# 239792.

Loan #5 - chattel mortgage and loan agreement dated April 13, 1998 and affidavit of bona fides dated April 9, 1998, registered in the Old Registry on April 22, 1998, reg# 240946.

Loan #7 - chattel mortgage, loan agreement and affidavit of bona fides all dated November 12, 1998, registered in the Old Registry on November 13, 1998, reg# 261670.

Loan #9 - chattel mortgage and loan agreement dated January 21, 1999 and affidavit of bona fides dated January 13, 1999, registered in the Old Registry on January 27, 1999, reg# 269698.

Loan #10 - chattel mortgage and loan agreement dated June 1, 1999 and affidavit of bona fides dated May 31, 1999, registered in the Old Registry on June 2, 1999, reg# 281845.

None of these pre-PPSA registrations includes the registration of a bill of sale. According to s.5 of the BSA, without a registered Bill of Sale, the mortgage is void as against a creditor and as against a subsequent purchaser or mortgagee claiming from or under the grantor in good faith for valuable consideration without notice. The requirement of a Bill of Sale has been confirmed by the Supreme Court of Canada.[1] As such, it is the opinion of the Trustee that ABN-AMRO cannot rely upon the date of the Old Registry registration and the relevant date for purposes of priority must be the date of registration in the PPR.

[1] Grand River Motors Ltd (Trustee of) v. Commercial Finance Corp, 1933 CarswellOnt 49 (S.C.C.).

On February 14, 2001, ABN-AMRO made the following registration in the PPR (#**800177**), in relation to the March 15 2000 Security Agreement:

> *All inventory and equipment now or hereafter acquired by the debtor and financed in whole or part by secured party, all book debts relating thereto and all monetary and non-monetary proceeds therefrom.*

This registration was amended by **registration #1566148**, dated January 24, 2002 to include the following information:

> *Pre-PPSA registration information continued by this registration:*
> *232750: 1998-01-30 Bills of Sale Act*
> *236836: 1998-03-11 Bills of Sale Act*
> *23972: 1998-04-09 Bills of Sale Act*
> *240946: 1998-04-22 Bills of Sale Act*
> *261670: 1998-11-13 Bills of Sale Act*
> *169698: 1999-01-27 Bills of Sale Act*
> *281845: 1999-06-02 Bills of Sale Act*
> *283517: 1999-06-17 Bills of Sale Act*
> *197061: 1999-11-09 Bills of Sale Act*

It appears that this was intended to be the transitioning registration for ABN-AMRO's pre-PPSA security. However, as the provisions of s.75 were not complied with until the amending registration in January of 2002, it is the opinion of the Trustee that ABN-AMRO did not properly transition its pre-PPSA security interests.

This is not to suggest that such security interests are now unperfected. As is described below, all have been perfected at some later time. Rather, the significance of this is that ABN-AMRO cannot rely upon its previous registration date for determination of its date of perfection in the PPSA.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a

binding commitment to extend the loan or purchase money credited to the debtor[2].

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?
(i) Value given?
YES ABN-AMRO has provided documentary copies of cheques and wire transfers that correspond with each of the loans noted above as being the basis of the security interest claimed. It is the opinion of the Trustee that this is sufficient evidence of value.

(ii) Rights in the collateral?
YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[3]. HEL held possession of the assets.

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

(ii) Have the evidentiary requirements of s. 11 been met?
YES The evidentiary requirements of s. 11, required for attachment, are established by the loan documents and the security agreements. Specifically, in accordance with s.11 (1) (b), they are in writing, they have been signed by HEL as debtor and provide an adequate description of the collateral that is secured.

Is there a perfection step?
In addition to **registration #800177** discussed above, ABN-AMRO has registered 6 financing statements as follows:

Registration # 156927, dated **March 15, 2000** (amended by Registration #1566772 on January 25, 2000 to add those assets marked by "*") contains the following description:

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

[3] Ibid. at 84.

All equipment now or hereafter sold, leased, supplied or financed by ABN-AMRO to HEL, together with all additions, attachments, appliances, parts, instruments, appurtenances, accessories, furnishings, and other parts of whatever nature which may from time to time be incorporated or installed in or attached to the equipment and any and all replacements, substitutions or exchanges therefore and proceeds of every type, item or kind (cash and non-cash, including insurance proceeds thereof (the "Equipment");

To the extent the equipment may constitute or be deemed to be inventory, such equipment now or hereafter offered or furnished under any contract of service or intended for sale or lease, any and all additions, attachments, accessories and accessions thereto, any and all substitutions, replacements or exchanges therefore, any and all leases, subleases, rentals, accounts and contracts with respect to the equipment which may now exist or hereafter arise, together with all rights thereunder and all rental and other payments and purchase options due and to become due thereunder, any and all sales proceeds payable for such property, all insurance, bonds, and/or other proceeds of the property and all returned or repossessed equipment now or at any time or times hereafter in the possession or control of the debtor or the undersigned (the "Inventory");

And all accounts, book accounts and book debts, dues, claims, choses in action and demands of any nature now owned by the debtor or hereafter acquired or owned by the debtor that might arise or result from any lease or other disposition of any of the equipment or the Inventory, including, but not limited to, any right of the debtor for payment for equipment or Inventory sold or leased or under any contract for services, whether or not evidenced by an instrument or chattel paper, and whether or not such right has been earned by performance (the "Accounts").

Serial Numbered Collateral:
JD 230LC Excavator (s/n FF0230X600204)
JD 850C Crawler Dozer (s/n T0850CX873998)
JD 744H 4WD Loader (s/n DW744HX569129)
JD 450H Crawler Dozer (s/n T0450HX874682)
JD 330LC Excavator (s/nFF0330X080543)
JD 450LC Excavator (s/n FF0450X090409)
Poulin Portable Stack Conveyor (s/n 2SAAQQ19705139895)
Poulin Portable Stack Conveyor (s/n 2SAAQQ19810285884)
*Valmet 860/8 Forwarder (s/n 8220)**
*Hitachi 160LC Excavator (s/n P00160X040053)**
*Hitachi 160LC Excavator (s/n P00160X040143)**
*JD 690E Excavator (s/n DW690EL564951)**
*JD 892E Excavator (s/n FF892EX012535)**
*JD 892E Excavator (s/n FF892EX012534)**
*Valmet 911C Harvester (s/n 911C4019)**
*JD 744HMH 4WD Loader (s/n DW744HM566010)**
*JD 450LC Excavator (s/n FF0450X090178)**

*JD TC44H TC Loader (s/n DWTC44H566123)**
*JD 160LC Excavator (s/n P00160X040561)**
*JD 160LC Excavator (s/n P00160X040536)**
*JD 744H 4WD Loader (s/n DW744HX569129) *)*
*JD 270LC Excavator Base (s/n FF0270X070370)**
*JD 230LC Excavator Base (s/n FF0230X0600204)**
*JD 270LC Excavator Base (s/n FF0270X070371)**
*JD 644H Loader (s/n DW644HX572385)**
*JD 160LC Excavator (s/n P00160X040994)**
*JD 892E Excavator (s/n FF892EX012339)**
*JD 690E Excavator (s/n DW690EL565836)**
*JD 310E Loader (s/n T0310EX876519)**
*Extec USA, Inc. 5000T Trailer (s/n 5434)**
*JD 9338 544B Forwarder (s/n 544B032885899)**
*JD 644H Loader (s/n DW644HX570518)**
*JD 330LC Boom (s/n FF0330X080412)**
*JD 744H 4WD Loader (s/n DW744HX572433)**
*Valmet 911C Harvester (s/n 911C4048)**

Registration #1572499, dated **January 29, 2002** contains the following description:

All goods in which the debtor now has or hereafter acquires any rights or interest in any way financed by the secured party and, to the extent such goods constitute or are deemed to be inventory, such inventory, and all leases, subleases, rentals, contracts, instruments, documents of title and chattel paper with respect to such goods (and any of them) which may now exist or hereafter arise and all rights thereunder and all accounts, book debts, other amounts due thereunder and all claims, choses in action, demands and other intangibles that arise or result from any lease, sale, transfer or other disposition of such goods and all proceeds of the foregoing.

Registration #381392, dated **June 26, 2000** contains the following description:

All inventory and equipment now or hereafter acquired by the debtor and financed in whole or part by secured party; all book debts relating thereto and all monetary and non-monetary proceeds therefrom.

Registration #342022, dated **June 9, 2000** contains the following description:

All inventory and equipment now or hereafter acquired by the debtor and financed in whole or part by secured party; all book debts relating thereto and all monetary and non-monetary proceeds therefrom.

Registration #222737, dated **April 14, 2000** contains the following description:

All inventory and equipment now or hereafter acquired by the debtor and financed in whole or part by secured party; all book debts relating thereto and all monetary and non-monetary proceeds therefrom.

Registration #220780, dated **April 14, 2000** contains the following description:

All equipment now or hereafter sold, leased, supplied or financed by ABN-AMRO to HEL, together with all additions, attachments, appliances, parts, instruments, appurtenances, accessories, furnishings, and other parts of whatever nature which may from time to time be incorporated or installed in or attached to the equipment and any and all replacements, substitutions or exchanges therefore and proceeds of every type, item or kind (cash and non-cash, including insurance proceeds thereof (the "Equipment");

To the extent the equipment may constitute or be deemed to be inventory, such equipment now or hereafter offered or furnished under any contract of service or intended for sale or lease, any and all additions, attachments, accessories and accessions thereto, any and all substitutions, replacements or exchanges therefore, any and all leases, subleases, rentals, accounts and contracts with respect to the equipment which may now exist or hereafter arise, together with all rights thereunder and all rental and other payments and purchase options due and to become due thereunder, any and all sales proceeds payable for such property, all insurance, bonds, and/or other proceeds of the property and all returned or repossessed equipment now or at any time or times hereafter in the possession or control of the debtor or the undersigned (the "Inventory");

And all accounts, book accounts and book debts, dues, claims, choses in action and demands of any nature now owned by the debtor or hereafter acquired or owned by the debtor that might arise or result from any lease or other disposition of any of the equipment or the Inventory, including, but not limited to, any right of the debtor for payment for equipment or Inventory sold or leased or under any contract for services, whether or not evidenced by an instrument or chattel paper, and whether or not such right has been earned by performance (the "Accounts").

Serial Numbered Collateral:
624H 4WD Loader (s/n DW624HX576034)
TC54HTC Loader (s/n DWTC54H575868)
450LC Base Excavator (s/n FF0450X090477)

Loan #2 (referenced in the claim to asset # 1 in the list above)
YES. The broad registration noted above correspond to the GSA and covers assets financed by ABN-AMRO including those connected to loan #2 and the chattel mortgage associated with loan #2.

Loan #4 (referenced in the claim to asset # 2 in the list above)
Yes. Same reasoning as set out for Loan #2

Loan #5 (referenced in the claim to asset # 3 in the list above)
Yes. Same reasoning as set out for Loan #2

Loan #15 (referenced in the claim to asset # 4 in the list above)
Yes. The 6 financing statements noted above.

Loan #18 (referenced in the claim to asset #5 in the list above)
Yes. The 6 financing statements noted above.

Loan #13 (referenced in the claims to assets #6-10 in the list above)
Yes. The 6 financing statements noted above.

Loan #7 (referenced in the claims to asset #11 in the list above)
Yes. Same reasoning as set out for Loan #2

Loan #17 (referenced in the claims to assets #12-13 in the list above)
Yes. The 6 financing statements noted above.

Loan #9 (referenced in the claims to asset #14 in the list above)
Yes. The 6 financing statements noted above.

Loan #10 (referenced in the claims to asset #15 in the list above)
Yes. The 6 financing statements noted above.

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

13. Proceeds

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

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

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

must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.[4]

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.[5]

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

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

Among the 15 Assets over which ABN-AMRO is asserting a security interest (the 15 listed above), there are 8 which are claims to proceeds arising from the assets originally secured. As indicated above, ABN0AMRO has an automatic and statutory interest in these pieces as proceeds from the disposition of a secured asset by them.

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as ABN-AMRO may be entitled to claim a super-priority status (ref: s. 35(2)). ABN-AMRO has provided certain documentation in this regard with respect to its claim to the JD 892E Excavator (s/n FF892EX011686).

[4] Ibid. at p.140.
[5] Ibid. at 140.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of ABN-AMRO's interest in the assets appears to be **March 15, 2000.** However, The Trustee identifies as an issue the possibility that description of the collateral contained in this financing statement does not satisfy the requirements of s.24 (2) of the regulations. If such is the case, then the relevant date for the determination of the priority of ABN-AMRO's interest in the assets would be **January 29, 2002**, the date of registration #1572499 which describes the assets as "goods…".

15. Auction Results

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

1. Valmet 860 Forwarder (s/n 8608220) - $30,000.00
2. Valmet 911C Harvester (s/n 911C4019) - $50,000.00
3. JD 892 Excavator (s/n FF892EX011686) - $40,000.00
4. JD 892E Excavator (s/n FF892EX011283) - $40,000.00
5. Komatsu Excavator c/w PC200-6 Logmax Harvesting Head (C10514) - $65,000.00
6. Poulin Screen Plant (s/n 804) & Poulin Radial Stack Conveyor (s/n 2SAAQQ19705139895) - $41,000.00
7. Hitachi 270 Excavator (s/n 158-5928) - $30,000.00
8. JD 450H Dozer (s/n T0450HX874682) - $60,000.00
9. Int'l TD15C Tractor/Dozer (s/n 6349) - $11,000.00
10. Tapio Harvesting Head - $3,500.00
11. JD 450G Dozer (T0450GX809815) - $57,500.00
12. JD 772CH Motor Grader (DW772CH567061) - $95,000.00
13. JD 892E Excavator (s/n FF892EX007239) - $40,000.00
14. Fabtek 544B Forwarder (s/n 544B-03-28858-99)- $65,000.00

Total: $628,000.00

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **BOMBARDIER CAPITAL LEASING LTD. ("BCL")**

1. Introduction

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

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

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

2. Summary Final Determination

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

3. Defined Terms

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

"CSA"	-	*Conditional Sales Act*, R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PMSI"	-	Purchase Money Security Interest
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. The Assets

15 pieces of heavy equipment. 4 of these were sold at the auction (indicated by "*"). The remaining 11 were sold out of trust.

1. 744H Loader DW744HM567458
2. 644G Loader DW644GB566323
3. 200LC Excavator FF0200X050658
4. 200LC Excavator FF0200X050655*
5. 310E Excavator T0310EX850513
6. 230LC Excavator FF0230X060319*
7. 370XX Excavator FF0370X080106
8. 450LC Excavator FF0450X090093
9. 330LC Excavator FF0330X080518*
10. 330LC Excavator FF0330X080505
11. 330LC Excavator FF0330X080503
12. 330LC Excavator FF0330X080456*
13. 310SE Loader T0310SE881906
14. 450LC Excavator FF0450X090444
15. Excavator FF0450X090460

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not

be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

BCL claims that it holds a perfected security interest in 15 pieces of heavy equipment. This arises from 2 master leases (one from 1998 and one from 2000) covering a total of 4 separate equipment schedules. BCL claims to have satisfied all the requirements to attach and perfect a security interest, including registration of the security interests in the PPR.

The Proof of Claim dated 15 April 2002, and the documents attached thereto (more particularly described below) indicate a total claim of **$1,589,597.00.** This is comprised of an unsecured claim in the amount of **$1,226,098.46** and a secured claim in the amount of **$363,498.54,** broken down as follows:

- Master Lease #1998062601 dated July 2, 1998 and the accompanying equipment schedule dated 2 July 1998 (together referred to herein as "Lease #1"), securing 4 assets (assets # 1-4 above). Balance outstanding of **$123,796.64.**

- Master Lease #1998062601 dated July 2, 1998 and the accompanying equipment schedule dated 2 July 1998 (together referred to herein as "Lease #2"), securing 4 assets (assets # 5-8 above). Balance outstanding of **$225,459.36.**

- Master Lease #1998062601 dated July 2, 1998 and the accompanying lease equipment schedule dated 2 July 1998 (together referred to herein as "Lease #3"), securing 4 assets (assets # 9-12 above). Balance outstanding of **$598,959.97.**

- Master Lease # 2000011104 dated January 11, 2000 and the accompanying equipment schedule dated 11 January 2000 (together referred to herein as "Lease #4"), securing 3 assets (assets #13-15 above). Balance outstanding of **$635,282.90.**

BCL also filed an Amended Proof of Claim dated October 29, 2002. In the Amended Proof of Claim BCL asserts a secured claim in the amount of $1,589,597.00. This

breaks down as follows:

- Lease #1 total balance outstanding $123,796.64
- Lease #2 total balance outstanding $225,459.36
- Lease #3 total balance outstanding $598,959.97
- Lease #4 total balance outstanding $635,282.92

BCL claims the total due pursuant to the Leases as $1,582,498.87. Added to this is legal and extra judicial fees in the amount of $6,098.13 for a total amount claimed of $1,589,597.00.

Schedule "B" to the Amended Proof of Claim identifies the fifteen (15) pieces of equipment noted above. It also references the following trade-ins as connected to pieces of equipment financed by BCL:

- 450 LC Excavator FF0370S080106 gave rise to trade-in FF892EX007239;
- 450 LC Excavator FF0450X090093 gave rise to trade-in EX400 Excavator 1642913;
- 330 LC Excavator FF0330XO80503 gave rise to trade-in 892E Excavator FF892EX012437, 728 Grader 24744 and a 540B Roller;
- 310 SE Loader T0310SE881906 gave rise to trade-in 645B Loader 11Y06221.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.
ii. Proof of Claim dated April 15, 2002.
iii. Amended Proof of Claim dated October 29, 2002.
iv. Document packages provided by BCL for each lease as follows:

a. <u>Lease #1</u> (assets # 1-4 above)

- The 1998 Lease (registered in the Old Registry on August 12/98 (# 704250))
- Equipment Schedule 1 (registered in the Old Registry with the 1998 Lease)
- Correspondence dated February 7, 2002 to HEL setting out the balance outstanding
- A series of computer print-outs dated February 11, 2002 titled as follows:
  - Contract detailed information asset list inquiry lease contract inquiry-variable payments
  - Document dated February 11, 2002 entitled *Commercial and Industrial Finance Division-BCLL-Buyout Quote*
  - Document dated February 11,2002 entitled *Commercial and Industrial Finance Division-BCLL-Amortization Schedule*
  - Document dated February 18, 2002 setting out payment schedule for HEL

- An Assignment Agreement dated 2 July 1998 (registered in the Old Registry on September 1, 1998 (# 705859)).
- Manual Payment Request Form indicating instructions from BCL to wire money to HEL in the amount of $2,217,378.90 dated July 21, 1998.
- Copy of the confirmation of wire transfer from CIBC from BCL's account to HEL's account for the amount of $2,217,878.90, made on July 21, 1998.
- *A Purchase and Sale agreement* dated 2 July 1998 whereby HEL sold the 12 pieces to BCL for $1,928,155.57. This was registered in the Old Registry on April 13, 1998 (reg # 276476)
- Invoice dated June 25, 1998 from HEL to BCL
- Lease to Labrador Forest Products Limited dated August 27, 1998 for, inter alia, JD200LC Excavator, s/n FF0200X050658
- Invoice The Town of Conception Bay South dated September 4, 1998 for a lease of a JD 310 Backhoe, s/n T0310EX846764
- Lease to H. Wareham & Sons dated August 17, 1998 for a JD 690EL Excavator s/N DW690EL565815
- Invoice to Fairview Investments Limited dated October 7, 1998 for an Excavator s/n FFO200X50655
- Invoice to Provincial Paving Limited dated July 13, 1998 for a JD Wheel Loader s/n DW644GB566323
- Invoice dated September 7, 1998 to Labrador Construction for a JD Loader, s/n DWTGBT4567754
- Invoice to Melville Forest Products Limited dated October 5, 1998 for a JD Excavator, s/n illegible
- Invoice dated September 14, 1998 to Melville Forest Products Limited for a JD Excavator, s/n FF0270X070316
- Invoice dated August 3, 1998 to Melville Forest Products Limited for a JD Backhoe, s/n illegible
- Invoice to Island Construction Limited dated August 25, 1998 for a JD Loader, s/n DW744HX567458
- Correspondence dated February 15, 1999 to RBC from BCL addressing Priorities
- Correspondence dated February 2, 1999 to Bank of Nova Scotia from BCL addressing Priorities
- Assignment of Receivables dated May 25, 1998 between Hickman Leasing Limited and CIBC Equipment Finance Limited
- Correspondence dated February 15, 1999 from BCL to Royal Bank of Canada addressing Priorities
- Correspondence dated February 2, 1999 from BCL to Bank of Nova Scotia addressing Priorities
- Lease Agreement between HEL and RDN Construction Limited dated June 11, 1998 for a JD 744H Wheel Loader, s/n DW744HM567458

- Invoice dated May 1, 1999 from HEL to Newfoundland Aggregates for the sale of Wheel Loader s/n DW644GB566323 and a Loader s/n DW624HX565405
- Computer print-out dated August 10, 1998 for a sale of the Excavator s/n FF0200x050658 to J. Eales Equipment Rentals
- Purchase Order between HEL and Eales Equipment Rentals for a JD 200LC Excavator, s/n SFO200X050658 dated February 1, 1999
- Invoice dated March 3, 2000 to BCL Construction Limited for the sale of a JD 230LC Excavator, s/n FFO230X060319 and a JD 544G Loader, s/n DW544GD560550
- Instalment Contract between HEL and BCL Construction Limited for the 200 LC Excavator, s/n FF0230X060319 and a Wheel Loader, s/n DW544GD560550
- Purchase Order between HEL and Marine Contractor Inc. dated October 27, 1999 for the sale of a JD 370 Excavator, s/n FF0370X080106
- Invoice to Diamond Equipment Limited dated July 10, 1998 for the sale of a JD 450LC Excavator, s/n SF0450X090093
- Invoice to Glenn Corp. Limited dated November 30, 1999 for the sale of a JD 644H Wheel Loader, s/n DW644HX569536 and for the sale of a JD 330LC Excavator, s/n FF0330X080503
- Invoice to Johnson Construction dated October 26, 2000 for the sale of ten pieces of equipment
- Copy of a cheque dated October 31, 2000 to HEL from GE Capitals in the amount of $3,300,866.02
- Invoice to Municipal Construction dated April 25, 2000 for the sale of a JD Excavator, s/n FF0450X090460, a JD Excavator, s/n FF0450X090461 and a JD 850C Crawler Dozer, s/n T0850CX879791
- Invoice dated February 12, 2001 to Russell's Excavating Limited for the sale of a JD 310SE Backhoe, s/n T0310SE881906
- Correspondence dated July 20, 1998 from Neil Jacobs of Stewart McKelvey to Mark Drouin of BCL re priorities
- Correspondence dated July 17, 1998 to BCL from JD Credit Inc. re its interest in certain pieces of property
- Correspondence dated July 10, 1998 signed by CIBC to BCL addressing its interest in certain pieces of equipment

b. <u>Lease #2</u>

- The 1998 Lease
- Equipment Schedule # 2 (registered at the Old Registry on December 11, 1998 #713825)
- *Assignment Agreement* dated 28 August 1998, registered in Old Registry on February 5, 1999 (# 717641)
- *Purchase and Sale agreement* dated 28 August 1998 whereby HEL sold the 1pieces to BCL for $1,566,430.99 registered in the Old Registry on February 5, 1999 (reg # 270485)

- 4 Invoices from JD (Complete Goods) to HEL for the purchase of the 4 assets as follows:
    - 24 July 1998 -- 1- Backhoe (T0310EX850513)
    - 28 July 1998 -- 1- Excavator (FF0370X080106)
    - 31 July 1998 -- 1- Excavator (FF0230X060319)
    - 25 September 1997 -- 1- Excavator (FF0450X090093)
- Lease to Labrador Forest Products Limited dated August 25, 1998 for a JD Excavator, s/n illegible
- Invoice dated September 14, 1998 to Labrador Forest Products Limited for a JD 450LC Excavator, s/n FF0450X090093
- Supplemental Rental Agreement between Marine Contractors and HEL for the 370 Excavator, s/n FF0370X080106
- Invoice dated August 27, 1998 to Island Aggregates and Readi-Mix for a JD Backhoe Loader, s/n T0310EX850513
- Invoice dated July 13, 1998 to Pyramid Construction Limited for a JD Excavator, s/n illegible
- Correspondence dated September 4, 1998 from JD Credit Inc. re: its interest in certain pieces of equipment
- Correspondence dated September 3, 1998 from CIBC re its interest in certain pieces of equipment
- Correspondence dated February 7, 2002 from BCL to ATL setting out the balances outstanding
- A series of computer print-outs dated February 11, 2000 entitled "Commercial and Industrial Finance Division-BCLL Buyout" and Amortization Schedule
- Computer print-out dated February 18, 2002 setting out the payment schedule for HEL
- Copy of a CIBC Confirmation of wire transfer dated September 9, 1998 in the amount of $1,801,395.64
- Manual Payment Request Form indicating instructions from BCL to wire money to HEL in the amount of $1,801,395.64 on September 9, 1998
- Copy of Confirmation of Wire Transfer from BCL's account to HEL's account in the amount of $1,801,395.64 made on September 9, 1998

c. <u>Lease #3</u>

- The 1998 Lease
- 2 different versions of a document entitled *Lease Equipment Schedule No. 3* dated 2 July 1998. One has been executed by both parties (BCL as Lessor and HEL as Lessee) but has not been registered at the Old Registry. The other has been executed by HEL only, but has been registered at the Old Registry on July 13, 1999 (Reg # 733018)
- *Assignment Agreement* dated 12 July 1999, registered in the Old Registry on July 28, 1999 (reg # 31708)

- *Purchase and Sale agreement* dated 12 July 1999 whereby HEL sold the pieces to BCL for $1,200,763.36). This was not registered in the Old Registry
- 4 Invoices from JD (Complete Goods) to HEL for the purchase of the 4 assets as follows
    - 21 June 1999 -- 1- Excavator (FF0330X080518)
    - 16 June 1999 -- 1- Excavator (FF0330X080456)
    - 16 June 1999—1- Excavator (FF0330X080505)
    - 7 June 1999 -- 1- Excavator (FF0330X080503)
- Correspondence dated July 23, 1999 from Neil Jacobs to BCL enclosing the lease of July 14, 1998 (registration no. 733018) and copies of letters from CIBC, GMAC and JD Credit (enclosures not provided)
- Correspondence dated July 9, 1999 from JD Credit to BCL addressing priorities
- Correspondence dated July 9, 1999 signed by CIBC to BCL addressing priorities
- Correspondence dated July 9, 1999 from GMAC to BCL addressing priorities
- Correspondence dated February7, 2002 from BCL to HEL confirming outstanding balances, a series of computer print-outs dated February 11, 2002 entitled "Commercial and Industrial Finance Division-BCLL, Buyout Quote and Amortization Schedule
- Computer Print-out dated February 18, 2002 identifying the payment schedule for HEL
- Manual Request Form indicating instructions from BCL to wire money to HEL in the amount of $1,192,391.30.
- Copy of BCL Statement of Account showing the debit of the amount of $1,192,391.30 on January 17, 2000.
- Copy of a Print-out confirmation from CIBC that the amount of $1,192,391.30 has been wired to HEL's bank account on that same day.

d. <u>Lease #4</u>

- The 2000 Lease
- Equipment Schedule 4
- A Purchase and Sale agreement dated 11 January 2000 whereby HEL sold the 3 pieces to BCL for $1,036,862.00
- Assignment Agreement dated 11 January 2000
- Equipment Acceptance Certificate dated 11 January 2000
- *Authorization Agreement* for Direct Payment Option
- An Equipment Inspection and Appraisal dated 17 January 2000
- 3 Invoices from JD (Complete Goods) to HEL for the purchase of the 3 assets as follows:
    - 22 Dec. 1999 -- 450 LC Hydraulic Excavator (FF0450X090460)
    - 14 Dec. 1999 – 450 LC Hydraulic Excavator (FF0450X090444)
    - 07 Dec. 1999 -- 310 SE Loader Backhoe (T0310SE881906)
- Invoice from HEL to BCL dated 12 January, 2000 for the 3 pieces.
- Correspondence dated 13 January 2000 from JD Credit addressing priorities
- Correspondence dated 13 January 2000 from CIBC addressing priorities

- Correspondence dated January 2000 from GMAC addressing priorities
- Correspondence dated February 7, 2002 from BCL to HEL setting out the balances outstanding
- Various computer print-outs dated February 11, 2002 entitled “Commercial and Industrial Finance Division-BCLL-Buyout Quote and Amortization Schedule”
- Computer print-out dated February 18, 2002 outlining the payment schedules for HEL
- Copy of BCL Statement of Account showing a debit in the amount of $1,380,877.86 on July 12, 1999
- Copy of a Print-out confirmation from CIBC that the amount of $1,380,877.86 has been wired to the bank account of HEL on that same day.

9. Classification of the Assets

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

10. Application of the PPSA

The documents indicate that in each case, the assets were purchased by BCL from HEL and then leased back to HEL. By operation of s.4 of the PPSA, such sale – leaseback type transactions are governed by the PPSA. The documents indicate that these were conditional sales, financed through BCL.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13,2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest relates and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such a secured parties to claim a date of perfection that extends back to the date of the pre-PPSA registration for purposes of priority. There are a number of conditions set out in the Act. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for the 1998 Lease and the 3 Equipment schedules associated with it, since this lease and the Equipment Schedules are all dated in 1998.

As part of the transitioning process, BCL has registered the following financing statements in the PPR:

- **Registration # 112581** dated February 18, 2000 contains the following description:
  1 Wheel Loader, model TC62H, s/n: DWTC62H567754
  1 Wheel Loader, model 244H, s/n: T6244HX000131
  1 Backhoe, Model 310E, s/n T0310EX846764
  1 Backhoe, model 310SF, s/n: T0310SE847170
  1 Wheel Loader, model 744H, s/n: DW744HM567458
  1 Wheel Loader, model 644G, s/n: DW644GB566323
  1 Excavator, model 690E, s/n: DW690EL565815
  2 Excavators, model 200LC, s/ns: FF0200X050658, FF0200X050655
  excluded the collateral subject to the discharge:
  1 Backhoe, model 310SF, s/n: T0310SE847170
  1 Excavator, model 690E, s/n: DW690EL565815

  Serial numbered Collateral
  Excavator, model 200LC, s/n FF0200X050655
  Excavator, model 200LC, s/n FF0200X050658
  Excavator, model 690E, s/n DW690EL565815
  Wheel Loader, model 644G, s/n DW644GB566323
  Wheel Loader, model 744H, s/n DW744HM567458
  Backhoe, model 310SF, s/n T0310SE847170
  Backhoe, model 310E, s/n T0310EX846764
  Wheel Loader, model 244H, s/n T6244HX000131
  Wheel Loader, model TC62H, s/n DWTC62H567754

  Pre-PPSA registration information continued by this registration: Conditional Sales Act dated August 12, 1998, Number 704250

- **Registration # 112359** dated February 18, 2000 contains the following description:
  1 Excavator, model 450LC, s/n: FF0450X090093
  1 Excavator, model 370XX, s/n: FF0370X0801061
  1 Excavator, model 230LC, s/n: FF0230X060319
  1 Backhoe, model 310E, s/n: T0310EX850513

  Serial numbered collateral:
  Backhoe, Model 310E, s/n T0310EX850513
  Excavator, model 230LC, s/n FF0230X060319
  Excavator, model 370XX, s/n FF0370X080106

Excavator, model 450LC, s/n FF0450X090093

Pre-PPSA registration information continued by this registration:
Conditional Sales Act Number 713825 dated December 11, 1998

- **Registration # 112300** dated February 18, 2000 contains the following description:
  General Description Collateral:
  4 Excavators, models 330LC, s/ns: FF0330X080456, FF0330X080503, FF0330X080505, FF0330X080518.
  Serial numbered collateral:
  Excavator, Model 330LC, s/n FF0330X80518
  Excavator, model 330LC, s/n FF0330X080505
  Excavator, model 330LC, s/n FF0330X080503
  Excavator, model 330LC, s/n FF0330X080456

  Pre-PPSA registration information continued by this registration:
  Conditional Sales Act number 733018, dated July 13, 1999.

As indicated above, the documents provided indicate that the 1998 Lease and the 3 Lease schedules were registered in the Old Registry. Specifically:

- The 1998 Lease, accompanied by Equipment Schedule #1 was registered on August 12, 1998, (#704250);
- Lease Equipment Schedule #2 was registered on December 11, 1998 (#713825)
- Lease Equipment Schedule #3 was registered on July13, 1999, (# 733018).

While it appears from the foregoing that BCL has properly transitioned its security interest so as to enable it to consider the date of pre-ppsa registration as its date of PPSA perfection, there is another consideration. As indicated by the documents and the registrations, Lease Equipment Schedules #2 and #3 which reference back to the 1998 Lease were registered in the Old Registry, *subsequent* to the actual lease to which they are associated. Section 5 of the CSA states:

> (1) a conditional sale of goods shall be evident by a writing, executed prior to or at the time of or within 10 days after delivery of the goods of the buyer or his or her agent, giving a description of the goods by which they may be readily and easily known and distinguished and stating the amount of the purchase price remaining unpaid or the terms and conditions of the hiring.
>
> (2) the writing, or a copy of it, shall be filed in the Registry.

Given the timing of the registration of the separate Lease schedules 2 and 3, being subsequent to the registration of the 1998 Lease, it does not appear that section 5(1) of the CSA was complied with. Section 21 of the CSA states that a defect, irregularity, omission or error in the execution or certification of a document will not invalidate it or destroy its effect

unless, in the opinion of the Judge before whom a question related to it is tried, the defect, irregularity, omission or error has actually mislead some person whose interests are affected by the document.

This demands a determination by the Court. If this is not a serious defect, the relevant date applying to BCL, for purposes of priority, will be the date of registration of the Master Lease in the Old Registry, August 12, 1998. If not, and this is indeed a serious and fatal defect, the relevant date, for purposes of priority of BCL's claim, will be the date of registration in the PPR.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

As indicated in the List of Documents above, BCL has provided copies of payment requests, confirmations of wire transfers and confirmations of payment from CIBC. It is the opinion of the Trustee that this is sufficient evidence of value in accordance with s. 13 of the PPSA and that BCL's security interest has attached.

(ii) Rights in the collateral?

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

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.[2] HEL held possession of the assets. Furthermore, s.13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the leased goods when s/he obtains possession under the lease.

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

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

Note: According to documents provided by Counsel for BCL, the Excavator (FF0200X050655) was sold to Fairview Investments and the Excavator (FF0230X060319) was sold to BCL Construction Ltd. Somehow (possibly by way of a trade in) these two excavators ended up back in HEL's inventory. The Trustee has no information as to how this was effected and therefore expresses no opinion as to whether or not the BCL security reattaches to them in accordance with s.30 of the PPSA. For the information of secured parties, the Trustee notes that if these 2 excavators were returned, seized or repossessed, by operation of S.30 of the PPSA, BCL's security interest would re-attach if the debt was still outstanding. However, a disposition of goods in the ordinary course of business of a commercial seller such as HEL will generally cut off the security interest in the goods of the inventory financier (ref.: SS.29(1)(a) & 31(2) of the PPSA). Nevertheless, where the buyer trades-in the goods it is possible for the security interest to re-attach.[3]

Is there a perfection step?

Lease # 1
Yes. – Refer to Registration # 112581 (above)

Lease #2
Yes. – Refer to Registration # 112359 (above)

Lease #3
Yes. – Refer to Registration # 112300 (above)

Lease #4
Yes –
Registration # 62372 dated January 20, 2000 contains the following description:

[2] Ibid. at 84.
[3] R. Cuming, R. Wood, Alberta Personal Property Security Handbook, 4th ed. (Toronto: Carswell, 1998) at 266.

2000 JD Loader Backhoe, model 310SE, s/n T0310SE881906
2000 JD Excavator, model 450LC, s/n FF0450X090444
2000 JD Hydraulic Excavator, s/n FF0450X090460.

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

13. Proceeds

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

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

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.[4]

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

[4] Ibid. at p.140.

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

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.[5]

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

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

The Amended Proof of Claim of BCL identifies certain pieces of equipment that were secured by them and gave rise to proceeds in the nature of trade-ins (as is more particularly set out above). The Trustee has not been provided with any evidence or documentation in respect of such trade-ins. Nevertheless, as indicated above, BCL's interest in these assets, as against the Trustee is automatic by operation of S.29 (1) of the Act.

14. Additional Comments on Priorities

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

- As indicated above, this is a sale-leaseback transaction between BCL and HEL whereby the 3 pieces were sold to BCL but remained at HEL's premises. BCL immediately leased them back to HEL in a conditional sale arrangement. Section 2(hh) of the PPSA specifically excludes "a transaction of sale by and lease back to the seller" from being a PMSI.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of BCL's interest in the assets are:
    - Lease #1 – **August 12, 1998**

    - Lease #2 – We refer you back to the discussion of transitioning and compliance with Section 5 of the CSA under heading number 10 of this Final Determination. With this in mind, the Trustee notes that lease number 2 was registered in the Old Registry on December 11, 1998. This was possibly transitioned on February 18, 2000 (registration number 112359).

[5] Ibid. at 140

- Lease #3 - We refer you back to the discussion of transitioning and compliance with Section 5 of the CSA under heading number 10 of this Final Determination. With this in mind, the Trustee notes that lease number 3 was registered in the Old Registry on July 28, 1999 . This was possibly transitioned on February 18, 2000 (registration number 112300).

- Lease #4 – **January 20, 2000.**

15. Auction Results

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

1. Excavator (FF0330X080456) $170,000.00
2. Excavator (FF0330X080518) $170,000.00
3. Excavator (FF0200X050655) $110,000.00
4. Excavator (FF0230X060319) $104,500.00

Total: $554,500.00

SCHEDULE A
FINAL DETERMINATION

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

Secured Party: **CATERPILLAR FINANCIAL SERVICES LIMITED ("CFSL")**

1. Introduction

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

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

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

2. Summary Final Determination

CFSL did not perfect its security interest in the Asset. Therefore, CFSL's claim is disallowed as a valid secured claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms:

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

"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"Noble"	-	Noble's Lumber Yard
"PMSI"	-	Purchase Money Security Interest

"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. Assets

1) 1998 Timberjack 610
(993395)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

For the purpose of determining the validity under prior law of security interests created and registered before the implementation of the PPSA and transitioned by registration in the PPR, the Trustee has only reviewed the security agreements and their registrations referenced in the PPR search report section entitled: "Pre-PPSA registration information

continued by this registration", endorsements, if any, on the security agreements reviewed and the pre-PPSA legislation relating to their registration.

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

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

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

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

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

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

7. Overview of Claim

CFSL claims that it financed the purchase of the Asset by Noble in February 2000 in exchange for which Noble provided CFSL with a security interest in the Asset by means of a Chattel Mortgage. CFSL claims that it perfected its security interest in the Asset by registration of a financing statement in the PPR. Noble subsequently traded the Asset to HEL in exchange for other goods without the permission of CFSL and CFSL claims that by

doing so, Noble has breached the terms of the Chattel Mortgage and that CFSL is entitled to seize the Asset.

CFSL brought an application before the Court on this matter and Mr. Justice Hall held that although CFSL had no direct dealings with HEL, it had nevertheless become a creditor of HEL and therefore CFSL's claim was subject to the provisions of the Realization Plan, Costs Allocation Plan and Claims Plan.

The Proof of Claim dated, 15 October 2002, indicates a total claim of $150,436.69 comprised of an Unsecured Claim in the amount of $0.00 and a Secured Claim in the amount of $150,436.69.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.

ii. Chattel Mortgage and Promissory Note between Nobel and CFSL both dated February 7, 2000 in the amount of $186,395.00

iii. Correspondence from CFSL dated June 21, 2001 to Nobel providing a buy-out quote for the Timberjack (s/n 993395)

iv. Invoice from HEL to Nobel dated June 26, 2001 for the sale of a Timberjack 1110B Forwarder (s/n 10DH1023). Trade-in on this sale was the Timberjack (s/n 993395)

v. Copy of a cheque from Nobel dated 28 June 2001 in the amount of $37,728.00

vi. Copy of a cheque from G.E. Capital Equipment Financing to HEL dated July 9, 2001 in the amount of $379,463.99, pursuant to a Conditional Sales Agreement with Nobel

vii. Correspondence from Nobel to Dave Bradley

viii. Correspondence dated February 27, 2002 from CFSL to Allen McKinnon, Deloitte & Touche Inc. setting out a claim in the amount of $150,436.69 with respect to the Timberjack. Attached is a copy of the PPSA Registration Statement, the Chattel Mortgage and Promissory Note, and electronic correspondence between the Monitor and CFSL

ix. Correspondence dated March 6, 2002 from G.E. Capital Canada Equipment Financing to Nobel enclosing a copy of the Conditional Sales Agreement, a copy of the invoice, the cheque issued to HEL and a letter signed by HEL

x. Interlocutory Application (Inter Partes) of CFSL dated 21 May 2002

xi. Memorandum of Fact and Law of CFSL dated 4 June 2002

xii. Memorandum of Fact and Law, List of Authorities and Affidavit of Alan Dengo from John Deere Credit Inc., filed by John Deere Credit Inc.

xiii. Memorandum of Fact and Law with respect to the Interlocutory Application filed by GMAC

xiv. Decision of Justice Hall on the Interlocutory Application of Caterpillar Financial Services dated 21 June 2002

xv. Correspondence from James Smyth, dated 18 October 2002, attaching:
- Proof of Claim
- Dealer Payment History, dated 8 March 2000, showing a payable to Toromont for $187,195.00 and a net financed amount of $186,395.00

9. Classification of the Assets

The actual subjective use to which the assets are put by the debtor dictates whether the assets will be classified as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that the Timberjack 610 was held by HEL for sale or lease and as such, forms part of the inventory of HEL (s. 2(x) of the PPSA).

The use to which the Asset was put by Noble has not been determined, nor has the Trustee attempted to make any such determination.

10. Application of the PPSA

By operation of s.4 of the PPSA, the Chattel Mortgage between CFSL and Noble contains an appropriate charging clause and qualifies as a security agreement governed by the PPSA. As a result of the unauthorized disposition of the Asset to HEL by Noble and by operation of s.29 of the Act, CFSL's security interest continues in the Asset (as held by HEL) and the PPSA governs CFSL's rights in the Asset.

The Trustee presumes that the sale (i.e. trade-in) of the Timberjack by Nobel to HEL was not a sale in the ordinary course of business of Noble so as to allow HEL to take the Asset free of CFSL's security interest (s.31). This assumption is based on the Trustee's understanding that Noble's business does not include the sale or rental of heavy equipment, however the Trustee has not been provided sufficient information on Noble's business and its relationship with CFSL to make a definitive determination in this regard. As mentioned in Item 7 above, CFSL has stated that they did not expressly or impliedly authorize the trade-in of the Asset. The Trustee has not been provided any evidence of this fact, but has

accepted CFSL's assertion for the purposes of making this Final Determination.

11. PRE-PPSA/ Transitioning Issues

Not applicable in this instance as the transaction between CFSL and Noble took place in 2000 and was therefore subsequent to the coming into force of the PPSA in the Province.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?
(i) Value given?

YES CFSL has provided a Dealer Payment History showing an account payable to Toromont and a net financed amount of $186,395.00. This corresponds with the amount of the Promissory Note between Noble and CFSL. This is sufficient evidence that CFSL did provide value to Noble in exchange for the security interest in the Asset.

With respect to the transaction between HEL and Noble, the Trustee has been provided with an invoice from HEL evidencing the trade-in and a copy of a cheque from Noble to HEL.

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

(ii) Rights in the collateral?

YES Both Noble and HEL held possession of the Asset, and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.[2]

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

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

YES As between CFSL and Noble, the evidentiary requirements of s. 11, required for attachment, are established by the Chattel Mortgage and Promissory Note. Specifically, in accordance with s.11(1)(b), this agreement is in writing, has been signed by Noble as the debtor and provides an adequate description of the collateral that is secured.

Is there a perfection step?

NO

CFSL did register their security interest in the Timberjack, while it was in the hands of Noble, on the PPR. Registration number 110551 contains the following information:

- **General Description of Collateral:** "One (1) 1998 Timberjack 610, S/N 993395; One (1) 1998 Caterpillar 320BL, S/N 6CR02773; One (1) 1997 Caterpillar 320BL, S/N 6CR00647, complete with One (1) 1997 Fabtek 18" R2000 Processor, S/N 0897021; One (1) 1998 Timberjack 1010B, S/N 106019; One (1) 1998 Timberjack 608B, S/N 987291."
- **Serial Numbered Collateral: "**1998 Timberjack 610 (s/n 993395); 1998 Caterpillar 320BL (s/n 6CR02773); 1997 Caterpillar 320BL (s/n 6CR00647); 1998 Timberjack 1010B (s/n 106019); 1998 Timberjack 608B (s/n 987291); 1997 Timberjack 610 (s/n 983200); 1999 Timberjack 608B (s/n 10BA1043)."

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to CFSL's security interest in the Timberjack. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

However, Section 52(2) of the PPSA requires a secured creditor to register a financing statement in the PPR within 15 days of becoming aware that the debtor has disposed of the collateral if the secured party wishes to avoid having its security interest subordinated to

[2] Ibid. at p.84.

subsequent secured creditors of the debtor. CFSL has failed to register a financing statement naming HEL as the new debtor with respect to the Asset. Counsel for CFSL contends that CFSL was not aware of the disposition by Noble until the bankruptcy of HEL and at that time were prevented from registering a financing statement because of the automatic stay of proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Nevertheless, the Trustee notes that in a 1993 decision, the Newfoundland Supreme Court, In Bankruptcy found that s.69(1) of the *BIA* does not prevent a secured creditor from filing its security documents.[3] However, after reviewing the order granted by the Court on February 8, 2002 in response to HEL's application under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (the "Initial Order"), the Trustee is of the opinion that the Initial Order stated that the right of any creditor to perfect or register a security interest in HEL's property was stayed for a period of 30 days (the "Stay").[4] The Stay was subsequently extended to April 17, 2002 by order of the Court on February 22, 2002 and was later extended indefinitely by the Receivership Order issued by the Court on March 13, 2002.[5]

While CFSL was stayed from amending its financing statement with respect to the Asset by virtue of the Stay, it does not alleviate the need for CFSL to make such an amendment to perfect its security interest in the Asset. The Initial Order provided an extension of any time periods related to HEL or HEL's property equal to the length of the stay created by the Initial Order. This extension was confirmed and extended in the Receivership Order. Therefore, if CFSL did not discover the disposition of the Asset until 13 March 2002 when the Receivership Order was issued, the 15 day period in which it had to register the change in debtor is effectively still running. Should CFSL receive permission from the Court to amend its financing statement to reflect the disposition of the Asset by Noble to HEL, CFSL's security interest will be perfected.

13. Proceeds

CFSL is not making a claim to the proceeds of the Timberjack; rather, they are looking for its return.

14. Additional Comments on Priorities

None

15. Auction Results

[3] *Labrie Equipment Ltd./Equipment Labrie Ltee. v. Harvey & Co.* (1993) 21 C.b.R. (3d) 281 (NF SC).
[4] See paragraph 4(c).
[5] See paragraph 37(a).

The 1998 Timberjack 610 (s/n 993395) was sold at the Trustee's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium) was **$95,000.00**.

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **CEDARAPIDS INC. ("Cedarapids")**

1. Introduction

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

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

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

2. Summary Final Determination

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

3. Defined Terms

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

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

4. The Assets 13 pieces of heavy equipment. 6 of these pieces (identified by "*" were sold at the Trustee auction (described below). The remaining items were sold out of trust.

1.MVP 450 Rollercone (s/n R101182)*
2.MSP 380 Rollercone
3.C380 Plant*
4.1328 Screening and Wash PLT*
5.TSH 6163032 Screen
6.C380 Portable Plant
7.MVP 380 Rollercone
8.SF 6203 Plant Base
9.FSG 6203 Screen*
10.JP 3042 Plant
11.3042 Jaw For Plant*
12.4217 VGF
13.CR 461 RXR Rubber Track Paver*

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

issues are set out in s.13.

7. Overview of Claim

Cedarapids claims a perfected security interest in the 13 assets listed above, arising from a Domestic Distributors Agreement entered into between it and HEL on July 10, 2001 (the "Agreement"). The Agreement contains a charging clause at paragraph 3 of the section entitled "Prices and Terms".

The Proof of Claim dated April 15, 2002 asserts a total claim of **$3,138,788.00.** This is exclusively a secured claim, relating to the 13 assets supplied by it under the Agreement.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.
ii. Proof of Claim dated April 15, 2002.
iii. The Agreement.
iv. Invoices from Cedarapids to HEL as follows:
    - May 31, 2001 - MVP 450 Rollercone.
    - July 31, 2001 - MSP 380 Rollercone and the C380 Plant.
    - August 31, 2001 - 1328 Screening and Wash PLT and TSH 6163-32 Screen.
    - August 31, 2001 - C380 Portable Plant and MVP 380 Rollercone.
    - August 31, 2001 - SF 6203 Plant Base and FSG 6203 Screen.
    - September 28, 2001 - JP 3042 Plant, the 3042 Jaw for Plant and 4217 VGS.
    - October 10, 2001 - CR 461 RXR Rubber Track Paver.
v. Bills of Lading:
    - May 10, 2001 for the 450 Cone Plant.
    - May 11, 2001 for the MVP 450 Cone.
    - August 31, 2001 for the 1328 Screening and Walsh Plant.
    - October 2, 2001 for the Rock Crushing Plant.
    - August 31, 2001 for the C380 Plant.
    - July 31, 2001 for the C380 Plant.
    - September 10, 2001 for the Screening Plant.

9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that the 13 assets were held by HEL for sale or lease and as such, they form part of the inventory (s. 2(x) of the PPSA).

10. Application of the PPSA

By operation of s. 4 of the PPSA, the Agreement, which has been duly executed by HEL and contains an appropriate charging clause, qualifies as a security agreement governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

Not applicable in this instance as all transactions took place in 2001 and therefore were subsequent to the coming into force of the PPSA in the Province.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor[1].

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

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

(i) Value given?

YES The Agreement entered into between HEL and Cedarapids allows HEL as distributor to purchase from Cedarapids the products it manufactures to form part of its inventory. The invoices to HEL and the Bills of Lading provided by Cedarapids provide the necessary evidence that value was given by Cedarapids to HEL.

(ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2]. HEL held possession of the assets under a domestic distributor's agreement with Cedarapids. As such, for purposes of attachment, possession of the assets sold and shipped to HEL would give rights in the collateral.

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

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

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

Is there a Perfection Step?

YES

Registration #1565176, dated 24 January 2002 contains the following description:

> *All rights to and title of inventory manufactured, distributed or supplied by the secured creditor including crushing equipment, material mixing equipment and hot mix pavers and which may bear the trade name and trade marks of Cedarapids and Eljay and any proceeds received from the sale of the aforesaid inventory.*

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

13. Proceeds

[2] Ibid. at 84.

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

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

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

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

[3] Ibid. at p.140.
[4] Ibid. at 140.

Cedarapids has not made a claim on the basis of proceeds/tracing.

14. Additional Comments on Priorities

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

- As established by s. 36 of the PPSA and the residual priority rules of the PPSA, the relevant date for the determination of the priority of Cedarapids' interest in the assets is the date of registration of its financing statement in the PPR - **January 24, 2002**

15. Auction Results

What follows is a list of the Cedarapids assets sold at the Trustee's auction on July 12, 2002, in Halifax, Nova Scotia along with the net amount obtained (bid amount less LVG buyer's premium):

MVP 450 Rollercone (s/n R10162)	-	$290,000.00
C380 Plant	-	$360,000.00
1328 Screening/Wash Plant	-	$225,000.00
Rubber Track Paver	-	$255,000.00
6 x 20 Screen Plant	-	$260,000.00
2236 Jaw Crusher	-	$325,000.00

Total: $1,715,000.00

*** Note:** the descriptions provided in the invoices provided by Cedarapids and the descriptions provided in the auction results do not match exactly. Without serial numbers it is difficult to say with certainty whether the items sold in the auction were those secured by Cedarapids. Nevertheless, the results provided above appear to be the assets secured by Cedarapids.

FINAL DETERMINATION
RE: CANADIAN IMPERIAL BANK OF COMMERCE CLAIMS

Final Determination
December 3, 2002

Final Determination of PricewaterhouseCoopers Inc. ("PWC") as Trustee of Hickman Equipment (1985) Limited in respect of the Claims of Canadian Imperial Bank of Commerce ("CIBC") to Security Interests

1. Introduction

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

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

2. Summary Determination

CIBC's claim:

(a) to be owed $15,433,523.95 (the "Total Debt") by HEL, as at the Date of Bankruptcy, as set out in its Proof of Claim, is allowed in the amount of $15,269,395 (the "Total Debt Allowed");

(b) to a security interest in Assets of HEL based on:

  (i) a General Assignment of Book Debts, Accounts, etc. (the "GABD") dated January 4, 1985, as security for the Total Debt Allowed, is allowed;

  (ii) a Floating Charge Debenture dated January 7, 1985 and Supplementary Debentures (collectively, the "Debenture") dated February 19, 1990, April 17, 1997, August 6, 1997, and July 9, 1998 as security for the "Total Allowed Debt" up to the principal sum of $20,000,000 plus interest as provided in the Debenture, is allowed;

  (iii) a Security Agreement dated January 25, 2000 (the "GSA"), is disallowed;

(iv) *Bank Act* Security registered on October 26, 2000 as Registration Number 01074579, is disallowed.

The Trustee has determined that the Assets in respect of which security interests are created in favour of CIBC for the Total Allowed Debt allowed are:

(a) based on the GABD a security interest in:

> "all debts, accounts, claims, moneys, and choses in action which now or at any time hereinafter be due or owing to or owned by (HEL), and also all securities, bills, notes and other documents now held or owned by (HEL) or anyone on behalf of (HEL) in respect of the said debts, accounts, claims, moneys and choses in action or any part thereof"

(b) based on the Debenture a security interest in:

> all of HEL's undertaking, property and assets, present and future, other than in Assets in which the holders of Permitted Encumbrances have a security interest. The Bank's interest in such Assets is subordinated to the interests of the holders of Permitted Encumbrances including, *inter alia*, unperfected PMSI holders and the Assets in which Permitted Encumbrancers have a security interest is held in trust by CIBC for the Permitted Encumbrancers.

The effective date of perfection for purposes of s.36 of the PPSA of:

(a) the security interest created by the GABD is January 16, 1985; and

(b) the security interest created by the Debenture is January 29, 1985.

If it is subsequently determined as a result of an appeal that the Trustee's determination disallowing CIBC's claim to a security interest in Assets of HEL based on the GSA is wrong, the Trustee has determined that the Assets in respect of which a security interest is created in favour of CIBC for the Total Allowed Debt based on the GSA is a security interest in:

> "all of the personal property of HEL in existence on March 13, 2002 and proceeds thereof, other than personal property or proceeds thereof in which holders of Permitted Encumbrances have a security interest. CIBC's interest in such Assets is subordinated to the interests of the holders of Permitted Encumbrances including, *inter alia*, unperfected PMSI holders and the Assets in which Permitted Encumbrancers have a security interest is held in trust by CIBC for the Permitted Encumbrancers."

The effective date of perfection of the GSA for purposes of the PPSA is January 25, 2000.

3. Defined Terms

When used in this Final Determination, the following words or abbreviations shall have the meaning ascribed:

"Asset(s)"	-	all of the Assets of HEL, as defined in the Receivership Order and of which PricewaterhouseCoopers Inc. is the Receiver
"BIA"	-	*Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended
"Date of Bankruptcy"	-	March 13, 2002
"Debenture"	-	the Original Debenture together with the Supplementary Debentures referred to in paragraph 8(h)
"Documents"	-	the documentation referred to in paragraph 8
"GABD"	-	the General Assignment of Accounts etc. referred to in paragraph 8(g)
"GSA"	-	the Security Agreement referred to in paragraph 8(i)
"HEL"	-	Hickman Equipment (1985) Limited
"Permitted Encumbrances"	-	mortgages, liens or other encumbrances on Assets permitted by paragraph 2.2 of the Original Debenture; and Purchase Money Liens, liens existing on an asset when it was acquired, a renewal or replacement of a Purchase Money Lien or of a lien existing on an asset when it was acquired, so long as the principal amount secured by the Lien does not increase, or a Normal Course Lien, permitted by Credit Agreements dated April 17, 2000 and June 19, 2000
"Permitted Encumbrancers"	-	the holders of Permitted Encumbrances
"PMSI"	-	Purchase Money Security Interest
"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P-7.1
"Province"	-	Newfoundland and Labrador
"Regulations"	-	*Personal Property Security Regulations* (103/99)
"Total Allowed Debt"	-	$15,269,395.00

"Total Debt"	-	$15,433,523.95
"Trustee"	-	PricewaterhouseCoopers Inc., in its capacity as Trustee of the Estate of Hickman Equipment (1985) Limited

4. Assets

The assets which are the subject of this Final Determination are the Assets.

5. Assumptions

For the purposes of this Final Determination, the Trustee has assumed:

(a) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

(b) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

(c) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

(d) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

(e) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

Notwithstanding the findings in this Final Determination concerning the validity of CIBC's Claim, the Trustee is not precluded by such determination from taking proceedings in respect of the Debt, Security Interest or Assets dealt with herein pursuant to the provisions of the BIA or any provincial or other legislation dealing with Preferences, reviewable or fraudulent transactions or settlements.

Except where a specific claim to proceeds has been made and material provided in support of that claim, the Trustee expresses no opinion with respect to claims to proceeds or claims involving tracing. An outline of the proceeds claim procedure and issues are set out in paragraph 17.

7. Overview of Claim

CIBC has filed a Proof of Claim under the BIA claiming HEL owed it as at the Date of Bankruptcy the total sum of $15,433,523.95 as set out in Schedule A.

CIBC claims to have a security interest in all of the "book debts", including choses in action of HEL by virtue of the GABD and a security interest generally in all of the undertaking and assets of HEL, present and future, by virtue of the Debenture, the GSA, and security under s.427 of the *Bank Act*.

8. Documentation

For the purposes of this Final Determination, the Trustee has been provided with, reviewed, considered and relied upon the following:

(a) Proof of Claim dated April 17, 2002 filed by CIBC herein and attachments thereto;

(b) Credit Agreement dated March 17, 1997 between CIBC and HEL, with Standard Credit Terms attached;

(c) Credit Agreement dated July 18, 1997, between CIBC and HEL, with Standard Credit Terms attached;

(d) Credit Agreement dated June 26, 1998 between CIBC and HEL, with Standard Credit Terms attached;

(e) Credit Agreement dated April 17, 2000 between CIBC and HEL, with Standard Credit Terms attached;

(f) Credit Agreement dated June 19, 2000 between CIBC and HEL, with Standard Credit Terms attached;

(g) General Assignment of Accounts, etc. between HEL as Assignor and CIBC as Assignee dated January 4, 1985, stamped to certify registration under the *Assignment of Book Debts Act* on January 16, 1985 with PPSA Registration Statement attached indicating registration as #1063565 on June 29, 2001 under the provisions of the PPSA;

(h) Demand Debenture on CIBC Form 1073-79 dated January 7, 1985 (the "Original Debenture") in the principal amount of $3,000,000 containing a Floating Charge issued by HEL in favour of CIBC with Certificate of Registration on January 29, 1985 in Role 77, Frame 70 endorsed, together with:

  (i) Supplemental Debenture to Original Debenture dated February 19, 1990 and containing a fixed charge on real estate with Certificate of Registration on February 22, 1990 in Roll 732, Frame 839 endorsed;

  (ii) Supplemental Debenture to Original Debenture dated April 17, 1997 increasing the principal amount to $5,000,000 with Certificate of Registration on April 30, 1997 in Roll 1521, Frame 1435 endorsed;

  (iii) Supplemental Debenture to Original Debenture dated August 6, 1997 increasing the principal amount of the Debenture to $10,000,000 with Certificate of Registration on August 29, 1997 in Roll 1564, Frame 2095 endorsed;

(iv) Supplemental Debenture to Original Debenture dated July 15, 1998 increasing the principal amount secured to $20,000,000 with Certificate of Registration in Roll 1668, Frame 1748 endorsed;

(i) Security Agreement dated January 25, 2000 on CIBC Form 6100 between HEL and CIBC with a PPSA Registration Statement attached indicating registration as #78490 on January 28, 2000 under the provisions of the PPSA;

(j) *Bank Act* Security (s.427), including:

(i) Notice of Intention to Give Security under s.427 of the *Bank Act* dated October 18, 2000 endorsed as received on October 26, 2000 by CSRS as Registrar for Bank of Canada;

(ii) Confirmation Letter from the Canadian Securities Registration System addressed to Deloitte & Touche Inc. confirming entry on October 26, 2000 of the name of HEL on the register of notices of intention to give security;

(iii) Application by HEL for Credit and Promise to Give Special Security under the *Bank Act* requesting a line of credit in the maximum amount of $13,500,000 dated October 18, 2000;

(iv) Security under s.427 of the *Bank Act* dated October 18, 2000;

(k) Letter of Credit in the amount of $55,000 bearing reference number SBGT719550 in favour of the City of St. John's, with an expiry date of July 31, 2002;

(l) Letter of Credit in the amount of $34,400 bearing reference number SBGT720372 in favour of the City of St. John's, with an expiry date of November 9, 2002;

(m) Letter of Credit in the amount of $17,600 bearing reference number SBGT720510 in favour of the City of St. John's, with an expiry date of November 28, 2002;

(n) Current Account Statement with respect to account number 00-02801 (subsequently converted to term loan number 63/5181-054) from December 3, 2001 - March 25, 2002;

(o) Current Account Statement for account number 45-09110 (subsequently converted to term loan number 63/5181-151) from November 30, 2001 - March 25, 2002;

(p) Term Loan Statement number 63/3900-754 from September 17, 2001 - February 21, 2002;

(q) Current Account Statement for account number 11-54613 from January 22, 2002 - March 28, 2002;

(r) PRR Registration Report dated March 21, 2002;

(s) A Reply dated October 18, 2002 of CIBC to the Information Request of the Trustee dated October 2, 2002;

(t) A letter from Benson Myles dated November 29, 2002 containing submissions in respect of the draft final determination with respect to CIBC's claim;

(u) The affidavits of John H. Webber of Victoria, British Columbia, who says he was the Director - Commercial Banking of Canadian Imperial Bank of Commerce, St. John's, NL, during, *inter alia*, the period when the GSH was provided and the April and June 2000 Credit Agreements were entered into between CIBC and HEL;

(v) The affidavit of Mr. Gary Bishop, C.A., of St. John's, NL, who says that prior to January 2002 and including the calendar year 2000, he was the Comptroller and Secretary of Hickman Motors Limited, in which capacity he coordinated the overall banking operations of the Hickman Group of Companies, including HEL.

9. The Claim

A. The Debt:

(a) Claimed

(i) CIBC has set out in its Proof of Claim the sum of $15,433,523.95 as being the total amount owed to it at the Date of Bankruptcy in respect of the Loans and/or Facilities provided by CIBC to HEL as detailed in Schedule A.

CIBC has provided additional information concerning the accrual of interest, legal and other expenses after the Date of Bankruptcy which will not be determined by this Final Determination.

(b) Allowed or Disallowed

(i) The amount of debt allowed as at the Date of Bankruptcy in this Determination is $15,269,395. The Trustee in this Determination has disallowed $164,128 of the amount claimed on the following basis:

(1) $107,000 has been claimed in respect of the Letters of Credit, no evidence has been provided that any amounts have been paid by CIBC on the Letters of Credit.

(2) calculation of the amounts owed in respect of the loans referred to in Schedule A based on CIBC's Reply dated October 18, 2002 indicates the following balances outstanding as at the Date of Bankruptcy:

<u>Term Loan 63/5881-054</u>	
Principal	12,208,798.35
Interest Accrued (Pre Class)	48,849.25
Accrued Interest to March 13	31,776.32
Fees (Pre Class)	680.00
<u>Term Loan 63/5181-151</u>	
Principal	2,934,312.71
Interest Accrued (Pre Class)	13,109.00
Accrued Interest (to March 1)	7,637.51
<u>Term Loan 63/3900-754</u>	
Principal	24,100.00
Interest Accrued (Pre Class)	72.90
Accrued Interest	60.75
<u>Operating Account 63/5881-054</u>	
This Account had a credit balance on the Date of Bankruptcy	~~0~~
<u>Letters of Guarantee</u>	
No evidence of any amount paid on the L/C's	~~0~~

The documents on which the Trustee has based its allowance of debt are:

(1) the Credit Agreement dated June 19, 2000 which provided for the provision by CIBC to HEL of an Operating Line to a limit of $15,000,000 (which includes provision for Letters of Credit) at CIBC Prime plus 1% and a Demand Instalment Loan of $96,100.

(2) the statements referred to in paragraphs 8(n)-(q) of this Determination.

(3) calculations provided to the Trustee in CIBC's Reply of October 18, 2002 to the Information Request of the Trustee.

B. The Security Interests

(a) Asserted

CIBC claims to have a security interest:

(i) In the Assets of HEL described in the GABD (generally the accounts receivable and choses in actions of HEL);

(ii) In all of the Assets based on:

(1) the Debenture;

(2) the GSA;

(3) *Bank Act* Security referred to in paragraph 8(j).

The Security Interests claimed are as security for the Total Debt.

(b) Security Interests Allowed or Disallowed

Determinations

1. The Trustee has determined that:

(a) CIBC has a security interest in the Assets described in the GABD as security for the "Total Allowed Debt";

(b) CIBC has a security interest in all of the Assets described in the Debenture (all of HEL's undertaking, property and assets, present and future) other than in assets in which the holders of Permitted Encumbrances have a security interest. The Bank's interest in assets in which the holders of Permitted Encumbrances have a security interest is subordinated to the interests of Permitted Encumbrancers including, *inter alia*, the holders of unperfected PMSIs and the assets in which Permitted Encumbrancers have a security interest are held in trust by CIBC for the Permitted Encumbrancers;

(c) CIBC has no security interest in Assets based on the GSA, but if the Trustee is found to be wrong in this aspect of its determination, the security interest which CIBC has in Assets based on the GSA is:

> a Security Interest in all of the Assets described in the GSA (all Personal Property of HEL existing on March 13, 2002 including all Proceeds thereof) other than in assets in which the holders of

Permitted Encumbrances have a security interest. The CIBC's interest in assets in which the holders of Permitted Encumbrances including, *inter alia*, the holders of unperfected PMSI's and the assets in which Permitted Encumbrancers have a security interest are held in trust by CIBC for the Permitted Encumbrancers; and

(d) CIBC has no security interest in Assets based on the *Bank Act* security.

for the reasons set out following:

The Credit Agreements:

The Credit Agreements set out the Facilities to be provided by CIBC to HEL and the security to be provided by HEL to CIBC for the Facilities. The Credit Agreement in effect on the Date of Bankruptcy is dated June 19, 2000 and is contained in a letter from CIBC to HEL accepted by HEL on July 6, 2000 ("June 2000 Credit Agreement'). A copy of the June 2000 Credit Agreement is attached as Schedule B. The June 2000 Credit Agreement provided in part:

> "We, Canadian Imperial Bank of Commerce (CIBC), are pleased to establish the following Credits to you, our customer.
>
> Credit A: Operating Line
>
> | | |
> |---|---|
> | Credit Limited: | The lesser at any time of:
(a) $15,000,000; and
(b) ... |
> | Description & Rates: | A revolving demand credit, for general business purposes, as follows:

(1) Canadian dollar loans and overdrafts. The interest rate is as follows: Prime Rate plus 1.00%

(2) Canadian dollar or foreign currency L/C's. The total amount of the L/C's outstanding at any time may not exceed $500,000
... |
>
> Credit B: Demand Instalment Loans
>
> | | |
> |---|---|
> | Loan Amount: | $96,100. |
> | Purpose: | Renewal of existing facility |
> | Interest Rate: | Prime Rate plus 0.85% per year |
>
> ...
>
> Security
>
> | | |
> |---|---|
> | Security: | The following security is required: [my underlining] |

Assignment of Receivables: General Assignment of accounts receivable.

Bank Act Security: Security under Section 427 of the Bank Act.

Debenture: Floating charge debenture for $20,000,000 giving CIBC a 1st charge over all assets subject to a Priority Agreement dated July 5, 1985, with John Deere Limited, plus acknowledged assignment of fire and other perils insurance, with loss payable to CIBC.

Guarantee: Guarantee & Postponement of Claim from Group Holdings Limited in an amount that is unlimited and supported by:

Fixed charge debenture for $3,000,000 giving CIBC a 1st charge over the following properties:

(various properties of Group Holdings are listed)

Postponement: Postponement of claims signed by Hickman Motors Limited for $1,000,000.

Covenants

Covenants: You will ensure that

...

...

Negative Pledge: There is no lien on any of your present or future assets, and that you do not assign any right to any income, without our prior consent (which consent will not be unreasonably withheld), except for the four exceptions below, namely:

(a) a Purchase Money Lien;
(b) a lien existing on an asset when it was acquired;
(c) a renewal or replacement of a Purchase Money Lien or a Lien referred to in (b) above, so long as the principal amount secured by the Lien does not increase; or
(d) a Normal Course Lien

... [my underlining]

Upon acceptance, this Agreement replaces the existing credit agreement dated April 18, 2000, between you and CIBC. Outstanding amounts (and security) under that Agreement will be covered by this Agreement." [my underlining]

The terms contained in the April 17, 2000 Credit Agreement are the same, except the Credit limited is $13,500,000 and the Demand Instalment Loan was $103,000.

The Security

The following security agreements required by the June 2000 Credit Agreement are relevant to this Determination:

1. GABD
2. *Bank Act* Security (s.427)
3. Debenture - Floating Charge - $20,000,000

The GSA which was not required by the June 2000 Credit Agreement or any of the other Credit Agreements is also relevant to this determination.

GABD

The GABD is required by the June 2000 Credit Agreement as security for the Facilities. It provides that HEL assigns and transfers to CIBC:

> "all debts, accounts, claims, ,moneys and choses in action which now are or which may at any time be due or owing to or owned by the undersigned..."

The Trustee is satisfied that this assignment was provided for the purpose of creating and creates a security interest in the Assets described in Schedule A as security for the Total Allowed Debt.

Bank Act Security (s.427)

The Trustee has reviewed the documents relating to CIBC's claim to a security interest in Assets based on security provided by HEL under the provisions of the *Bank Act* (the "s.427 security") referred to in paragraph 8(j).

Security under the *Bank Act* is excluded from the ambit of the PPSA by section 5(k). Security under the *Bank Act* is governed by the *Bank Act* and common law relating thereto. The *Bank Act* Security was required by the June 2000 Credit Agreement and the Trustee is satisfied it was provided by HEL for the purpose of creating a security interest in all of HEL's Assets as security for the debt arising from provision of the Facilities.

However, the Trustee has determined that the *Bank Act* security does not create a security interest in any of the Assets as the description of the assets to be charged is too imprecise.

The security provided by HEL under s.427 describes the security as follows:

> "...all property and classes of property hereinafter described of which the undersigned is now or may hereafter become an owner, to wit: All assets, subject to Priority Agreement with John Deere Limited dated July 5, 1985 and that now or may hereafter be in the place or places hereafter designated to wit: (no place or places are identified)."

All assets may not be taken as security under the *Bank Act*:

> "427(1) A bank may lend money and make advances
>
> (a) to any wholesale or retail purchaser or shipper, or dealer in, products of agriculture, products of aquaculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers or goods, wares and merchandise, manufactured or otherwise, on the security of such products or goods, wares and merchandise and of goods, wares and merchandise used in or procured for the packing of such products or goods, wares and merchandise." [my underlining]

> "The descriptions of the security in the documents giving the security need not be subjected to strict or exceptionally rigorous detail... Thus the courts have taken a liberal approach to descriptions although they have invalidated securities when the descriptions are so imprecise as to be of no use whatsoever in identifying the security for the loan or advance." Banking Law of Canada, 2nd ed., 1998, Carswell, M.H.Ogilvie
> [my underlining]

Security under s.427 of the *Bank Act* cannot be taken on all HEL's assets. The description contained in the s.427 security agreement is too imprecise to permit the property on which s.427 security can be taken and which is intended to be charged to be identified.

As the property on which a security is intended to be created cannot be identified, a security is not created in any of HEL's Assets based on the s.427 security.

The section 427 *Bank Act* Security is also void because of a failure to register a Notice of Intention to give security as required by section 427(4)(a) of the *Bank Act* before the security was given (see page 26 of this Determination).

Debenture

The Debenture is required by the June 2000 Credit Agreement.

The Original Debenture which comprises part of the Debenture contains the following charging provision:

> "2.1 As security for the due payment of all moneys payable hereunder, the Company as beneficial owner hereby charges as and by way of a first floating charge to and in favour of the Bank, its successors and assigns, all its undertaking, property and assets, both present and future, of every nature and kind and wherever situate (other than such as are at all times validly subjected to the first fixed and specific mortgage and charge hereby created) including, without limitation, its franchises and uncalled capital."

Supplemental Debentures which are part of the Debenture add a fixed charge on real estate and the following to the floating charge provision:

> "If the Bank gives value for the purpose of enabling the Company to acquire rights in or to any of the Charged Property, the Company granted the Bank a purchase money security interest in such Charged Property to the extent that the value is applied to acquire such rights. In this Debenture the mortgages and charges hereby constituted are called the "Security" and the subject matter of the Security is called the "Charged Property".

The Original Debenture provided:

> "2.2 Until the Security becomes enforceable, the Company may dispose of or deal with the subject to 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." [my underlining]

The Debenture gives CIBC a security interest by virtue of paragraph 2.1 of the Original Debenture in the:

> undertaking, property and assets both present and future, of every nature and kind and wheresoever situate,..."

and in addition:

> "if the Bank gives value for the purpose of enabling the Company to acquire rights in or to any of the Charged Property, the Company grants the Bank a purchase money security interest in such Charged Property to the extent that the value is applied to acquire such rights."

(CIBC has not asserted the right to a PMSI in any of the Assets.)

However, the Trustee has determined that the Debenture (paragraph 2.2) and the Negative Pledge contained in the Credit Agreements of 2000 referred to at pages 11 and 12 of this Final Determination which permits HEL to grant Permitted Encumbrances without CIBC's consent subordinates CIBC's security interest and excludes from its charge the security interest of persons holding Permitted Encumbrances. The basis of this determination is as follows:

The language contained in paragraph 2.2 of the Debenture has been determined to be effective to and does subordinate the Bank's interest to other charges including the charges in property held by unperfected PMSI holders.

> *Canadian Imperial Bank of Commerce v. International Harvesters Credit Corp. of Canada Ltd.* [1986] O.J.No. 1315, Ont.C.A: *Chiips v. Skyview Hotels Ltd.*

(1994), 166 D.L.R. (4th) 385, Alb.C.A. leave to appeal to the Supreme Court of Canada denied [1994] S.C.C.A. No. 444

The PPSA provides:

> s.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 subordination was intended.

In *Re Chiips and Skyview Hotel Ltd. et al,*. the Alberta Court of Appeal considered, in the context of section 40 of the Alberta PPSA (the equivalent to section 41 of the NL PPSA), the following clauses:

> "Until the Security becomes enforceable, the Company may...provided that the Company shall not, without the prior written consent of the Holder, create, assume or have outstanding, except to the Holder, any mortgage, charge or other encumbrance in any part of the Mortgaged Property, ranking or purporting to rank or capable of being enforced in priority to or *pari passu* with the Security, other than,
>
> (a) 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." [my underlining]

and

> "...the Company shall not: ...
>
> (c) create or permit any mortgage, charge, lien or other encumbrance upon any part or all of the Mortgaged Property ranking or purporting to rank in priority to or *pari passu* with the Security in order to secure any monies, debts, liabilities, bonds, debentures, notes or other obligations...or *pari passu* with this Debenture, provided, however, that this covenant shall not apply to, nor operate to prevent, and there shall be permitted:
>
> (i) the assuming or giving of purchase money mortgages or other purchase money liens on property acquired by the Company...provided that such purchase money mortgages or purchase money liens shall be secured only by the property being acquired by the Company and no other property of the Company..."

As reported in the headnote to the case:

> "Per Forsy J.A: The provisions in the debenture were subordination clauses; they allowed the hotel to grant security to its suppliers in the form of purchase money security interests that would have priority over the floating charge in the debentures. Commercial reality also supported this conclusion. Section 40 of the PPSA, S.A. 1988, c.P-4.05 does not require registration of the subsequent security. Further it permits a third party, such as the

> appellant, to enforce the subordination clauses, since the appellant was a person for whose beenfit the clauses were included; and
>
> Per Haradence, J.A. concurring. Section 40 made it essential to determine whether the clauses were valid subordination clauses. The clauses were subordination clauses, since they purported to give priority to certain later security interests. Further commercial reality made the ability to grant priority to suppliers in the ordinary course of business necessary. Moreover registration by the appellant was not contemplated by the debenture holders since they took their security before the Act was in force."

The language in paragraph 2.2 of the CIBC Debenture being substantially the same as the language contained in the debenture considered in the *Chiips* case, the Trustee has determined that the effect of the language in the CIBC Debenture is to subordinate the security interests contained in the CIBC Debenture to the security interest of Permitted Encumbrancers whether those Permitted Encumbrancers have perfected their security interests by registration under the applicable registration law or not.

It has also been determined that where the principles of subordination as referred to apply and a bankruptcy has occurred (as in the current situation), the subordination results in the bank (CIBC) holding the security interest in the property in trust for the Permitted Encumbrancers.

> *Grove Packaging Inc.*, Re 2001 Carswell Ont. 4763, 31 C.B.R. (4th) 37, Ontario Superior Court of Justice [Commercial List] Farley, J. *Bank of Montreal v. Dynex Petroleum Ltd.* (1997) 46 C.B.R. (39) 36 (Alb.Q.B.) Alberta Queen's Bench, Rooke, J., overturned on other grounds (1999), 15 C.B.R. (4th) 5 (Alta.C.A.)

The court in *Bank of Montreal v. Dynex* said:

> "...the bankruptcy of [Dynex] does not effect the subordination of [B of M's] security interest in the [ORR's] overriding royalty and that the [B of M] continues to be obliged to hold in trust for [the ORR's] the proceeds it realized from the oil and gas properties to the extent of [the ORR's] overriding royalty interests."
>
> (*Bank of Montreal v. Dynex* (1997), Carswell Alta.209 at p.26)

The foregoing translates in this case to read:

> "...the bankruptcy of [HEL] does not affect the subordination of the [CIBC's] security interest to the [security interest of unperfected PMSI Holders or other permitted encumbrances] [CIBC continues to be obliged to hold in trust for the unperfected PMSI holders and other permitted encumbrancers] the proceeds realized for [the Assets in which the unperfected PMSI holders and other permitted encumbrancers had a security interest].

The Security Agreement (GSA)

Under the PPSA, a security interest is defined to mean an interest in personal property that secures payment or performance of an obligation.

The GSA is dated January 25, 2000. A financing statement was registered in the PPR under the PPSA on January 28, 2000 as registration #78490.

On January 25, 2000, the GSA created a security interest in favour of the Bank. The Credit Agreement in effect between HEL and CIBC on January 25, 2000 was a Credit Agreement dated June 29, 1998 (the "'98 Credit Agreement").

The '98 Credit Agreement provided that security for HEL's obligations to the Bank included:

> "All security CIBC may now and from time to time hold plus:"
>
> -- specifically listed security, including the GABD, *Bank Act* Security, the Debenture, but not including the GSA.

The GSA when given became part of the security held by CIBC. It created a security interest, i.e. an interest in personal property that secured payment or performance of HEL's obligation under the'98 Credit Agreement.

In April of 2000, a new credit agreement was entered into between CIBC and HEL. This Credit Agreement was, in turn, replaced by a further new Credit Agreement dated June 19, 2000 (the "June 2000 Credit Agreement").

The June 2000 Credit Agreement was the Credit Agreement in effect between HEL and CIBC on the Date of Bankruptcy.

The April 2000 Credit Agreement provides:

> "Upon acceptance, this Agreement replaces the existing credit agreement dated June 29, 1998, between you and CIBC. Outstanding amounts (and security) under that Agreement will be covered by this Agreement."

The June 2000 Credit Agreement provides:

> "Upon acceptance, this Agreement replaces the existing credit agreement dated April 18, 2000 between you and CIBC. Outstanding amounts (and security) under that Agreement will be covered by this Agreement."

Each of the April and June 2000 Credit Agreements stated, in respect of security:

> "The following security is required:"
>
> -- specific security is listed, including the GABD, *Bank Act* Security, Debenture, Guarantees with supporting collateral and Postponement of Claim.

A GSA is not listed as part of the "required security".

The 2000 Credit Agreements do not include the phrase "All security CIBC may now and from time hold...".

The Standard Terms forming part of the 2000 Credit Agreements provided:

> "1.17 Pre-Conditions: You may use the Credits granted to you under this Agreement only if:
> (a) ...
> (b) all the <u>required security</u> has been received and registered to our satisfaction; [my underlining]
> (c) ...
> (d) ..."

From April 2000, the GSA ceased to be required security for the obligations of HEL to CIBC.

As the GSA was no longer security for an obligation, it no longer created a security interest. In the same way other security previously held by the Bank but not referred to in the 2000 Credit Agreement no longer constituted security for HEL's obligations to CIBC, the GSA no longer constituted security for HEL's obligations to the Bank under the Credit Agreements.

In the affidavits referred to in paragraphs 8(u) and (v):

1. Mr. John H. Webber says, among other things:

    (a) He was the Director - Commercial Banking of Canadian Imperial Bank of Commerce at all relevant times.

    (b) On or about January 25, 2000, CIBC asked HEL to execute a GSA as security for HEL's debt to CIBC. If HEL refused to execute the GSA, CIBC would have been entitled to regard that as sufficient grounds to demand payment.

    (c) The GSA was intended to be continuing security for HEL's liabilities to CIBC.

    (d) He understood when the 2000 Credit Agreements were signed that the GSA was to continue to act as security for the liability of HEL to CIBC.

    (e) It was never his understanding nor, to the best of his knowledge, CIBC's intention that the GSA would be terminated by execution of the 2000 Credit Agreements.

    (f) To the best of his knowledge, CIBC has never informed HEL that CIBC intended to cancel the GSA.

2. Mr. Gary Bishop, C.A., says, among other things:

    (a) Since January 2002, he has been the Vice-President and CFO of Hickman Motors Limited, and prior to that (including the year 2000) he was the Comptroller and

Secretary of Hickman Motors Limited and, in that capacity, he coordinated overall banking arrangements of the Hickman Group of Companies, including HEL.

(b) In early 2000, John Webber asked him and Albert Hickman to arrange for the provision by HEL of a GSA for HEL's obligations to CIBC.

(c) He understood the GSA was required because of the implementation of the PPSA and in order for CIBC to provide, *inter alia*, the Operating Line to HEL.

(d) He forwarded a GSA (received from CIBC) to Gary Hillyard and Hubert Hunt, two of HEL's signing officers, for signature.

(e) On or about January 28, 2000, he and Mr. Albert Hickman met with John Webber and provided him with the executed GSA.

(f) He understood the GSA was to be continuing security for HEL's liabilities to CIBC until HEL's indebtedness to CIBC was paid in full.

(g) He was aware that HEL was subsequently asked to execute the 2000 Credit Agreements. It was his understanding the GSA was to continue to act as security for HEL's liability to CIBC.

(h) To the best of his knowledge, CIBC never indicated an intention to cancel the GSA.

(i) It was never his understanding the intention of HEL was to terminate the GSA by virtue of the execution of the 2000 Credit Agreements.

CIBC submits that:

1. The GSA stands on its own as a separate and independent contract, enforceable in accordance with its terms.

2. The last paragraph of the 2000 Credit Agreements have the effect of incorporating by reference all pre-existing security held by the Bank which has not been specifically released or returned. The paragraph set out in the April 2000 Credit Agreement states:

> "Upon acceptance, this agreement replaces the existing Credit Agreement dated June 26, 1998 between you and CIBC. Outstanding amounts (and security) under that agreement will be covered by this agreement."

The same paragraph appears in the June 2000 Credit Agreement; however, it refers to the existing Credit Agreement of April 2000.

Notwithstanding the affidavits and submissions, it is the Trustee's determination that on the acceptance of the 2000 Credit Agreements, the GSA ceased to constitute a valid enforceable security interest in the Assets as security for the liabilities of HEL to CIBC in respect of the Credit Facilities made available to HEL pursuant to the Credit Agreements.

The reasons for the Trustee's determination are as follows:

> "If the parties have seen fit to put their contractual intentions into writing, it must be because they wanted their meaning to be clearly and unequivocally established. There should be no room for argument about what has been agreed. The written word should make plain beyond doubt or question what were the requirements of the contract that was entered into by the parties.
>
> ...The golden rule is that the literal meaning must be given to the language of the contract, unless this would result in an 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. But evidence of the commercial context surrounding the making of an agreement may be admitted only to show the purpose for which the various contractual provisions were included, not to vary the meaning of the words of a written contract."
> The Law of Contracts, G.H.L. Fridman, Carswell, 4th ed. 1999 at pp.478-479.

The terms of the 2000 Credit Agreements are clear. It describes the credit facilities and the security required for provision of the Credit Facilities. The security required is listed. The GSA is not listed as part of the security required.

The only condition relating to use of the facilities relating to security is that:

> "1.17 (b) all the required security has been received and registered to our satisfaction..."

CIBC drafted the 2000 Credit Agreements. If it had wished to require a GSA as part of the "required security", it could have listed it. It did not.

It is the Trustee's determination that the last paragraph of the Credit Agreements, which states:

> "Upon acceptance, this Agreement replaces the existing credit agreement dated June 26, 1998, between you and CIBC. Outstanding amounts (and security) covered by that Agreement will be covered by this Agreement."

means that the only security for the Facilities is the security required by the 2000 Credit Agreement; it does not incorporate by reference all pre-existing security which had not been specifically released or returned. If the latter was the case, there would have been no need to refer in the Credit Agreement to the GABD, Bank Act security or postponement of claim by Hickman Motors Limited, all of which had been required in earlier Credit Agreements.

Notwithstanding the Trustee's determination that the GSA ceased to have any continuing effect after the 2000 Credit Agreements were entered into and their conditions fulfilled in the event the Trustee's determination in this respect is found to be wrong, it has made a determination concerning the nature and extent of the charge created by the GSA.

The GSA provides:

> "1. Grant of Security. The Customer mortgages, charges and assigns to CIBC and grants to CIBC, and CIBC takes a security interest in...
>
> (b) All Personal Property: all of the Customer's present and after acquired undertaking and Personal Property...
>
> 4. Collateral Free of Charges. The Customer represents and warrants that the collateral is, and agrees that the Collateral will at all times be, free of any charge or trust except in favour of CIBC or incurred with CIBC's prior written consent... [my underlining]
>
> 5. Use of Collateral. The Customer will not, without CIBC's prior written consent, sell, lease or otherwise dispose of any of the Collateral (other than Inventory, which may be sold, leased or otherwise disposed of in the ordinary course of the Customer's business." [my underlining]

The 2000 Credit Agreements provide:

> "You will ensure that:
> ...
> Negative Pledge: There is no lien on any of your present or future assets and that you do not assign any right to any income, without our prior consent (which consent will not be unreasonably withheld), except for the four exceptions below, namely:
> (a) a Purchase Money Lien;
> (b) a lien existing in an asset when it was acquired;
> (c) a renewal or replacement of a Purchase Money Lien or a lien referred to in (b) above, so long as the principal amount secured by the lien does not increase; or
> (d) a Normal Course Lien."
> [my underlining]

The Pre-2000 Credit Agreements did not contain this Negative Pledge language; however, the Debenture contained exclusionary language as referred to at page 14 of this Final Determination.

It is the Trustee's determination that pursuant to Section 41 of the PPSA, the referenced provisions of the GSA and the 2000 Credit Agreements are effective to subordinate any security interest CIBC may have in the Assets based on the GSA to the security constituted by Permitted Encumbrances.

In the 2000 Credit Agreements and prior to that in paragraph 2.2 of the Original Debenture, CIBC has given written consent to the Permitted Encumbrances.

The 2000 Credit Agreements and paragraph 2.2 of the Debenture permit HEL to grant security to suppliers or other lenders as described in the Credit Agreements and the Original Debenture.

The GSA permits charges granted with CIBC's prior written consent. The decision of the Courts in *Chiips v. Skyview Hotel Ltd.* is applicable and the Trustee has determined that with the consents contained in the 2000 Credit Agreements, the clauses contained in the GSA are enforceable as subordination clauses. The policy rationale for such a determination is consistent with the policy rationale applied in *Chiips*. In *Chiips,* Mr. Justice Foisy stated in paragraph 28 *et seq.* of his decision as follows:

> "The policy rationale for finding that the clauses in question should be enforceable by Chiips is one of commercial reality. The whole purpose for including these kinds of clauses in security agreements is to "remove any obstacles the debtor might encounter in acquiring new collateral for the conduct of his business" (see Ziegel, The Scope of Section 66a of the OPPSA and Effects of Subordination Clause: *Euroclean Canada Inc. v. Forest Glade Investments Ltd.*" (1984), 9 C.B.L.J. 367 at p.372). Clauses such as those in this case are intended to confer priority on purchase money security interests; without this clause the debtor would not be able to purchase goods on credit as the potential creditor would not be able to get any sort of credit from the debtor.
>
> I think it is clear that the clauses gave Skyview the right in the ordinary course of business to grant security to its suppliers (in the form of purchase money security interests) which would have priority over the floating charge in the debentures. At the time the debentures were granted, the law was clear that the language used in the debentures acted to subordinate the floating charge to a conditional sale or purchase money charge...The debenture holders ought to have known then that the provisions had that effect. Clearly, the parties intended that the floating charge would be subordinated to allow Skyview to carry on its business."

It is the Trustee's determination that it is equally clear that the language in the Credit Agreements coupled with the GSA and the Debenture was intended to subordinate the Bank's security to the type of charges described in the exception paragraph contained in the Credit Agreement and to the type of charges described in paragraph 2.2 of the Debenture.

It is the Trustee's determination that the principles set out by the Court in *Bank of Montreal v. Dynex* are applicable to the GSA with the result that if the GSA creates a valid security interest in favour of CIBC, CIBC holds in trust, for unperfected PMSI holders and other Permitted Encumbrancers, proceeds derived from Assets in which Permitted Encumbrancers had a security interest, whether that security interest was perfected or not.

10. Application of the PPSA

By section 4 of the PPSA, the PPSA applies to every transaction that in substance creates a security interest without regard to form and without regard to who has title to the collateral and

includes a chattel mortgage, conditional sale, fixed charge, floating charge, pledge, trust indenture, trust receipt, an assignment, a consignment, lease, trust or transfer of chattel paper where they secure payment or performance of an obligation.

Section 74(2) of the PPSA provides that, except as otherwise provided, the PPSA applies to every security agreement entered into before the commencement of the Act that was not validly terminated in accordance with prior law before the commencement of the Act ("Prior Security Agreement").

By Section 5(k) of the PPSA, security agreements governed by Part VIII of the *Bank Act* (Canada) are excluded from the application of the Act.

The GABD and Debenture are Prior Security Agreements to which by virtue of section 74(2), the PPSA applies.

The GSA falls within the ambit of the PPSA by virtue of section 4.

The *Bank Act* security referenced herein is excluded from the application of the PPSA.

11. Enforceability of the Security Agreements

Under s.11 of the PPSA, a security agreement is only enforceable against a 3rd party where a debtor (HEL) has signed a security agreement that contains an appropriate description of the collateral as provided in Section 11.

However, by virtue of section 74(3), section 11 does not apply to Prior Security Agreements, the validity of security interests created by Prior Security Agreements is governed by the prior law.

The PPSA does not apply to the *Bank Act* security.

In the result:

(a) The GSA is only enforceable against 3rd parties if it satisfies the requirements of s.11 of the PPSA;

(b) The GABD and Debenture are only enforceable against 3rd parties if they create valid enforceable security interests under the prior law;

(c) The *Bank Act* Security is only enforceable against 3rd parties if it satisfies the requirements of the *Bank Act*.

<u>The Security Agreement (GSA)</u>

HEL has signed the GSA. The GSA contains a statement that a security interest is taken in all of the debtor's present and after-acquired undertaking and Personal Property.

Section 11(b) permits a description of collateral by a statement that a security interest is taken in all of the debtor's present or after-acquired personal property.

The Trustee has determined, based on the foregoing, that the description of the Property contained in the GSA is enforceable against 3rd parties pursuant to s.11 of the PPSA.

Notwithstanding the adequacy of the description for purposes of section 11 of the PPSA, the Trustee has determined that the GSA does not constitute a security interest in any of the Assets.

The GABD

The *Assignment of Book Debts Act*, R.N.F. 1990, c.A-19, in Section 5, provides that an assignment of book debts made by a person engaged in a trade or business in the province is void as against creditors of the assignor and against subsequent purchasers unless the assignment is:

(a) in writing;

(b) accompanied by an affidavit of the execution of it by the assignor, except in the case of assignments executed by a corporation which, by virtue of s.13 of the Act, do not require the affidavit of a certifying witness;

(c) an affidavit of the assignee (CIBC) or its agent that the assignment was executed in good faith, for valuable consideration, and not merely for the purpose of protecting the book debts from creditors; and

(d) registered as provided in the Act.

The Act requires registration in the Registry of Deeds by filing a copy of the Assignment with required affidavits.

The GABD dated January 4, 1985, in which CIBC bases a claim to a security interest is:

(a) in writing and signed by HEL;
(b) accompanied by the affidavits required; and
(c) endorsed by the Registrar of Deeds as having been registered on January 16, 1985 as Document #16040.

The Debenture

The *Registration of Deeds Act*, R.S.N. 1990, c.R-10, provides in section 10 that an "instrument" made after March 27, 1862 and not proved and registered shall be judged fraudulent and void both at law and in equity against a subsequent purchaser or mortgagee for valuable consideration who first registers his or her instrument, or against a Trustee of an insolvent estate, or an assignee or trustee under a conveyance for the benefit of creditors.

The Debenture is an instrument defined in the *Registration of Deeds Act* as it existed prior to the commencement of the PPSA.

Under section 24(1) of the *Registration of Deeds Act*, a document submitted for registration is considered to be registered when it is delivered to the registry provided it:

(a) is executed by all persons from whom an interest passes (here, HEL);
(b) has attached to it the proper proof; and
(c) is accompanied by the proper fee.

The Debenture, including the Original Debenture and the Supplements, have been executed by HEL, are proved in accordance with the *Registration of Deeds Act* and are endorsed by the Registrar of Deeds as to registration.

Based on the *Registration of Deeds Act*, the Debenture was not void or fraudulent as against third parties but was enforceable according to its terms.

The *Bank Act* Security

The *Bank Act* provides in section 427(4)(a) that:

> "The rights and powers of the bank in respect of property covered by the security (s.427 security) are void as against creditors of the person giving the security and as against subsequent purchasers or mortgagees in good faith of the property covered by the security unless a notice of intention signed by or on behalf of the person giving the security was registered in the appropriate agency not more than three years immediately before the security was given."

In Banking Law of Canada, 2nd ed., 1998, Carswell, M.H.Ogilvie, the following appears at page 362:

> "to be valid however the notice of intention must be given at the time the security is taken and the security will be void if given after"

The Notice of Intention was registered under the provisions of the *Bank Act* on October 26, 2000. The security was given by HEL to CIBC on October 18, 2000.

As the Notice of Intention was not registered under the provisions of the *Bank Act* before the security was given, the security is void against creditors of HEL and against subsequent purchasers or mortgagees in good faith.

The Trustee has also determined that the section 427 *Bank Act* security is ineffective and fails to create a security interest in any of the Assets because of the inadequacy of the description of the property to be charged by the agreement (see page 13 of this Determination).

12. Effectiveness of the Security Agreements

According to s.10 of the PPSA, a security agreement is effective according to its terms.

The Trustee has determined that:

(a) The terms of the GABD are effective to provide a security interest in the Assets described in it and, in particular, in the Assets described in Schedule C;

(b) For the reasons set out in paragraph 9(b), the terms of the Debenture are effective to provide a security interest in all of the Assets other than Assets which are charged by Permitted Encumbrances.

The Security Interest in such Assets is held in trust by CIBC for the Permitted Encumbrancers as security for the debt owed to the Permitted Encumbrancer and intended to be secured by the Permitted Encumbrancer's security agreement, whether or not the security of such Permitted Encumbrancer has been properly perfected under the PPSA.

(c) The terms of the GSA are effective to provide a security interest in all of the Assets other than Assets which are charged by Permitted Encumbrances; however, for the reasons set out in paragraph 9, the Trustee has determined that no security interest in the Assets exists by virtue of the GSA.

If the Trustee is incorrect in determining that no security interest exists by virtue of the GSA, the Trustee has determined that any security interest of CIBC in Assets charged by a Permitted Encumbrance is held in trust by CIBC for the Permitted Encumbrancers as security for the debt owed to the Permitted Encumbrancers and intended to be security by the Permitted Encumbrancer's security agreement, whether or not the security of such Permitted Encumbrancer has been properly perfected under the PPSA.

(d) The PPSA does not apply to *Bank Act* Security; however, for the reasons more fully set out in paragraph 9, the Trustee has determined that the description of the property intended to be charged is so imprecise as to make the section 427 security agreement ineffective.

Canadian Banking Law, 2nd edition, Carswell, M.H. Ogilvie, at p.362; *Hawker v. Royal Bank* (1921), 59 D.L.R. 674 (Sask.K.B.); *Battle Island Paper Co. v. Molsen's* (1917), 38 D.L.R. 372.

13. Attachment

Pursuant to the terms of the PPSA, a security interest, including a security interest in the nature of a floating charge in collateral contained in a security agreement attaches when value is given and the Debtor has rights in the collateral.

The *Bank Act* Security

As the PPSA does not apply, concepts of attachment are not relevant to the *Bank Act* Security.

The GABD and the Debenture

CIBC gave value by providing credit facilities to HEL as described in the Credit Agreements referred to in paragraph 8. It was a condition of each of the Credit Agreements that the GABD and Debenture be provided as security for the credit facilities.

HEL had rights in all of the Assets which constitute collateral under the GABD and the Debenture on the Date of Bankruptcy.

The Debenture contains a floating charge. The law is clear that the use or existence of a floating charge debenture does not indicate an intention to delay attachment until crystallization. Use of floating charge form of security does not invoke the floating charge law. The charge and its priority are governed by the PPSA.

> Introduction to the New Brunswick Personal Property Security Act, Catherine Walsh (1985), p.85; Atlantic Personal Property Security Act Handbook, 4th ed., Cummings & Wood, at p.152.

The GSA

The GSA attached when given in January of 2000.

The GSA was provided in furtherance of the ’98 Credit Agreement and Value was provided by CIBC’s continuing to make the Credit Facilities available to HEL.

However, in April 2000, a new Credit Agreement was entered into, under which only specific itemized security was required. The GSA was not required. Existence of a GSA was not a condition of the provision of the Credit Facility. The Facilities were made available to HEL without any requirement for the GSA. No value was given by CIBC to HEL for continuance of the GSA.

14. Perfection

A security interest is perfected when it has attached and all steps required for its perfection under the PPSA have occurred.

The Trustee has determined that the security interests which the Trustee has determined are valid, namely:

(a) the GABD; and

(b) the Debenture

have been perfected as:

(a) the Trustee has determined they have attached; and
(b) CIBC has made the following registrations under the PPSA:

Registration Number 1063565 at the PPR dated June 29, 2001 with an expiry date of June 29, 2006 contains the following information:

Security
GENERAL DESCRIPTION COLLATERAL
all accounts, debts, claims, choses in action and receivables and also all securities, instruments, documents of title, chattel paper, intangibles, money (all as defined in PPSA) bills, notes, and other documents electronically stored data, books of account, and other books and records, evidencing or relating to the collateral or the proceeds therefrom which now are or which may be any time hereafter be due or owing to or owned by the debtor.
Proceeds: goods, securities, instruments, documents of title, chattel paper, intangibles, fixtures, money, crops or licenses as defined in PPSA, derived directly or indirectly from any dealings with collateral.
Debtor: Hickman Equipment (1985) Limited
Secured Party: Canadian Imperial Bank of Commerce
PRE-PPSA INFORMATION
16040
Assignment of Book Debts Act, 1985-01-16

Registration Number 1403243 at the PPR dated November 29, 2001 with an expiry date of November 29, 2006 contains the following information:

Security
GENERAL DESCRIPTION COLLATERAL
all of the debtor's present and after acquired personal property as defined in PPSA.
Debtor: Hickman Equipment (1985) Limited
Secured Party: Canadian Imperial Bank of Commerce

ADDITIONAL INFORMATION
Demand debenture dated Jan 7, 1985, registration number roll 77, frame 70, registration date January 29, 1985, registrar of deeds, Newfoundland.

PRE-PPSA INFORMATION
77-70
Registration of Deeds Act, 1985-01-29

In addition, CIBC has made the following Registration under the provisions of the PPSA:

Registration Number 78490 at the PPR dated January 28, 2000 with an expiry date of January 28, 2005:

Security
GENERAL DESCRIPTION COLLATERAL
all the debtor's present and after acquired personal property as defined in PPSA.
Debtor: Hickman Equipment (1985) Limited
Secured Party: Canadian Imperial Bank of Commerce

Section 24 of the Regulations permits a description of collateral by item or kind *or* by reference to, "goods", "document of title", "chattel paper", "security", "instrument", "money" or "intangible"; a statement that a security interest is taken in all of the debtor's present or after-acquired personal property; or a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except one or more of the following: "goods", "documents of title", "chattel paper", "security", "instrument", "money" or "intangible".

The description in Registration Numbers 1063565 and 1403243 are in compliance with the requirements of the Regulations. By operation of s.26 of the PPSA, the registrations qualify as a perfection step with respect to CIBC's security interest in the Assets in which a security interest is created by the GABD and the Debenture.

15. Effective Date of Perfection

It is the Trustee's determination that the effective date of perfection of the security interest claimed by CIBC for the purpose of s.36 of the PPSA are as follows:

(a) the GABD is January 16, 1985; and

(b) the Debenture is January 29, 1985.

If the GSA constitutes a valid security interest, which the Trustee has determined it does not, the effective date of its perfection is January 28, 2000.

Basis of Determination

The GABD and the Debenture are prior security interests as defined in s.74(1)(c) of the PPSA.

Under s.75 of the PPSA, a prior security interest that is covered by an unexpired registration under prior registration law, is considered to have been registered and perfected under the PPSA as of the time of registration under the prior registration law and to maintain that status for 2 years after the commencement of the PPSA.

If the security interest is registered in accordance with the Act within 2 years of the Act's commencement, its perfected status effective as at the date of its original registration under the prior law is continued.

Each of the GABD and the Debenture were registered under the prior law and were covered by an unexpired registration under the prior registration law on the date of commencement of the Act.

The Regulations set out in s.26, the requirements for registration under the PPSA, section 26 provides that where a financing statement is registered under s.75 to continue the registered and perfected status of a prior security interest covered by an unexpired registration under prior registration law, the registrant shall:

(a) indicate under which prior registration law the security interest to which the registration relates is registered;

(b) enter the registration number under prior registration law;

(c) except in the case of a prior security interest covered by a registration under the *Registration of Deeds Act*, indicate the venue in which the registration under prior registration law is registered;

(d) in the case of a prior security interest covered by a registration under the *Registration of Deeds Act*, indicate that the registration was made under that Act; and

(e) enter the date on which registration became effective under prior registration law, with the number of the year entered first followed by the number of the month followed by the number of the day.

As appears from the particulars set out above concerning the Registrations made by CIBC under the PPSA, the requirements of s.26 of the Regulations have been satisfied so as to continue the perfection of the GABD and the Debenture from the date of their original registration under the prior law and the Trustee so determines.

A question has been raised as to whether or not s.26 required CIBC in its financing statement to provide particulars of the registration under prior law of the Original Debenture and each of the Supplementary Debentures.

The Trustee has determined that s.26 does not so require.

There is and has always been only One Debenture consisting of the Original Debenture dated January 27, 1995, and a series of Supplementary Debentures, each of which is expressly declared to be supplementary to and form one instrument with the Original Debenture and such Supplementary Debentures as already exist.

Each Supplemental Debenture contains the following (with appropriate variations depending on the number of Supplemental Debentures then in existence):

> 3. The Company hereby declares, covenants and agrees with the Bank that (a) this Supplemental Debenture shall be supplementary to and form one instrument with the Debenture, the 1990 Supplemental Debenture, the 1997 Supplemental Debenture and the 1997 Second Supplemental Debenture, (b) the Debenture, the 1990 Supplemental Debenture, the 1997 Supplemental Debenture and the 1997 Second Supplemental Debenture by this reference shall be incorporated herein with the same effect as if set forth at length herein and shall for all purposes be deemed to form part hereof, and (c) unless there is something in the subject or context inconsistent herewith, expressions used in this Supplemental Debenture shall have the same meaning as ascribed to corresponding expressions in the Debenture, the 1990 Supplemental Debenture, the 1997 Supplemental Debenture and the 1997 Second Supplemental Debenture;
>
> 4. The Company hereby declares, covenants and agrees with the Bank that the Debenture, 1990 Supplemental Debenture, the 1997 Supplemental Debenture and the 1997 Second Supplemental Debenture and all covenants, provisions, agreements and power contained therein and supplemented or amended by this Supplemental Debenture and the lien and security created thereby are in all respects confirmed and preserved."

There being only One Debenture, there is only one prior security interest as defined in s.74(1)(c) of the Act created which needs to be continued under the PPSA.

The date upon which the Debenture was registered under the prior law is the original date of registration.

If the Trustee is wrong in respect of the foregoing, it is its determination that the omission is not seriously misleading and the registration is effective notwithstanding the omission.

The PPSA provides in section 44(7) that:

> "The validity of the registration of a financing statement is not affected by any defect, irregularity, omission or error in the financing statement unless the defect, omission or error is seriously misleading."

The PPSA creates a notice system of registration. The object of registration under the PPSA is not to provide a searcher with precise particulars of the security interest claimed or the debt it secures; it is to provide notice that a person claims a security interest in a particular asset or class of assets.

A subsequent lender is put on notice of the existence of a security interest in an asset or class of assets and permitted to make inquiry of the particulars of the security. Failure to provide particulars of the registration under prior law of the amending debenture would not result in a person being seriously misled. A person conducting a search would have notice of the Debenture. If affected, a person can and should make inquiry pursuant to section 19 of the Act.

It is the particulars provided by the security holder after inquiry on which the subsequent lender is entitled to rely (see PPSA, section 19 and Commentary, An Introduction to the New

Brunswick Personal Property Security Act, Catherine Walsh, 1995, at pp.99-101 and Alberta Personal Property Security Act Handbook, 4th ed., Cummings and Wood at pp.179-184.

16. PMSI

CIBC does not assert an entitlement to a PMSI in any of the Assets.

17. Proceeds

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

The Trustee does not believe CIBC is asserting a claim to proceeds; however, the Trustee has made no determination with respect to competing claims to proceeds as with respect to this is an issue of priority and not within the Trustee's mandate under the Claims Plan. However, the Trustee has outlined below the statutory requirements that must be met by a secured party in order to assert a claim to proceeds from the disposition of collateral as against other secured creditors.

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

Subsection 29(3) provides for three instances where perfection in proceeds is automatic and continuous. A security interest in proceeds is a continuously perfected security interest where the interest in the original collateral is perfected by a registration of a financing statement under s.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 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 institutions.

If proceeds do not fall intone of these categories, s.29(4) of the PPSA requires registration with respect to the proceeds collateral within 15 days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.

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

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

18. Additional Comments on Priorities

While it is not within the mandate of the Trustee to determine priorities, it nevertheless offers the following comments in order to provide assistance to any creditor who may also have a valid perfected security interest in the Asset(s) and wishes to determine, for its own benefit, the relative ranking of security and creditors with respect to same.

The Trustee is aware of a priority agreement made between CIBC and John Deere Limited which is specifically referred to in the Credit Agreements. It is also aware of a priority agreement made between General Motors Acceptance Corporation, CIBC and HEL.

19. Auction Proceeds

As CIBC claims a security interest in all of the Assets for the Total Debt, the Trustee has not listed Auction Proceeds for Assets in which CIBC claims a security interest. The Auction Proceeds are set out in a report on the Receiver's website.

SCHEDULE A

MARCH 13, 2002

Term Loan 63 / 5881-054	
Principal:	$12,246,055.62
Interest Accrued (Pre-Class.):	48,849.25
Accrued Interest (Current):	33,411.67
Fees (Pre-Class):	680.00
Total	$ 12,328,996.54
Term Loan 63 / 5181-151	
Principal:	$ 2,935,458.77
Interest Accrued (Pre-Class.):	13,109.00
Accrued Interest (Current):	8,042.35
Total	$ 2,956,610.12
Term Loan 63 / 3900-754	
Principal:	$ 24,100.00
Interest Accrued (Pre-Class.):	72.90
Accrued Interest (Current):	60.75
Total	$ 24,233.65
Operating Account 63 / 5881-054	
Principal:	$ 16,683.64
Interest Accrued:	0.00
Total	$ 16,683.64
Letters of Guarantee	
Total Outstanding	$ 107,000.00
Total Liabilities	**$ 15,433,523.95**

Schedule B

Canadian Imperial Bank of Commerce

St. John's CBC
Box 340
St. John's, NF
A1C 5J9

June 19, 2000

HICKMAN EQUIPMENT (1985) LIMITED
P.O. Box 8340, Station A
St. John's, NF
A1B 3N7
Attention: Mr. Howard Hickman
Mr. Garry Bishop

Dear Mr. Hickman and Mr. Bishop,

We, Canadian Imperial Bank of Commerce ("CIBC"), are pleased to establish the following Credits for you, our customer.

Credit A: Operating Line

Credit Limit: The lesser at any time of:

(a) $15,000,000; and

(b) the total of

- 75% of the Receivable Value, plus
- 65% of the Inventory Value, except this amount cannot 50% of the outstandings, minus
- all Priority Claims

Description and Rate: A revolving demand credit, for general business purposes, as follows:

(1) **Canadian dollar loans and overdrafts**. The interest rate is as follows: Prime Rate plus 1.00%:

(2) **Canadian dollar or foreign currency L/Cs**. The total amount of the L/Cs outstanding at any time may not exceed $500,000. L/Cs may not have terms to expiry of more than 12 months. Fees are CIBC standard L/C fees, minimum $250, plus out of pocket expenses. Our standard L/C documentation is also required.

If there is a drawing under any L/C, we will pay it by drawing on your Operating Account, unless you have made other arrangements with us.

Credit B: Demand Installment Loan

Loan Amount:	$96,100
Purpose:	Renewal of existing facility.
Interest Rate:	Prime Rate plus 0.85% per year.
Scheduled Payments:	Unless we make demand, you will pay CIBC as follows: Regular monthly payments of $3,600 each, plus interest.

Security

Security:	The following security is required:
Assignment of Receivables:	General assignment of accounts receivable.
Bank Act Security:	Security under Section 427 of the Bank Act.
Debenture:	Floating charge debenture for $20,000,000 giving CIBC a first charge over all assets subject to a Priority Agreement dated July 5, 1985, with John Deere Limited, plus acknowledged assignment of fire and other perils insurance, with loss payable to CIBC.
Guarantee:	Guarantee and Postponement of Claim from Group Holdings Limited in an amount that is unlimited and supported by:
Debenture:	Fixed charge debenture for $3,000,000 giving CIBC a first charge over the following properties: 504 Water Street, St. John's, NF 6 Stratford Place, St. John's, NF "HBC Site", Placentia, NF 1 Grenfell Heights, Grand Falls, NF 15 Bayley Street, Grand Falls, NF 239 Main Street, Burin, NF 166 Bayview, Fortune, NF 162-164 Bayview, Fortune, NF and a floating charge over all your business assets, plus acknowledged assignment of fire and other perils insurance, with loss payable to CIBC as first mortgagee.

This fixed debenture is also held as security for the Credit Facilities of Group Holdings Ltd., Hickman Leasing Ltd., Hickman Motors Ltd., and 10067 Newfoundland Ltd.

Postponement of claim signed by Hickman Motors Limited for $1,000,000.

Covenants

Covenants:

You will ensure that:

Minimum Equity: The customer will ensure, determined on an non-consolidated basis, of (A) its shareholders' equity less "Due from related companies", "Investments in related companies", and "Intangible assets" plus (B) such subordinated debt shareholders' equity is not at any time less than $7,500,000.

Interest Coverage Ratio: Your Interest Coverage Ratio is not at any time less than 1.75:1.

Negative Pledge: There is no Lien on any of your present or future assets, and that you do not assign any right to any income, without our prior consent (which consent will not be unreasonable with held), except for the four exceptions below, namely:

(a) a Purchase Money Lien

(b) a Lien existing on an asset when it was acquired;

(c) a renewal or replacement of a Purchase Money Lien or a Lien referred to in (b) above, so long as the principal amount secured by the Lien does not increase; or

(d) a Normal Course Lien

Reporting Requirements

Reporting Requirements:

You will provide:

(1) Within 30 days of each calendar month-end, a summary of Receivable Value and a summary of Inventory Value, together with an aged list of receivables and an aged list of accounts payable and a Monthly Statement of Available Credit Limit, as of that month-end. Detailed Account receivable listings to be provided as at June 30 each year.

(2) Within 30 days of the end of each month, financial statements for that month.

(3) Within 120 days of each fiscal year-end, financial statements for that fiscal year on an audited basis.

(4) Within 120 days of each fiscal year-end, financial statements from the Guarantor for that fiscal year on an audited basis.

(5) Within 120 days of each fiscal year-end, a business plan/forecast for the next fiscal year.

Fees

Standby:	For the Credit A, 0.25% per year of the undrawn portion, payable monthly.
Set-up:	Waived.
Review:	A fee of $5,000.
Amendment:	If you require an amendment to this Agreement, there will be a fee of 0.25% of the amended amount requested, with a minimum of $500.

Pricing Protection. The customer acknowledges that each fee, interest rate and other charge for all the Customer's banking arrangements with CIBC is priced dependent upon the others. If the Customer cancels any of those banking arrangements, the Customer agrees to be bound to any increased or added fees, interest rates, and charges (as CIBC may determine and notify the Customer), effective from the date of such cancellation.

Other Provisions

Calculations:	When applicable, the calculations made under the "Covenants" and "Reporting Requirements" sections of this Agreement are to be done on an unconsolidated basis.
Interest Rate Applicable to Credit Limit Excesses:	Prime Lending Rate plus 5% per year. If the Credit Limit of a Credit, or the Credit Limit of part of a Credit, or the Overall Credit Limit, is exceeded at any time, the Interest Rate Applicable to Credit Limit Excesses is calculated on that excess amount.
Next Scheduled Review Date:	We will review the credit by August 31, 2000. At that time, we will review your financial statements, your forecast business and financial plans, and how well you have complied with the requirements of this Agreement. The terms of this Agreement will continue to apply until either a new Agreement or an Amendment to this one is settled.

Standard Credit Terms: The attached Schedule - Standard Credit Terms forms part of this Agreement.

Please indicate your acceptance of these terms by returning a signed copy of this Agreement.

Upon acceptance, this Agreement replaces the existing credit agreement dated April 18, 2000, between you and CIBC. Outstanding amounts (and security) under that Agreement will be covered by this Agreement.

Yours truly,

Canadian Imperial Bank of Commerce

by: _____

John Webber
Director

Phone: 709 576-8996
Fax: 709 576-8744

by: _____

Susan Ewanick
Commercial Lending Specialist

Phone: 709 576-8789
Fax: 709 576-8744

Acknowledgment: The undersigned certifies that all information provided to CIBC is true, and acknowledges receipt of a copy of this Agreement (including any Schedules referred to above).

Accepted this 6 day of July, 2000.

HICKMAN EQUIPMENT (1985) LTD.

By: _____ By: _____

Name: H.T. Hickman Name: A Hickman

Title: Director Title: Director

Guarantor

Group Holdings Ltd.

By: _____ By: _____

Name: H.T. Hickman Name: A Hickman.

Title: Director Title: Director

Schedule - Standard Credit Terms

Article 1 - General

1.1 **Interest Rate.** You will pay interest on each Credit at nominal rates per year equal to:

(a) for amounts above the Credit Limit of a Credit or a part of a Credit or the Overall Credit Limit, as described in section 1.4, or for amounts that are not paid when due, the Interest Rate Applicable to Credit Limit Excesses, and

(b) for any other amounts, the rate specified in this Agreement.

1.2 **Variable interest.** Each variable interest rate provided for under this Agreement will change automatically, without notice, whenever the Prime Rate changes.

1.3 **Payment of interest.** Interest is calculated on the daily balance of the Credit at the end of each day. Interest is due once a month, unless the Agreement states otherwise. Unless you have made other arrangements with us, we will automatically debit your Operating Account for interest amounts owing. If your Operating Account is in overdraft and you do not deposit to the account an amount equal to the monthly interest payment, the effect is that we will be charging interest on overdue interest (which is known as compounding). Unpaid interest continues to compound whether or not we have demanded payment from you or started a legal action, or get judgment, against you.

1.4 **Interest Rate Applicable to Credit Limit Excesses.** To determine whether the Interest Rate Applicable to Credit Limit Excesses is to be charged, the following rules apply:

(a) Interest Rate Applicable to Credit Limit Excesses will be charged on the amount that exceeds the Credit Limit of any particular Credit. This will happen even if the Overall Credit Limit has not been exceeded.

(b) If there are several parts of a Credit, Interest Rate Applicable to Credit Limit Excesses will be charged if the Credit Limit of a particular part is exceeded. For example, if Credit A's limit is $250,000, and the limit of one part is $100,000 and the limit of that part is exceeded by $25,000, the Interest Rate Applicable to Credit Limit Excesses will be charged on that $25,000 excess, even if the total amount outstanding under Credit A is less than $250,000.

(c) To determine if the Overall Credit Limit has been exceeded, the outstanding principal amount of each Credit is totalled, and any amounts in foreign currency are converted to Canadian dollars. If that total exceeds the Overall Credit Limit, the Interest Rate Applicable to Credit Limit Excesses will be charged on that excess amount. For example, if there are three Credits, each with a Credit Limit of $100,000 and an Overall Credit Limit of $250,000, if each of those Credits is at $90,000, they are each under their own Credit Limits, but the Overall Credit Limit has been exceeded by $20,000, and the Interest Rate Applicable to Credit Limit Excesses will be charged on that excess amount.

1.5 **Fees.** You will pay CIBC's fees for each Credit as outlined in the Letter. You will also reimburse us for all reasonable fees (including legal fees) and out-of-pocket expenses incurred in registering any security, and in enforcing our rights under this Agreement or any security. We will automatically debit your Operating Account for fee amounts owing.

1.6 **Our rights re demand Credits.** At CIBC, we believe that the banker-customer relationship is based on mutual trust and respect. It is important for us to know all the relevant information (whether good or bad) about your business. CIBC is itself a business. Managing risks and monitoring our customers' ability to repay is critical to us. We can only continue to lend when we feel that we are likely to be repaid. As a result, if you do something that jeopardizes that relationship, or if we no longer feel that you are likely to repay all amounts borrowed, we may have to act. We may decide to act, for example, because of something you have done, information we receive about your business, or changes to the economy that affect your business. Some of the actions that we may decide to take include requiring you to give us more financial information, negotiating a change in the interest rate or fees, or asking you to get further accounting assistance, put more cash into the business, provide more security, or produce a satisfactory business plan. It is important to us that your business succeeds. We may, however, at our discretion, demand immediate repayment of any outstanding amounts under any demand Credit. We may also, at any time and for any cause, cancel the unused portion of any demand Credit. Under normal circumstances, however, we will give you 30 days' notice of any of these actions.

1.7 **Payments.** If any payment is due on a day other than a Business Day, then the payment is due on the next Business Day.

1.8 **Applying money received.** If you have not made payments as required by this Agreement, or if you have failed to satisfy any term of this Agreement (or any other agreement you have that relates to this Agreement), or at any time before default but after we have given you appropriate notice, we may decide how to apply any money that we receive. This means that we may choose which Credit to apply the money against, or what mix of principal, interest, fees and overdue amounts within any Credit will be paid.

1.9 **Information requirements.** We may from time to time reasonably require you to provide further information about your business. We may require information from you to be in a form acceptable to us.

1.10 **Insurance.** You will keep all your business assets and property insured (to the full insurable value) against loss or damage by fire and all other risks usual for property such as yours (plus for any other risks we may reasonably require). If we request, these policies will include a loss payee clause (and if you are giving us mortgage security, a mortgagee clause). As further security, you assign all insurance proceeds to us. If we ask, you will give us either the policies themselves or adequate evidence of their existence. If your insurance coverage for any reason stops, we may (but do not have to) insure the property. We will automatically debit your Operating Account for these amounts. Finally, you will notify us immediately of any loss or damage to the property.

1.11 **Environmental.** You will carry on your business, and maintain your assets and property, in accordance with all applicable environmental laws and regulations. If (a) there is any release, deposit, discharge or disposal of pollutants of any sort (collectively, a "Discharge") in connection with either your business or your property, and we pay any fines or for any clean-up, or (b) we suffer any loss or damage as a result of any Discharge, you will reimburse CIBC, its directors, officers, employees and agents for any and all losses, damages, fines, costs and other amounts (including amounts spent preparing any necessary environmental assessment or other reports, or defending any lawsuits) that result. If we ask, you will defend any lawsuits, investigations or prosecutions brought against CIBC or any of its directors, officers, employees and agents in connection with any Discharge. Your obligation to us under this section continues even after all Credits have been repaid and this Agreement has terminated.

1.12 **Consent to release information.** We may from time to time give any credit or other information about you to, or receive such information from, (a) any financial institution, credit reporting agency, rating agency or credit bureau, (b) any person, firm or corporation with whom you may have or propose to have financial dealings, and (c) any person, firm or corporation in connection with any dealings you have or propose to have with us. You agree that we may use that information to establish and maintain your relationship with us and to offer any services as permitted by law, including services and products offered by our subsidiaries when it is considered that this may be suitable to you.

1.13 **Our pricing policy.** Fees, interest rates and other charges for your banking arrangements are dependent upon each other. If you decide to cancel any of these arrangements, you will have to pay us any increased or added fees, interest rates and charges we determine and notify you of. These increased or added amounts are effective from the date of the changes that you make.

1.14 **Proof of debt.** This Agreement provides the proof, between CIBC and you, of the credit made available to you. There may be times when the type of Credit you have requires you to sign additional documents. Throughout the time that we provide you credit under this Agreement, our loan accounting records will provide complete proof of all terms and conditions of your credit (such as principal loan balances, interest calculations, and payment dates).

1.15 **Renewals of this Agreement.** This Agreement will remain in effect for your Credits for as long as they remain unchanged. We have shown a Next Scheduled Review Date in the Letter. If there are no changes to the Credits this Agreement will continue to apply, and you will not need to sign anything further. If there are any changes, we will provide you with either an amending agreement, or a new replacement Letter, for you to sign.

1.16 **Confidentiality:** The terms of this Agreement are confidential between you and CIBC. You therefore agree not to disclose the contents of this Agreement to anyone except your professional advisors.

1.17 **Pre-conditions.** You may use the Credits granted to you under this Agreement only if:

(a) we have received properly signed copies of all documentation that we may require in connection with the operation of your accounts and your ability to borrow and give security;
(b) all the required security has been received and registered to our satisfaction;
(c) any special provisions or conditions set forth in the Letter have been complied with; and
(d) if applicable, you have given us the required number of days notice for a drawing under a Credit.

1.18 **Notices.** We may give you any notice in person or by telephone, or by letter that is sent either by fax or by mail.

1.19 **Use of the Operating Line.** You will use your Operating Line only for your business operating cash needs. You are responsible for all debits from the Operating Account that you have either initiated (such as cheques, loan payments, pre-authorized debits, etc.) or authorized us to make. Payments are made by making deposits to the Operating Account. You may not at any time exceed the Credit Limit. We may, without notice to you, return any debit from the Operating Account that, if paid, would result in the Credit Limit being exceeded, unless you have made prior arrangements with us. If we pay any of these debits, you must repay us immediately the amount by which the Credit Limit is exceeded.

1.20 **Margin Requirements.** If your Operating Line is margined against Inventory and/or Receivable Value, the available Credit Limit of that Credit is the lesser of the Credit Limit stated in the Letter and the amount calculated using the Monthly Statement of Available Credit Limit.

1.21 **Instalment Loans.** The following terms apply to each Instalment Loan.

(a) **Non-revolving loans.** Unless otherwise stated in the Letter, any Instalment Loan is non-revolving. This means that any principal payment made permanently reduces the available Loan Amount. Any payment we receive is applied first to overdue interest, then to current interest owing, then to overdue principal, then to any fees and charges owing, and finally to current principal.

(b) **Floating Rate Instalment Loans.** Floating Rate Instalment Loans may have either (i) blended payments or (ii) payments of fixed principal amounts, plus interest, as described below.

(i) **Blended payments.** If you have a Floating Rate Loan that has blended payments, the amount of your monthly payment is fixed for the term of the loan, but the interest rate varies with changes in the Prime or US Base Rate (as the case may be). If the Prime or US Base Rate during any month is lower than what the rate was at the outset, you may end up paying off the loan before the scheduled end date. If, however, the Prime or US Base Rate is higher than what it was at the outset, the amount of principal that is paid off is reduced. As a result, you may end up still owing principal at the end of the term because of these changes in the Prime or US Base Rate.

(ii) **Payments of principal plus interest.** If you have a Floating Rate Loan that has regular principal payments, plus interest, the principal payment amount of your Loan is due on each payment date specified in the Letter. The interest payment is also due on the same date, but it is debited from your Operating Account one or two banking days later. Although the principal payment amount is fixed, your interest payment will usually be different each month, for at least one and possibly more reasons, namely: the reducing principal balance of your loan, the number of days in the month, and changes to the Prime Rate or US Base Rate (as the case may be).

(c) **Prepayment.** Unless otherwise agreed, the following terms apply to prepayment of any Instalment Loan:

(i) **Floating Rate Instalment Loans.** You may prepay all or part of a Floating Rate Instalment Loan (whether it is a Demand or a Committed Loan) at any time without notice or penalty.

(ii) **Fixed Rate Instalment Loans.** You may prepay all (but not part) of a fixed Rate Installment Loan, on the following condition. You must pay us, on the prepayment date, a prepayment fee equal to the greater of (A) three months' interest on the Loan, and (B) the interest rate differential for the remainder of the term of the Loan, determined in accordance with the standard formula used by CIBC in these situations.

(d) **Demand of Fixed Rate Demand Instalment Loans.** If you have a Fixed Rate Demand Instalment Loan and we make demand for payment, you will owe us (i) all outstanding principal, (ii) interest, (iii) any other amount due under this Agreement, and (iv) a prepayment fee. The prepayment fee is equal to the interest rate differential for the remainder of the term of the loan, in accordance with the standard formula used by CIBC in these situations.

Article 2 - Bankers' Acceptances

2.1 **Definitions.** In this Article, the following terms have the following meanings:

"Bankers' Acceptance" or *"B/A"* means a Canadian dollar Draft that we have accepted under this Agreement.

"Commerce Acceptance Rate" means the variable reference rate that we declare from time to time as our stamping or acceptance fee for Drafts accepted by us.

"*Draft*" means, at any time, either a depository bill within the meaning of the *Depository Bills and Notes Act* or a bill of exchange within the meaning of the *Bills of Exchange Act*, in blank, drawn by the Customer on us (in satisfactory form), but before we have accepted it.

2.2 **Availability.** B/As are available only with terms to maturity of between 30 and 180 days.

2.3 **Minimum issue amount.** You will present Drafts for acceptance in a minimum amount of $1 million. We can change this minimum amount at any time by 30 days' prior written notice.

2.4 **Required Notice.** You may either obtain a new advance by issuing a B/A stamped by CIBC (including a rollover of an existing B/A) or you may convert an amount outstanding under another Credit to issuance of a B/A on the following terms. You must give us notice (in the form we require, including, when applicable, the date of acceptance, the amount and the maturity date). Notice must be given by 10:00 a.m. (local time where the CIBC Branch/Centre is located) on the Business Day prior to the requested date of issuance. You must also give us any other notice required by the Letter.

2.5 **Special Conditions.**

(a) **Draft Conditions.** You will deliver to us the Drafts that you want us to issue. Each Draft must (i) be in a whole multiple of C$100,000, (ii) be dated the date of delivery (which will be the same date as the requested date you notified us); (iii) mature on a Business Day; and (iv) be presented to the CIBC Branch/Centre for acceptance by 12:00 noon on the date of delivery (unless you have made prior arrangements in writing with us).

(b) **Maturity Limitation.** The maturity date of a Draft submitted to us for acceptance may not (i) be after a scheduled or mandatory final maturity or termination date for that Credit or (ii) conflict, in our opinion, with any scheduled or mandatory repayment for that Credit.

(c) **Conversion-To-Loan Limitation.** You may only convert a B/A into a loan otherwise allowed under this Agreement if the total of "A" plus "B" is less than Prime Rate existing on that maturity date, where:

"A" is the annual discount rate quoted at 9:30 a.m. (Toronto time) by the Toronto office of Wood Gundy Inc. as the discount rate at which it would purchase a bankers' acceptance issued by CIBC having a term to maturity of 30 days, and

"B" is the annual stamping or acceptance rate applicable to a Draft accepted by us under this Agreement, as determined on the maturity date of that B/A.

In making these calculations, each of "A" and "B" is expressed as a percentage.

2.6 **Stamping Fee.** When we accept a Draft under this Agreement, you will pay us a stamping fee, on the date of acceptance, in the amount as set out in the Letter. The stamping fee will be calculated on the face amount of that Draft for the number of days to maturity based on a 365 day year.

2.7 **Reimbursement.** B/As are negotiable instruments that are purchased in financial markets at a discount. Market forces determine what the discount amount for B/As is at any particular time. At maturity, the holder of a B/A redeems it from CIBC. We then pay the holder the face amount. You will, therefore, reimburse us at the maturity date for the face amount of all B/As that we have accepted for you, unless you convert those amounts to another Credit (assuming all proper notice has been given). If you do not reimburse us or convert those amounts to another Credit, we may convert them to any type of loan (if available) under any Credit.

2.8 **Signatures and Safekeeping.** All Drafts must either be signed by a properly authorized signing officer or bear a mechanically reproduced facsimile signature of that officer (subject to any prior written arrangements with us). Each Draft and B/A bearing a facsimile signature of that officer will be as binding on you as if it had been manually signed by that officer. This applies even for individuals who may no longer be authorized or otherwise be an officer at any time. You will compensate us for any loss or expense relating to any Draft or B/A that we deal with under this Agreement. We need only exercise the same degree of care in safekeeping executed Drafts delivered to us for future acceptance as if they were CIBC's property and we were keeping them at the place at which they are to be held.

2.9 **Credit Cancellation.** If your B/A Credit is terminated for any reason, we may require you to pay us immediately on demand the appropriate reimbursement amount for each B/A then outstanding. We will calculate the reimbursement amount in accordance with standard practice in the banking industry in Canada. After making this payment, (a) you will have no further liability for that B/A, and (b) we will (i) become the sole party liable under the B/A, and (ii) compensate you if you have to pay anyone else under that B/A.

2.10 **Waiver.** You will not claim any days of grace for the payment of a B/A. You waive any defence to payment which might otherwise exist if for any reason a B/A is held by us in our own right at its maturity.

2.11 **Obligations Absolute.** Your obligations for Drafts and B/As are unconditional and irrevocable. You will perform your obligations strictly in accordance with the provisions of this Agreement including, among other things, (a) any lack of validity or enforceability of a Draft accepted by us as a B/A, and (b) the existence of a claim, set-off, defence or other right which you may have against the holder of a B/A, CIBC or another person.

Article 3 - Definitions

3.1 **Definitions.** In this Agreement, the following terms have the following meanings:

"Business Day" means any day (other than a Saturday or a Sunday) that the CIBC Branch/Centre is open for business.

"CIBC Branch/Centre" means the CIBC branch or banking centre noted on the first page of this Agreement, as changed from time to time by agreement between the parties.

"Credit" means any credit referred to in the Letter, and if there are two or more parts to a Credit, "Credit" includes reference to each part.

"Credit Limit" of any Credit means the amount specified in the Letter as its Credit Limit, and if there are two or more parts to a Credit, "Credit Limit" includes reference to each such part.

"Current Assets" are cash, accounts receivable, inventory and other assets that are likely to be converted into cash, sold, exchanged or expended in the normal course of business within one year or less, excluding amounts due from related parties.

"Current Liabilities" means debts that are or will become payable within one year or one operating cycle, whichever is longer. They usually include accounts payable, accrued expenses, deferred revenue and the current portion of long-term debt.

"Current Ratio" means the ratio of Current Assets to Current Liabilities.

"Debt to Effective Equity Ratio" means the ratio of X to Y, where
X is the total of all liabilities, less all Postponed Debt, and
Y is the total Shareholders' Equity, plus all Postponed Debt, less (i) amounts due from/investments in related parties and (ii) Intangibles.

"Interest Rate Applicable to Credit Limit Excesses", unless otherwise defined in the Letter, means the Standard Overdraft Rate.

"Demand Instalment Loan" means an Instalment Loan that is payable upon demand. Such a Loan may be either at a fixed or a floating rate of interest.

"Fixed Rate Instalment Loan" means an Instalment Loan that is also a Fixed Rate Loan.

"Fixed Rate Loan" means any loan drawn down, converted or extended under a Credit at an interest rate which was fixed for a term, instead of referenced to a variable rate such as the Prime Rate or US Base Rate, at the time of such drawdown, conversion or extension. For purposes of certainty, a Fixed Rate Loan includes a LIBOR Loan.

"Floating Rate Instalment Loan" means either an Instalment Loan that is either a Prime Rate Loan or a Base Rate Loan.

"Instalment Loan" means a loan that is repayable either in fixed instalments of principal, plus interest, or in blended instalments of both principal and interest. A Demand Instalment Loan is repayable on demand. A Committed Instalment Loan is repayable only upon the occurrence of an Event of Default.

"Intangibles" means assets of the business that have no value in themselves but represent value. They include such things as copyright, patents and trademarks; franchises; licences; leases; research and development costs; and deferred development costs.

"Interest Coverage Ratio" means the ratio of earnings before interest and taxes to interest expense.

"Inventory Value" means the total value (based on the lower of cost or market) of your inventories (other than
(i) inventories supplied by trade creditors who at that time have not been fully paid and would have a right to repossess all or part of such inventories if you were then either bankrupt or in receivership,
(ii) work in process, and
(iii) those inventories we may from time to time designate.

"Letter" means the letter agreement between you and CIBC to which this Schedule and any other Schedules are attached.

"Letter of Credit" or *"L/C"* means a documentary or stand-by letter of credit, a letter of guarantee, or a similar instrument in form and substance satisfactory to us.

"L/C Acceptance" means a draft (as defined under the *Bills of Exchange Act* (Canada)) payable to the beneficiary of a documentary L/C which the L/C applicant or beneficiary, as the case may be, has presented to us for acceptance under the terms of the L/C.

"Monthly Statement of Available Credit Limit" means the CIBC form by that name, as it may from time to time be changed.

"Operating Account" means the account that you normally use for the day-to-day cash needs of your business, and may be either or both of a Canadian dollar and a US dollar account.

"Postponed Debt" means any debt owed by you that has been formally postponed to CIBC.

"Prime Rate" means the variable reference rate of interest per year declared by CIBC from time to time to be its prime rate for Canadian dollar loans made by CIBC in Canada.

"Prime Rate Loan" means a Canadian dollar loan on which interest is calculated by reference to Prime Rate.

"Priority Claims" means any amount owing to a creditor that ranks, or may rank, equal to or in priority to our security. These may include unremitted source deductions and taxes; other amounts owing to governments and governmental bodies; and amounts owing to creditors who may claim priority under the *Bankruptcy and Insolvency Act* or under a purchase money security interest in inventory or equipment.

"Receivable Value" means, at any time of determination, the total value of those of your trade accounts receivable, including accounts domiciled in the United States, that are subject to the security (other than those accounts:
(i) outstanding for 90 days or more,
(ii) owing by persons, firms or corporations affiliated to you, and
(iii) that we may from time to time designate).

"Shareholders' Equity" means paid-in capital, retained earnings and attributed or contributed surplus.

"Standard Overdraft Rate" means the variable reference interest rate per year declared by CIBC from time to time to be its standard overdraft rate on overdrafts in Canadian or US dollar accounts maintained with CIBC in Canada.

ACKNOWLEDGEMENT FOR RECEIPT OF TERMS LETTER

Name of Company: **HICKMAN EQUIPMENT (1985) LTD.**

Date of Terms Letter: **June 19/00**

Please acknowledge receipt by signing & dating below and return the original copy to my attention at CSSC – TR: 82213:

Risk Analyst: _____ **Date:** Aug 11/00

Per: Betty

Thanks,

Karalisa Johnson
Security Analyst
Tel: (416) 980- 5099
Fax: (416) 980-8150

Comments:

GROUP/CONNECTION: A.E. Hickman et al

CUSTOMER: Hickman Equipment (1985) Ltd.

CREDIT AGREEMENT DATE: 19-Jun-00

ACCOUNT TO DEBIT: 63 (transit) _____ (A/C #) * RA to complete

CLS/CAM: Susan Ewanick 709 576-8789

TYPE OF AGREEMENT

X	Credit Agreement
X	Amendment
	Renewal

NEW FUNDS/INCREASE	Increase
NEW SECURITY	No
CHANGE MARGIN	No
CHANGE COVENANTS	No
CHANGE PRICING	No
ATO APPROVED	No

ATO date: _____

LOAN RATE		%	refer to Cred Agree't
OVERDRAFT INTEREST RATE	P + 1.00	%	
OTHER BA, LIBOR, ETC		bps	
LETTER OF CREDIT FEE		%	
LOAN ADMIN FEE		/month	
Overdraft Excess Interest Rate	P + 5.00		

		Total anticipated
DISCHARGE FEE	/lot	
	/doc	

	Amount	Received	Due OR/Antic'd*
APPLICATION or CONSULTING FEES			
COMM'T FEE -ON SIGNING			
COMM'T FEE ON DRAWDOWN			
TOTAL ANTICIPATED FEE	$ -		
AMENDMENT/RENEWAL FEE	$ 3,750.00		
EXPOSURE FEE			
SITE VISIT FEE			every _days

RA to Advise

Revenue Collections

date collected	initials

STANDBY FEE	Unutilized CR Amt. From	To	Tier Rate
Tier 1			
Tier 2			
Tier 3			

RA Input to MIF

Diary Notes & Details (optional)

Operating Facility Increased to $15,000K from $13,500K

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **CIBC EQUIPMENT FINANCE LIMITED ("CEFL")**

1. Introduction

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

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

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

2. Summary Final Determination

It is the opinion of the Trustee that CEFL has not properly perfected its security interest in the Assets. Therefore, CEFL's claim is disallowed as a valid secured claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms:

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

"CSA"	-	*Conditional Sales Act*, R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"HLL"	-	Hickman Leasing Ltd.
"JD"	-	John Deere
"Old Registry"	-	The Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PMSI"	-	Purchase Money Security Interest

"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)

4. The Assets

CEFL has made a claim to 9 pieces of heavy equipment. At the time of bankruptcy all 9 pieces remained in the inventory of HEL and 8 of these remaining pieces were sold at the Receiver's auction (details below). However, as a result of the interlocutory application of Wells Fargo Equipment Finance Co., one piece (indicated by "*") was excluded from the auction by Court Order.

1. JD 330 LC Excavator (FF0330X080518)	2. JD 370 Excavator (FF0370X080344)*
3. JD 330 LC Excavator (FF0330X080456)	4. 330 LC Excavator (FF0330X080747)
5. Blaw Knox Pave (551028-64)	6. 850C Dozer (T0850CX888907)
7. 450H Dozer (T0450HX889199)	8. 200LC Excavator (FF0200X501362)
9. Timberjack Forwarder (17DD0305)	

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of

them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

Pursuant to the terms of the Court Order establishing the Claims Plan, this Final Determination determines the validity of security claimed and whether such security has been properly perfected. For the assistance of readers, the Trustee has sometimes provided comments concerning the priority of such security vis-à-vis other parties but such

priority-related comments are made without prejudice to any position which may be taken at any future date by any other party in regards to priorities.

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

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

7. Overview of Claim

CEFL is claiming a security interest in the 9 pieces of heavy equipment listed above. The original security was taken with respect to 15 pieces, but it appears that 6 pieces were sold out of trust to third parties.

CEFL's Proof of Claim dated October 22, 2002 and the documents attached thereto indicate a total claim of **$3,141,130.09**. This is a secured claim.

The 9 assets can be broken into two groups as follows:

- 3 pieces that were registered at the Old Registry on October 4, 1999 - (# 1-3 in the list above).

- 6 pieces that were registered in the PPR on April 27, 2001 and again on May 3, 2001 (# 4-9 in the list above).

CEFL's claim with respect to these assets differs from the claims advanced by other creditors of HEL, since it arises from financing provided to HLL rather than HEL. The claim involves the operation of s.36(8) of the PPSA which addresses a transfer of secured collateral by a debtor where the transferee does not take free of the security interest. In such a case, the security interest given by the debtor would take priority over a prior-registered security interest covering after-acquired property of the transferee. The exception to this is where the secured party has actual knowledge of the transfer and fails to amend its financing statement to include the name of the transferee within the 15 day grace period imposed by s.52 of the Act.

A flow chart of the transactions at issue is set out in the flow charts attached hereto. CEFL's position is that it financed a sale of equipment from HEL to HLL, but that subsequent to this sale, HLL, as debtor, transferred the 9 pieces to HEL, without CEFL's knowledge or consent. As such, HEL, as transferee, does not take the 9 pieces free of CEFL's security interest. Rather, CEFL takes the position that its security interest in the 9 pieces is

preserved since it registered a financing statement naming HEL as debtor within 15 days of obtaining actual knowledge of the unauthorized disposition (s.36(8) and s.52 of the PPSA).

The analysis of the Claim requires 2 separate considerations:

1. The validity of CEFL's security as concerns its debtor, HLL.
2. The transfer of the assets from HLL to HEL and whether CEFL's security is preserved.

There is a further issue concerning amendments made by CEFL to it's registered security interests over the Assets that is explained in detail in Section 12 of this Final Determination.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.
ii. Proof of Claim dated October 22, 2002, and attachments thereto.

The 3 Assets:

iii. Assignment of Receivables dated September 29, 1999 between CEFL and HLL. This is with respect to the receivables for assets #1-3 in the list above.
iv. Guarantee and Indemnity dated September 29, 1999 in favour of CEFL whereby HEL is guarantor of the obligations of HLL.
v. Invoice from HEL dated July 27, 1999 to HLL for the 3 Excavators (#1-3 above)
vi. 3 separate leases dated September 1, 1999 between HLL and HEL for the 3 pieces:
    - **Lease # 741** JD 330 LC Excavator (FF0330X080518) (asset #1 above)
    - **Lease # 737** JD 370 Excavator (FF0370X080344) (asset #2 above)
    - **Lease # 738** JD 330 LC Excavator (FF0330X080456) (asset #3 above)
vii. Correspondence dated April 17, 2001 between CIT Financial Limited and HEL re: release of interest.
viii. 3 separate Conditional Sales Contracts (complete with a Delivery and Acceptance Certificate)between HLL (buyer/borrower) and HEL(seller) dated September 29, 1999:
    - Contract # - 556098 - Excavator (FF0330X080518).
    - Contract # - 556099 - Excavator (FF0330X080456).
    - Contract # - 556096 - Excavator (FF0370X080344).
ix. Copy of HEL blank cheque.
x. Copy of Newcourt wire transfer requisition for $2,268,899.92 payable to HLL.
xi. Copy of input information for wire transfer.
xii. Confirmation of wire transfer reference #9284173 for the amount of $2,268,899.92.

The 6 Assets:

xiii. Invoice from HEL to HLL dated December 29, 2000 to HLL with respect to five assets (#4-8 above).

xiv. Invoice from HEL to HLL dated January 10, 2001 for the sale of, *inter alia*, a, Timberjack Forwarder (#9 in the list above).

xv. 12 Separate leases between HLL and HEL:

- **Lease # 827** – Jan.1/01 - Excavator (FF0200X501362) **(#8 above).**
- **Lease # 828** – Jan.1/01 - Excavator (FF0200X501391).
- **Lease # 829** – Jan.1/01 - Excavator (FF0200X501453).
- **Lease # 830** – Jan.1/01 - Excavator (FF0330X080747) **(#4 above).**
- **Lease # 831** – Jan.1/01 - Crawler Dozer (T0450HX889199**).(#7 above)**
- **Lease # 832** – Jan.1/01 - Dozer (T0850CX888907**).(#6 above)**
- **Lease # 833** – Jan.1/01 - Loader (DWTC62H577315).
- **Lease # 834** – Jan.1/01 - Paver (551028-64) **(#5 above).**
- **Lease # 844** – Feb.1/01 - Forwarder (17DD0305).(**#9 above)**
- **Lease # 846** – Feb.1/01 - Harvester (01AB2122).
- **Lease # 851** – Feb.1/01 - Dynapac Model (58314351).
- **Lease # 852** – Feb.1/01 - Tramac Breaker (121444).

xvi. Correspondence dated April 23, 2001 between CEFL and Bombardier Capital Leasing addressing priorities.

xvii. Correspondence dated March 23, 2001 between CEFL and ABN AMRO Leasing addressing priorities.

xviii. Correspondence dated April 17, 2001 between CIT Financial Limited and HEL re: release of interest.

xix. Correspondence dated April 18, 2001 between John Deere Limited and CEFL addressing priorities.

xx. Correspondence dated April 2, 2001 between CEFL and G.E. Capital Canada Equipment Financing addressing priorities.

xxi. Correspondence dated March 23, 2001 between National Leasing Group Inc. and CEFL addressing priorities.

xxii. Correspondence dated April 9, 2001 between CEFL and Mellon Leasing addressing priorities.

xxiii. Undated correspondence between CEFL and Charter Financial Company addressing priorities.

xxiv. Correspondence dated May 7, 2001 between CEFL and CIBC addressing priorities.

xxv. Correspondence dated May 8, 2001 between GMAC and CEFL addressing priorities.

xxvi. Correspondence dated May 4, 2001 between Cyber Lease and T D Asset Finance Corp. addressing priorities.

xxvii. Correspondence dated May 16, 2001 between CEFL and Daimler Chrysler addressing priorities.

xxviii. Correspondence dated May 16, 2001 between CEFL and Wayburn Credit Union Limited addressing priorities.

xxix. Undated correspondence between Credit Union Central of Saskatchewan and CEFL addressing priorities.

xxx. Undated correspondence between Cooperative Trust Company of Canada and CEFL addressing priorities.

xxxi. Correspondence dated May 9, 2001 between Assinibola Credit Union Limited and CEFL addressing priorities.
xxxii. Undated correspondence between Biggar and District Credit Union Limited and CEFL addressing priorities.
xxxiii. Correspondence dated May 14, 2001 between CEFL and Kelvington Credit Union addressing priorities.
xxxiv. Correspondence dated May 9, 2001 between CEFL and Yorkton Credit Union Limited addressing priorities.
xxxv. Correspondence dated May 18, 2001 between CEFL and Cyber Lease Corporation addressing priorities.
xxxvi. Correspondence dated March 27, 2001 between CEFL and CIBC addressing priorities.
xxxvii. Undated correspondence between CEFL and Hickman Motors Limited addressing priorities.
xxxviii. Correspondence dated May 14, 2001 between Bank of Nova Scotia and CEFL addressing priorities.
xxxix. 6 separate Conditional Sales Contracts (complete with a Delivery and Acceptance Certificate)between HLL (buyer/borrower) and HEL(seller) dated May 29, 2001:
- Contract # 079472- Excavator (FF0330X080747).
- Contract # 079483- Paver (551028-64).
- Contract # 079474 - Dozer (T0850CX888907).
- Contract # 079473- Dozer (T0450HX889199).
- Contract # 165838- John Deere Excavator (FF0200X501362).
- Contract # 079486 - Timberjack Forwarder (17DD0305).

xxxvii. Wire transfer requisition for the amount of $2,978,778.10 payable to HEL.
xxxviii. Journal entry indicating wire transfer in the amount of $2,978.778.10 to HEL.
xxxix. Copy of an e-mail confirming wire transfer in the amount of $2,978,778.10 to HEL.

9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that the 9 assets were all held by HEL for sale or lease and as such, they form part of the inventory (s. 2(x) of the PPSA).

10. Application of the PPSA

CEFL financed the conditional sale of the 3 pieces by HEL to HLL in September 1999 and the conditional sale of the 6 pieces by HEL to HLL in May 2001. It is the opinion of the Trustee that by operation of s. 4, such transactions are governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13, 2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest relates and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-ppsa registration for purposes of priority. There are a number of conditions set out in the Act. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for the 3 pieces secured in 1999. The Trustee has confirmed that each of these has been registered in the Old Registry on October 4, 1998 and that they comply with the requirements set out in s.5 of the CSA.

In accordance with the transitioning provisions, CEFL registered 3 separate financing statements with respect to each of the conditional sales as follows:

- **Registration #1285157** dated October 16, 2001 naming HLL as debtor (amended by **Registration #1652447** on March 13, 2002 to add HEL as the debtor) contains the following description:

  > *JD 330 LC Excavator s/n FF0330X080456, 1999; together with all accessions, attachments and accessories, and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, money or intangibles.*
  >
  > *Pre-ppsa information continued by this registration: 742436-October 4, 1999 – Conditional Sales Act.*

- **Registration #1285120** dated October 16, 2001 naming HLL as the debtor (amended by **Registration #1652438** dated March 13, 2002 to add HEL as debtor) contains the following description:

  > *JD 330 LC Excavator s/n FF0330X080518, 1999; together with all accessions, attachments and accessories and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, monies or intangibles.*

Pre-ppsa registration information continued by this registration: 742439 – October 4, 1999 – Conditional Sales Act.

◊ **Registration #1285139** dated October 16, 2001 naming HLL as debtor (amended by **Registration #1652429** dated March 13, 2002 to add HEL as debtor) contains the following description:

JD 370 Excavator s/n FF0370X080344, 1999; together with all accessions, attachments and accessories and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, monies or intangibles.

Pre-ppsa registration information continued by this registration: 742435 – October 4, 1999 – Conditional Sales Act.

It is the opinion of the Trustee that the original registrations of these three security interests were properly registered in the PPR and the relevant date for purposes of perfection would be the date of registration in the Old Registry. However, as explained in Section 12 below, it is the opinion of the Trustee that the amendments to these three financing statements on March 13, 2002 were not valid and therefore the security interests are not validly perfected as against HEL.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor[1];

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

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

Is there attachment?

(i) Value given?

YES The Conditional Sales Contracts executed with respect to the 3 pieces and also with respect to the 6 pieces contain confirmation of delivery and acceptance certificates, duly executed by HLL. The fact that the assets financed by CEFL were delivered to HLL provides the necessary evidence to confirm that value was indeed given by CEFL to HLL with respect to the secured transaction. Furthermore, the Trustee has been provided with evidence of wire transfers to the account of HLL for the 1998 financing and to the account of HEL for the 2001 financing. It is the opinion of the Trustee that such documentation provides the necessary evidence of value for purposes of attachment.

(ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2]. HLL acquired the assets through the financing provided by CEFL for the conditional sales contracts. Furthermore, s. 13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when s/he obtains possession of them under the lease.

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

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

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

Is there a perfection step?

NO

CEFL did take steps to perfect its security interest in the Assets by amending its registrations soon after learning of the disposition of the Assets by HLL to HEL.

[2] Ibid. at p.84.

However, after reviewing the order granted by the Court on February 8, 2002 in response to HEL's application under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (the "Initial Order"), the Trustee is of the opinion that the Initial Order stated that the right of any creditor to perfect or register a security interest in HEL's property was stayed for a period of 30 days (the "Stay").[3] The Stay was subsequently extended to April 17, 2002 by order of the Court on February 22, 2002 and was later extended indefinitely by the Receiving Order issued by the Court on March 13, 2002.[4] By amending its registrations on March 13, 2002 to include HEL as debtor, CEFL was in breach of the Stay and therefore the Trustee is of the opinion that such a registration is invalid and does not act to perfect CEFL's security interest in the Assets.

Note: The Receiving Order permits creditors to make application to the Court for lifting of the Stay (see paragraph 5).

The 3 pieces

- ◊ **Registration #1285157** (as above)

- ◊ **Registration #1285120** (as above)

- ◊ **Registration #1285139** (as above)

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

The 6 pieces

- ◊ **Registration #922716** dated April 27, 2001, which names HLL as the debtor (amended by **registration #1652456** on March 13, 2002 to add HEL as debtor) contains the following description:

> *All present goods now owned or acquired or financed by the secured party and leased or otherwise made available to the debtor, as described herein, and contained in Conditional Sales Contract between the debtor and secured party, together with all attachments, exchanges, replacement parts, repairs and additions thereto, and all present and future accounts, intangibles, instruments, chattel paper, documents of title, securities and money, and all proceeds of the foregoing in any form, including goods, documents of title, chattel paper, securities, instruments, money and intangibles and all proceeds thereof.*
>
> *Timberjack 1270C Harvester (s/n 01282122)*

[3] See paragraph 4(c).
[4] See paragraph 37(a).

Timberjack 1410 8W Forwarder (s/n 17DD0305)
Dynapac CA251A (s/n 58314351)
JD 200LC (s/n FF0200X501453)
JD 300LC (s/n FF0330X080747)
JD TC62H (s/n DWTC62H577315)
JD 200LC (s/n FF0200X501391)
JD 450H (s/n T0450HX889199)
JD 200LC (s/n FF0200X501362)
JD 850C (s/n T0850CX888907)
Blaw-Knox PF-5510.1 Paver (s/n 55102864)
Tramac Breaker Model no. V55 (s/n 121444)

◊ **Registration #933770** dated May 3, 2001 naming HEL as the debtor contains the following description:

An Assignment of Rentals from equipment financed by the secured party and leased to the debtor and to the extent the equipment may constitute or be deemed to be inventory, such equipment now or hereafter offered or furnished under any contract of service or intended for sale or lease, including all attachments, exchanges, replacement parts, repairs and additions and any and all leases, subleases, rentals, accounts and contracts with respect to the equipment which may now exist or hereafter arise, together with all rights thereunder and all rental and other payments and purchase options due and to become due thereunder.

Serial Number Collateral

Timberjack 1270C Harvester (s/n 01AB2122)
Timberjack 14108W Forwarder (s/n 17DD0305)
Dynapac CA251A (s/n 58314351)
JD 200LC (s/n FF0200X501453)
JD 330LC (s/n FF0330X080747)
JD C62H (s/n DWTC62H577315)
JD 200LC (s/n FF0200X501391)
JD 450H (s/n T0450HX889199)
JD 200LC (s/n FF0220X501362)
JD 850C (s/n T0850CX888907)
Blaw-Knox PF05510 Paver (s/n 55102864)
Tramac Breaker Model No. V55 (s/n 121444)

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

13. Proceeds

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

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

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.[5]

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral. [6]

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

[5] Ibid. at p.140.
[6] Ibid. at 140.

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

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

14. The Disposition from HLL to HEL

We have outlined the position of CEFL with respect to the alleged disposition of the assets secured by CEFL by HLL to HEL. There are 2 key issues to be determined in order to assess the validity of CEFL's entitlement to the assets in the hands of HEL as transferee.

First, the disposition from HLL to HEL must be examined. As indicated above, it is the opinion of the Trustee that the assets are inventory. Inventory is generally intended for resale and therefore, even in the absence of express authority, the debtor is usually permitted to deal with it free of the security interest that binds it in the ordinary course of the debtor's business.[7] It is the position of the Trustee that there must be a determination by the Court as to whether HLL was under any restrictions with respect to disposition of the inventory financed by CEFL.

If the disposition from HLL to HEL is in the ordinary course of HLL's business and HLL was not precluded from disposing of the assets, then HEL takes the equipment free and clear of the secured party (s. 31 (2) of the PPSA). If not, there is no such protection. CEFL takes the position that the transfer of the equipment from HLL (its debtor) to HEL is not a sale in the ordinary course of HLL's business.

The determination of whether this is a sale in the ordinary course of HLL's business demands a determination by the Court. There are a number of indicia that play into the determination. These include such factors as whether the sale was advertised, the identity of the buyer (ordinary consumer as opposed to a dealer) and the quantity of goods (the greater the quantity the greater the suspicion). The courts will also consider the general circumstances and the overall pattern of conduct between the parties.

If it was <u>not</u> a transaction in the ordinary course of HLL's business, then section 36(8) and 52(2) of the PPSA require CEFL as the secured party to amend its financing statement so as to include the name of the transferee as a new debtor within 15 days of having knowledge of the information required to register the transfer.

As indicated above, the 3 pieces were properly transitioned on October 16, 2001 and these financing statements were amended on March 13, 2002 to include HEL, the transferee, as a debtor. The Trustee has no knowledge of when CEFL became aware of the disposition from HLL to HEL and therefore cannot opine on when the 15 day

[7] Ibid. at 146.

period provided by s36(8) and 52(2) of the PPSA commenced. This will demand a determination by the Court.

As concerns the 6 pieces, the financing statements outlined above indicate that on April 27, 2001, CEFL registered a financing statement with respect to its interest in the pieces and in it named HLL as the debtor (#922716). 6 days later, on May 3, 2001, CEFL registered a financing statement in which it named HEL as the debtor, claiming a security interest in an assignment of rentals with respect to these pieces (#933770). CEFL amended its April 27, 2001 registration on March 13, 2002 to include HEL, the transferee, as a debtor. While it is possible to argue that this May 3, 2001 financing statement is evidence of CEFL's knowledge of the disposition from HLL to HEL, the Trustee has no specific knowledge of when CEFL became aware of the disposition and therefore cannot opine on when the 15 day period provided by s36(8) and 52(2) of the PPSA commenced. This will demand a determination by the Court.

Note: The Initial Order provides an extension of any time periods related to HEL or HEL's property equal to the length of the stay created by the Initial Order. This extension was confirmed and extended in the Receivership Order. Therefore, if the Court should determine that CEFL did not learn of the disposition until sometime during or after the 15 days prior to the date of the Initial Order, the 15 day period in which it had to register the change in debtor is effectively still running. Should CEFL receive permission from the Court to amend its financing statement to reflect the disposition of the Asset by HLL to HEL, CEFL's security interest will be perfected.

15. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as CEFL may be entitled to claim a super-priority status (ref: s. 35(2)). CEFL has not provided evidentiary support for such an entitlement.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of CEFL's security interests are as follows:
    - The 3 assets: This will demand a determination by the Court as to when CEFL obtained knowledge of the disposition from HLL to HEL. If CEFL registers in the name of HEL within 15 days (as extended) of obtaining knowledge of the disposition, then by operation of s.36(8), its interest will take priority over a prior registered security interest covering after acquired property given by HEL. If not, then the relevant date must be the date of registration in the name of HEL.

- The 6 assets: This will demand a determination by the Court as to when CEFL obtained knowledge of the disposition from HLL to HEL. If CEFL registers in the name of HEL within 15 days (as extended) of obtaining knowledge of the disposition, then by operation of s.36(8), its interest will take priority over a prior registered security interest covering after acquired property given by HEL. If not, then the relevant date must be the date of registration in the name of HEL.

16. Auction Results

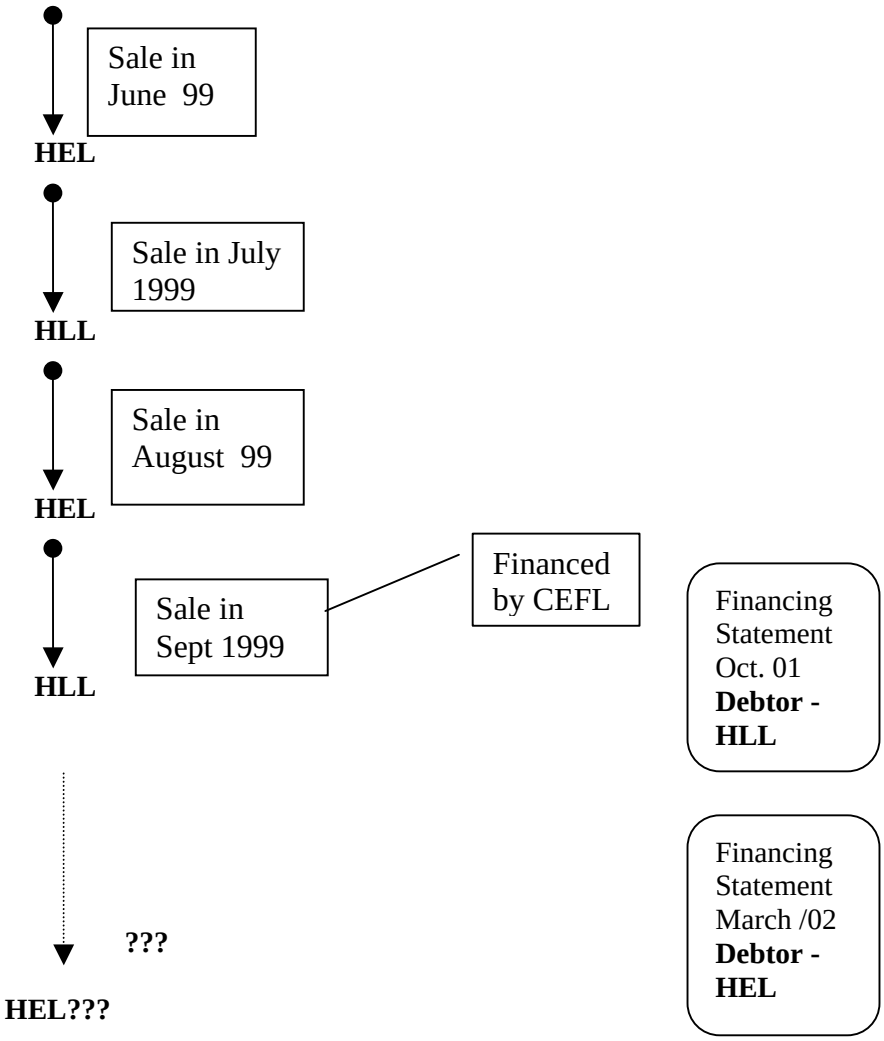
The following assets were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium):

(Asset #1)	**200LC Excavator** (s/n FF0200X501362)	$135,000.00
(Asset #2)	**850C Dozer** (s/n T0850C888907)	$160,000.00
(Asset #3)	**450H Dozer** (s/n T0450HX889199)	$127,500.00
(Asset #4)	**Timberjack Forwarder** (s/n 17DD0305)	$306,000.00
(Asset #5)	**Blaw-Knox Paver** (s/n 551028-64)	$213,750.00
(Asset #6)	**330LC Excavator** (s/n FF0330X080456)	$170,000.00
(Asset #7)	**330LC Excavator** (s/n FF0330X080518)	$170,000.00
(Asset #8)	**330LC Excavator** (s/n FF0330X080747)	$199,500.00

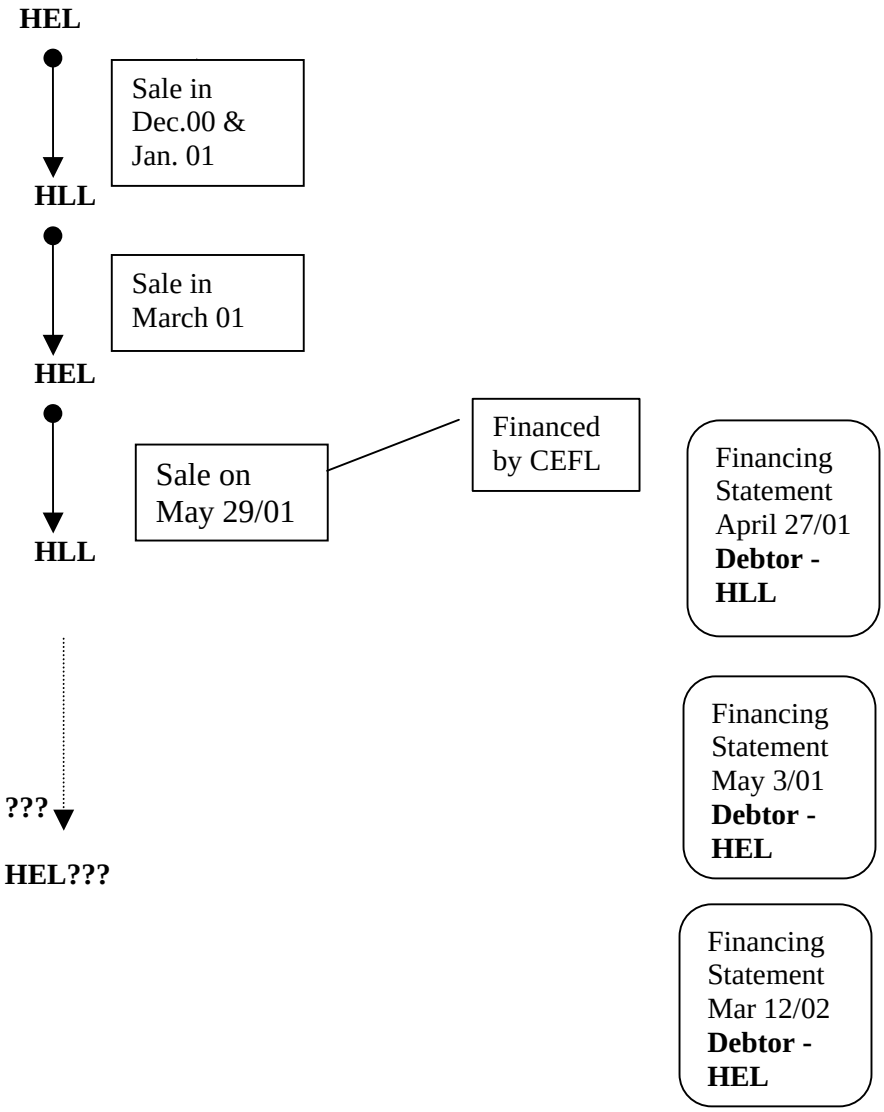
Net amount obtained (bid amount less LVG buyer's premium) **$1,481,750.00**

THE 3 PIECES

John Deere Limited (Complete Goods)



THE 6 PIECES


HEL
Sale in Dec.00 & Jan. 01
HLL
Sale in March 01
HEL
Financed by CEFL
Sale on May 29/01
HLL
Financing Statement April 27/01 Debtor - HLL
Financing Statement May 3/01 Debtor - HEL
???
HEL???
Financing Statement Mar 12/02 Debtor - HEL

FINAL DETERMINATION

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

Secured Party: **CIT FINANCIAL LIMITED ("CIT")**

1. Introduction

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

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

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

2. Summary Final Determination

Office Equipment
The Claim to office equipment allowed as a valid secured claim. The Trustee claims no interest in the assets that are the subject of the claim.

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

3. Defined Terms

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

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

4. The Assets

In total, CIT is making a claim with respect to 123 pieces of heavy equipment, plus a number of smaller items which are in the nature of office equipment. Those pieces of heavy equipment sold at the Trustee's auction are indicated by "*"

Heavy Equipment:

1. ECM350 Air Track Drill (CB7361)*
2. ECM350 Air Track Drill (BY7085)*
3. ECM350 Air Track Drill (R10025)*
4. ECM350 Air Track Drill (CB7385)*
5. ECM350 Air Track Drill (4184)*
6. ECM350 Air Track Drill (242657)*
7. ECM350 Air Track Drill (4260)*
8. ECM350 Air Track Drill (4259)*
9. ECM350 Air Track Drill (CB7240)*
10. ECM350 Air Track Drill (R10062)*
11. ECM350 Air Track Drill (R10063)*
12. ECM350 Air Track Drill (CB7497)*
13. ECM350 Air Track Drill (CB7242)*
14. ECM350 Air Track Drill (4244)*
15. ECM350 Air Track Drill (242648)*
16. ECM350 Air Track Drill (S4257)*
17. ECM350 Air Track Drill (T38076)*
18. ECM350 Air Track Drill (CB7238)*
19. EMC350 Air Track Drill (CB7371)*
20. ECM350 Air Track Drill (R10064)*
21. ECM350 Air Track Drill (R10061)*
22. ECM350 Air Track Drill (BY7073)*
23. ECM350 Air Track Drill (S4201)*
24. ECM350 Air Track Drill (CB7369)*
25. ECM350 Air Track Drill (BY7146)*
26. XP825WCU Compressor (175545)*
27. XP825WCU Compressor (184609)*
28. XP825WCU Compressor (178926)*
29. XP825WCU Compressor (183168)*
30. XP825WCU Compressor (186847)*
31. XP825WCU Compressor (175544)*
32. XP825WCU Compressor (184608)*
33. XP825WCU Compressor (186846)*
34. XP825WCU Compressor (183210)*
35. XP825WCU Compressor (189179)*
36. XP825WCU Compressor (193577)*
37. XP825WCU Compressor (207010)*
38. XP825WCU Compressor (207880)*
39. XP825WCU Compressor (173645)*

40. XP825WCU Compressor (V88497)*
41. XP825WCU Compressor (152924)*
42. XP825WCU Compressor (178925)*
43. XP825WCU Compressor (183169)*
44. XP825WCU Compressor (186186)*
45. XP825WCU Compressor (192568)
46. XP825WCU Compressor (192567)*
47. XP825WCU Compressor (191994)*
48. XP825WCU Compressor (189165)*
49. XP825WCU Compressor (173406)*
50. XP825WCU Compressor (173408)*
51. XP825WCU Compressor (173411)*
52. XP825WCU Compressor (206742)*
53. XP825WCU Compressor (192810)*
54. XP825WCU Compressor (206642)*
55. XP825WCU Compressor (206842)*
56. XP825WCU Compressor (209490)*
57. 2000 JD 200LC (FF0200X501358)
58. 2000 JD 850C (T0850CX888907)*
59. 2000 JD 450H (T0450HX889199)*
60. 2000 JD 200LC (FF0200X501345)
61. 2000 JD 310SE (T0310SE889704)
62. 2000 JD 624G (DW624HX577306)
63. 2000 JD 200LC (FF0200X501391)
64. 2000 JD 644H (DW644HX577276)
65. 2000 JD 544H (DW544HX577180)
66. 2000 JD 310SE (T0310SE889712)
67. 2000 JD 200LC (FF0200X501393)
68. 2000 JD TC44H (DWTC44H577307)
69. 2000 JD 200LC (FF0200X501362)*
70. 2000 JD 744H (DW744HX577308)
71. 2000 JD 744H (DW744HX576819)
72. 2000 JD 744H (DW744HX577272)
73. 2000 JD 200LC (FF0200X501390)
74. 2000 JD 310 SE (T0310SE890935)
75. 2000 JD 544H (DW544HX577412)
76. 2000 JD 310SE (T0310SE890549)
77. 2000 JD TC62H (DWTC62H577315)
78. 2000 JD 200LC (FF0200X501455)
79. 2000 JD 200LC (FF0200X501479)
80. 2000 JD 644H (DW644HX577435)
81. 2000 JD 200LC (FF0200X051249)
82. 2000 JD 330LC (FF0330X080747)*
83. 2000 JD 450LC (FF0450X090542)
84. 2000 JD 644H (DW644HX577290)
85. 2000 JD 330LC (FF0330X080883)

86. 2000 JD 330LC (FF0330X080882)
87. 2000 JD 330LC (FF0330X080850)
88. 2000 JD 330LC (FF0330X080881)
89. 2000 JD LC (FF0200X501453)
90. 1999 Terex Truck Model TA 25 (A7581103)
91. 1999 Terex Truck Model TA 25 (A7581118)
92. 2001 Terex Truck Model TA 35 (A7761284)
93. 1999 Terex Truck Model TA 35 (A7761061)
94. 1999 Terex Truck Model TA 35 (A7761062)
95. 1999 Terex Truck Model TA 35 (A7761064)
96. 1999 Terex Truck Model TA 35 (A7761065)
97. 1999 Terex Truck Model TA 35 (A7761066)
98. 1999 Terex Dump (A7761082)
99. 1999 Terex Truck Model TA 35 (A7761086)
100. 1999 Terex Truck Model TA 35 (A7761095)
101. 1999 Terex Truck Model TA 35 (A7761096)
102. 1999 Terex Truck Model TA 35 (A7761097)
103. 1999 Terex Truck Model TA 35 (A7761111)
104. 1999 Terex Truck Model TA 35 (A7761112)
105. 1999 Terex Truck Model TA 35 (A7761113)
106. 1999 Terex Truck Model TA 35 (A7761114)
107. 1999 Terex Truck Model TA 35 (A7761119)
108. 1999 Terex Truck Model TA 35 (A7761120)
109. 1999 Terex Truck Model TA 35 (A7761122)
110. 1999 Terex Truck Model TA 35 (A7761144)
111. 2000 Terex Truck Model TA 35 (A7761166)
112. 2000 Terex Truck Model TA 35 (A7761181)
113. 2000 Terex Truck Model TA 35 (A7761182)
114. 2000 Terex Truck Model TA 35 (A7761186)*
115. 2000 Terex Truck Model TA 35 (A7761187)*
116. 2000 Terex Truck Model TA 35 (A7761188)*
117. 2000 Terex Truck Model TA 35 (A7761195)*
118. 2000 Terex Truck Model TA 35 (A7761196)*
119. 2001 Terex Truck Model TA 35 (A7761280)
120. 2001 Terex Truck Model TA 35 (A7761283)
121. 2001 Terex Truck Model TA 45 (A7811048)
122. 2001 Terex Truck Model TA 45 (A77811050)
123. 2001 Terex Truck Model TA 45 (A7911043)

<u>Office Equipment</u>

- 450 Digital Copier, complete with finisher, 3 –hole punch, paper deck, document feeder, bridge unit.
- M7208 Telephone Set; 2 talkback Horn V048C 1993 and 3 four-pair wiring modules.

- 3 M7310 sets; 3 M7208 sets; a Comp ICS KSU with LS/DS trk cart, a Comp ICS LS/DS Anal trk cart; a Cics Stand 4 x 16 S/W Feat Cart; and a three zone paging control V2003A.
- H.P. Laserjet; 32 MB Kingston UPG HP 400012; Kingston 32 MB UPG for HP 4000; HP Laserjet 4000 Printer; Kingston 8 MB UPG for HP 4000; HP J311OR and a Laserjet 1100 Printer.
- 2 IBM Thinkpads; 3 IBN 56W Ultraslim AC Adapter; 3 Numeric Keypads; 2 64MB Ram Upgrade; 1 Xercom Real Port; 1 Real Port Ethernet Cardbio.
- IBM Thinkpad; 1 IBM 56W Ultralsim AC Adapter; 1 Numeric Keypad; 1 Realport Ethernet Cardbio; and 1 64 MB Ram Upgrade.
- 1 Kobra 385 Shredder and 1 shelf for Kobra 385.
- 1 SM78PL-semi automatic; 1 5 Kg scale; 1 8854 Interfacs and 1 5KG scale stand.
- 1 AR-150 Digital Copier; 1 Printer Expansion Kit and 1 Stand.
- 1 Sharp Digital Copier; 1 Sharp Digital Fax; 1 Sharp extra cassette; and 1 Sharp Cabinet.

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

CIT's claim is with respect to a number of pieces of office equipment (listed above) and also with respect to the 123 pieces of heavy equipment (listed above). The claim to the office equipment arises from 10 separate lease agreements. The claim to the 123 pieces of heavy equipment arises from 3 specific security agreements entered into in July and August 2000 and a general security agreement (wholesale) dated November 9, 2001 taking security over all present and after-acquired personal property of HEL.

The Proof of Claim of CIT dated October 22, 2002 and the documents attached thereto (more particularly described below) indicates a total secured claim of **$9,889,878.00**.

This breaks down as follows:

Office Equipment

- Lease No. 780-277388-001: Amount $3,745.85
- Lease No. 780-717136-001: Amount $16,204.82
- Lease No. 780-717138-001: Amount $442.42
- Lease No. 780-717139-001: Amount $3,623.89
- Lease No. 780-717140-001: Amount $889.32
- Lease No. 780-717141-001: Amount $2,849.68
- Lease No. 780-717142-001: Amount $1,478.76
- Lease No. 780-717143-001: Amount $749.08
- Lease No. 780-717144-001: Amount $4,374.92
- Lease No. 780-717145-001: Amount $2,677.99

Total Outstanding: $37,036.73

Heavy Equipment

- Specific Security Agreement dated July 2000 (#800-0246838-001), securing a Promissory Note in the amount of $862,500. Security was taken over 56 assets (#1-56 in the list above).

  Total outstanding: $580,452.51

- Specific Security Agreement dated 7 July 2000 (#800-0246893-001), securing a Promissory Note in the amount of $3,685,063.30. Security was taken over 16 assets (#57 - 72 in the list above).

  Total outstanding: $1,858,705.00

- Specific Agreement Agreement dated 10 August 2000 (#800-0252504-001), securing a Promissory Note in the amount of $4,485,070. Security was taken over 17 assets (#73 - 89 in the list above).

  Total outstanding: $2,547,696.65

- General Security Agreement (Wholesale) dated 9 November 2001. This relates to 34 separate Conditional Sales Contracts: one for each of the Terex trucks (# 90- 123 in the list above). **Total outstanding :$4,865,957.27**

CIT has not made a specific claim to proceeds.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.
ii. Proof of Claim dated October 22, 2002 (and supporting documentation).
iii. 10 Proofs of Claim dated March 13, 2002 asserting an unsecured claim in the amount of $44,184.75. These relate to the various pieces of office equipment covered in the 10 lease agreements noted above.
iv. 10 Lease Agreements and related documents covering various pieces of office equipment as follows:

(1) #780-717136-001 covering a 450 Digital Copier, complete with finisher, 3 –hole punch, paper deck, document feeder, bridge unit.
(a) Copy of an invoice dated September 30, 1998 to Newcourt from Reprographics stamped and authorized for payment;
(b) Copies of CIBC “electronic funds system” and bank reconciliation reports for October 5, 1998 confirming payment made to Reprographics.

(2) #780-717138-001 covering a M7208 Telephone Set; 2 talkback Horn V048C 1993 and 3 four-pair wiring modules.
(a) Copy of a cheque stub from Newcourt payable to Newtel Communication dated March 3, 1999 in the amount of $952.49.

(3) $780-717139-001 covering 3 M7310 sets; 3 M7208 sets; a Comp ICS KSU with LS/DS trk cart, a Comp ICS LS/DS Anal trk cart; a Cics Stand 4 x 16 S/W Feat Cart; and a three zone paging control V2003A.
(a) Copy of a cheque stub dated March 19, 1999 from Newcourt payable to Newtel Communication in the amount of $7,593.13l

(4) #780-717140-001 covering a H.P. Laserjet; 32 MB Kingston UPG HP 400012; Kingston 32 MB UPG for HP 4000; HP Laserjet 4000 Printer; Kingston 8 MB UPG for HP 4000; HP J311OR and a Laserjet 1100 Printer.
(a) Copies of invoices dated June 4 and 16, 1999 to Newcourt from Triware Technologies Inc. stamped and authorized for payment;
(b) Copies of CIBC “electronic funds system” and bank reconciliation reports for June 25, 1999 confirming payment made to Triware Technologies Inc.

(5) #780-71741-001 covering 2 IBM Thinkpads; 3 IBN 56W Ultraslim AC Adapter; 3 Numeric Keypads; 2 64MB Ram Upgrade; 1 Xercom Real Port; 1 Real Port Ethernet Cardbio.

(a) Copy of a cheque stub dated October 20, 1999 from Newcourt payable to Microwave Computer Centres in the amount of $11,309.10.

(6) #780-71742-001 covering an IBM Thinkpad; 1 IBM 56W Ultralsim AC Adapter; 1 Numeric Keypad; 1 Realport Ethernet Cardbio; and 1 64 MB Ram Upgrade.

(a) A copy of a cheque stub dated November 2, 1999 from Newcourt payable to Microwave Computer Centres in the amount of $5,068.45.

(7) #780-717143-001 covering 1 Kobra 385 Shredder and 1 shelf for Kobra 385.

(a) A copy of a cheque stub dated November 2, 1999 from Newcourt payable to Reprographics Limited in the amount of $2,972.75.

(8) #780-717144-001 covering 1 SM78PL-semi automatic; 1 5 Kg scale; 1 8854 Interfacs and 1 5KG scale stand.

(a) A copy of a cheque stub dated January 22, 2001 from CIT payable to Pinnacle Office Solutions in the amount of $5,773.76.

(b) A copy of a cheque requisition dated December 1, 2000 payable from CIT to Pinnacle Office Solutions in the amount of $5,773.76.

(9) #780-717145-001 covering 1 AR-150 Digital Copier; 1 Printer Expansion Kit and 1 Stand.

(a) Copies of invoice dated January 31, 2001 to CIT Financial from Modern Business Equipment stamped and authorized for payment;

(b) Copies of CIBC “electronic funds system” and bank reconciliation reports for February 23, 2001 confirming payment made to Modern Business Equipment.

(10)#7800-0277388-001 covering 1 Sharp Digital Copier; 1 Sharp Digital Fax; 1 Sharp extra cassette; and 1 Sharp Cabinet.

(a) A copy of a cheque stub dated September 21, 2001 from CIT payable to Modern Business Equipment Limited in the amount of $4,651.75.

(b) A copy of a cheque requisition dated September 20, 2001 from CIT payable to Modern Business Equipment Limited in the amount of $4,651.75.

v. The Heavy Equipment Security Agreements:

a. **Specific Security Agreement (#800-0246838-001),** (assets # 1-56 above)

- Copy of the Agreement with schedule "A" attached listing the 56 assets.
- Copy of Promissory note in the amount of $862,500.00 dated July 7, 2000.
- Assignment of Lease Agreement dated July 2, 2000
- Correspondence dated July 10, 2000 between Newcourt and CIBC Equipment Finance Limited addressing priorities.
- Correspondence dated 13 July 2000 between John Deere Construction Equipment Company and CIT addressing priorities. Correspondence dated July 10, 2000 between Newcourt and CIBC setting out relative priorities.
- Correspondence dated July 10, 2000 between Newcourt and John Deere Limited addressing priorities.
- Correspondence dated July 10, 2000 between Newcourt and Mellon Bank of Canada addressing priorities.
- Correspondence dated July 10, 2000 between Newcourt and GMAC addressing priorities.
- Correspondence dated July 10, 2000 between ABN-AMRO Leasing and Newcourt addressing priorities.
- Correspondence dated July 10, 2000 between ABN-AMRO Bank of Canada and Newcourt addressing priorities.
- Correspondence dated July 11, 2000 between John Deere Credit and Newcourt addressing priorities.
- Correspondence dated July 10, 2000 between MTC Leasing Inc. and Newcourt addressing priorities.
- Invoice dated June 13, 2001 to Torngait Ujaganniavingit Corporation - one Ingersoll-Rand XP825 Compressor (s/n 192568).
- Copy of a funding request dated July 14, 2000 for a cheque payable to HEL in the amount of $862,500.00.
- Copy of a cheque dated July 14, 2000 (#1031480) from CIT payable to HEL in the amount of $862,500.00.

b. **Specific Security Agreement (#800-0246893-001),** (assets # 57-72 above)

- Copy of the Agreement with schedule "A" attached listing the 16 assets.
- Copy of Promissory note in the amount of $3,685,063.30 dated July 7, 2000.
- Assignment of Lease Agreement dated July 2, 2000
- Copy of a funding request dated July 14, 2000 for a cheque payable to HEL in the amount of $3,685,063.30.
- Copy of a cheque dated July 14, 2000 (#1031433) from CIT payable to HEL in the amount of $3,685,063.30.
- Correspondence dated 14 July 2000 between CIT and John Deere Limited addressing priorities.
- Correspondence dated July 13, 2000 between John Deere Construction Equipment Company and CIT addressing priorities.

- Correspondence dated July 10, 2000 between CIBC and Newcourt addressing priorities.
- Correspondence dated July 10, 2000 between Newcourt and CIBC Equipment Finance Limited addressing priorities.
- Correspondence dated July 10, 2000 between Mellon Bank Canada and Newcourt addressing priorities.
- Correspondence dated July 10, 2000 between GMAC and Newcourt addressing priorities.
- Correspondence dated July 10, 2000 between Newcourt and ABN-AMRO Leasing addressing priorities.
- Correspondence dated July 11, 2000 between John Deere Credit and Newcourt addressing priorities.
- Correspondence dated July 10, 2000 between MTC Leasing Inc. and Newcourt addressing priorities.
- Invoice dated November 29, 2000 to B & R Enterprises Ltd. – one J D 624H Loader (s/n DW624HX577306).
- Invoice dated September 29, 2000 to Enviro-Safe Fuel Systems – one J D TC44H TC Loader (s/n DWTC44H577307). Trade in was JD 244H Loader (s/n T6244HX000090).
- Invoice dated April 20, 2001 to Concord Paving Ltd. – one JD 744H Loader (s/n DW744HX576819). Trade ins were one CAT 966 Loader (s/n 94X05335) and one Autocar Truck (s/n 4V25MBCF2LU504777).
- Invoice dated July 27, 2000 to CIBC Equipment Finance – one JD 544H Wheel Loader (s/n DW544HX577180). Trade in was a Dresser 520C Loader (s/n C008145).
- Invoice dated December 22, 2000 to Marine Contractors Inc. – one Telsmith Cone Plant (s/n 7608); one JD 330LC Excavator (s/n FF0330X080964); and one JD 744H 4WD Loader (s/n DW744HX577272).
- Invoice dated June 22, 2000 to Royal Bank of Canada – one JD 200LC Excavator (s/n FF0200X501345).
- Invoice dated July 24, 2000 to Weir's Construction – one JD 310SE Backhoe (s/n T0310SE89704). Trade ins were one JD 544E Loader (s/n DW544EB517148) and one JD 310D Backhoe (s/n T0310DG789868).
- Invoice dated October 25, 2000 to Budgell's Equip. & Rental – one JD 200LC Excavator (s/n FF0200X501358).
- Invoice dated July 29, 2000 to Wilco Holdings Ltd. – one JD 310SE Backhoe (s/n T0310SE889712). Trade in was one JD 310C Backhoe (s/n T0310CF767728).
- Invoice dated September 20, 2000 to Marne Contractors Inc. – one Telsmith 3042 Crusher (s/n 505M2720); one JD 744H Loader (s/n DW744HX577308) and one Terex TA25 Articulated Truck (s/n A7581103).
- Invoice dated October 27, 2000 to Premier Construction for the following:
  JD 450LC Excavator FF0450X090542

JD 450LC Excavator	FF0450X090556
JD 450LC Excavator	FF0450X090545
JD 330LC Excavator	FF0330X080076
Terex 2766C Articulated Truck	A7001320-16
Terex TA25 Articulated Truck	A7581118
JD 892ELC Excavator	F892EX012534
JD 744HMH 4WD Loader	DW744HM572769
JD 200LC Excavator	FF0200X501390
JD 200LC Excavator	FF0200X501393
JD 644H Wheel Loader	DW644HX577276
JD 744H 4WD Loader	DW744HX569129
JD 850C Crawler Dozer	T0850CX850222
JC 50 Ton Trailer	2J9J7A1F6YK001167
Ingersoll-Rand SD110 Roller	160665

c. **Specific Security Agreement (#800-0252504-001),** (assets # 73-89 above)

- Copy of the Agreement with schedule "A" attached listing the 17 assets.
- Copy of Promissory note in the amount of $4,485,780.00 dated August, 2000.
- Assignment of Lease Agreement dated August 10, 2000.
- Copy of a funding request dated August 15, 2000 for a cheque payable to HEL in the amount of $4,485,780.00.
- Copy of a cheque dated August 15, 2000 (#1033597) from CIT payable to HEL in the amount of $4,485,780.00.
- Correspondence dated August 8/00 between CIT and CIBC addressing priorities.
- Correspondence dated August 10/00 between CIT and MTC Leasing Inc. addressing priorities.
- Correspondence dated August 9/00 between CIT and ABN-AMRO Leasing and ABN-AMRO Bank Canada addressing priorities.
- Correspondence dated August 9/00 between CIT and CIBC Equipment Finance Ltd. addressing priorities.
- Correspondence dated August 29/00 between CIT and Mellon Bank Canada addressing priorities
- Correspondence dated August 14/00 between CIT and John Deere Ltd. addressing priorities.
- Correspondence dated August 10/00 between CIT and John Deere Credit addressing priorities.
- Correspondence dated August 11/00 between CIT and GMAC Leaseco Ltd. addressing priorities.
- Invoice dated December 22, 2000 to BLC Construction Ltd. – JD 330LC Excavator (s/n FF0330X080881) and Tramac V1600 Hydraulic Breaker (s/n 121541). Trade in was JD 450LC Excavator (s/n FF0450X090408).
- Invoice dated September 6, 2000 to Anderson Logging Ltd. – Timberjack 608B Harvester (s/n 10BA1221); JD 330LC Excavator (s/n FF0330X080883); BWS Pulpwood Trailer (s/n 2B948LF3951002261) and

BWS 42' Pulpwood Trailer (s/n 2B942LD33V1002684). Trade ins were CAT 310L Harvester (s/n 6CR00908) and CAT 320L Excavator (s/n 9KK00385).

- Invoice dated December 9, 2000 to Concord Paving Ltd. – JD 644H Wheel Loader (s/n DW644HX577290). Trade ins were Ingersoll-Rand Roller (s/n 7425) and GMC J75 Dump Truck (1GDT8C477GV530059).
- Invoice dated November 2, 2000 to Penney Paving – JD 310SE Backhoe (s/n T0310SE890935). Trade ins were Ingersoll-Rand DD23 Roller (s/n 5808-8) and Allatt 550P Paver (s/n 8843224).
- Invoice dated July 26, 2000 to Marine Contractors Inc. – JD 544H Wheel Loader (s/n DW544HX577412); JD 160LC Excavator (s/n Order # 048532); JD 270LC Excavator (s/n Ff0270X070607) and JD 330LC Excavator (s/n FF0330X080850). Trade ins were JD 590D Excavator (s/n FF590DX002664); JD 792D Excavator (FF792DX010033) and JD 892E Excavator (s/n FF892EX011705).
- Invoice dated September 20, 2000 to Town of Wabush – JD 644H Wheel Loader (s/n DW644HX577435). Trade in was CAT 950B Loader.
- Invoice dated August 18, 2000 to Farrell's Excavating – JD 330LC Excavator (s/n FF0330X080882); JD 200LC Excavator (s/n FF0200X501455); JD 160LC Excavator (s/n P00160X041411) and JD 310SE Backhoe (s/n T0310SE890549). Trade ins were JD 160LC Excavator (s/n P00160X040198); JD 200LC Excavator (s/n FF0200X050548; and JD 310SE Backhoe (s/n T0310SE838500).
- Invoice dated October 19, 2000 to Hickman Leasing Ltd. – JD 450LC Excavator (s/n FF0450X090542); JD 644H Wheel Loader (s/n DW644HX577290) and JD 200LC Excavator (s/n FF0200X501479).
- Invoice dated October 11, 2000 to Southern Ready-Mix – JD 200LC Excavator (s/n FF0200X051249). Trade in was Hitachi EX200LC Excavator (s/n 14C-83138).
- Invoice dated October 27, 2000 to Premier Construction – JD 450LC Excavator (s/n FF0450X090542); JD 450LC Excavator (s/n FF0450X090556); JD 450LC Excavator (s/n FF0450X090545); JD 330LC Excavator (s/n FF0330X080076); Terex 2766C Articulated Dump Truck (s/n A7001320-16); Terex TA25 Articulated Dump Truck (s/n A7581118); JD 892ELC Excavator (s/n FF892EX012534); JD 744HMH 4WD Loader (s/n FF0200X501390); JD 200LC Excavator (s/n FF0200X501393); JD 644H Wheel Loader (s/n DW644HX577276); JD 744H 4WD Loader (s/n DW744HX569129); JD 850C Crawler Dozer (s/n T0850CX850222); JC 50 Ton Trailer (s/n 2J9J7A1F7YK001167) and Ingersoll-Rand SD110 Roller (s/n 160665).

d. **General Security Agreement (Wholesale) dated November 9, 2001** (assets # 90-123 above)
   - Copy of Agreement
   - Assignment of Lease Agreement (All Leases – All Equipment) dated November 9, 2001.

- Conditional Sales Contracts for each of the Terex trucks as follows:
    - Truck # A7581103 – Invoice # A7581103, dated 06/03/99
    - Truck # A7581118 – Invoice # A758118, dated 06/28/99
    - Truck # A7761284– Invoice # A7761284, dated 05/03/01
    - Truck # A7761061– Invoice # A7761061, dated 06/09/99
    - Truck # A7761062– Invoice # A7761062, dated 06/09/99
    - Truck # A7761064– Invoice # A7761064, dated 06/09/99
    - Truck # A7761065– Invoice # A7761065, dated 06/03/99
    - Truck # A7761066– Invoice # A7761066, dated 06/03/99
    - Truck # A7761082– Invoice #A7761082, dated 06/25/99
    - Truck # A7761086– Invoice #A7761086, dated 08/10/99
    - Truck # A7761095– Invoice #A7761095, dated 07/28/99
    - Truck # A7761096– Invoice #A7761096, dated 07/28/99
    - Truck # A7761097– Invoice #A7761097, dated 05/10/99
    - Truck # A7761111– Invoice #A7761111, dated 09/02/99
    - Truck # A7761112– Invoice #A7761112, dated 09/02/99
    - Truck # A7761113– Invoice #A7761113, dated 09/02/99
    - Truck # A7761114– Invoice #A7761114, dated 09/02/99
    - Truck # A7761119– Invoice #A7761119, dated 09/02/99
    - Truck # A7761120– Invoice #A7761120, dated 09/22/99
    - Truck # A7761122– Invoice #A7761122, dated 09/22/99
    - Truck # A7761144– Invoice #A7761144, dated 01/13/00
    - Truck # A7761166– Invoice #A7761166, dated 04/24/00
    - Truck # A7761181– Invoice #A7761181, dated 04/17/00
    - Truck # A7761182– Invoice #A7761182, dated 04/17/00
    - Truck # A7761186– Invoice #A7761186, dated 04/24/00
    - Truck # A7761187– Invoice #A7761187, dated 04/24/00
    - Truck # A7761188– Invoice #A7761188, dated 04/24/00
    - Truck # A7761195– Invoice #A7761195, dated 05/12/00
    - Truck # A7761196– Invoice #A7761196, dated 05/12/00
    - Truck # A7761280– Invoice #A7761280, dated 05/03/01
    - Truck # A7761283– Invoice #A7761283, dated 05/03/01
    - Truck # A7811048– Invoice #A77811048, dated 05/03/01
    - Truck # A77811050– Invoice #A77811050, dated 05/03/01
    - Truck # A7911043– Invoice #A77811043, dated 05/03/01

vi. Evidence of value being given by CIT for the Terex Trucks as follows:
    - **Trucks # A7761061, A7761062, A7761064:**
        - Internal request of Newcourt dated June 9, 1999 for delivery of $1,004,066.40
        - Correspondence from Newcourt to HEL dated June 9, 1999 advising of the cost for the 3 units being funded.
        - Dealer Credit Requests executed by HEL for each of the 3 units including invoices for each of 3 pieces.
    - **Truck # A7581118:**

- Internal request of Newcourt dated June 28, 1999 for delivery of $244,567.80
- Dealer Credit Requests executed by HEL for the unit, invoice attached.

o **Trucks # A7581103, #A7761066, #A7761065:**
- Internal request of Newcourt dated June 3, 1999 for delivery of $905,637.60
- Dealer Credit Requests executed by HEL for the each of the 3 units, invoices attached.
- Requests from HEL to Newcourt requesting that the Dealer Credit Requests be processed.

o **Trucks # A7761111, #A7761112, #A7761113, #A7761114, #A7761119:**
- Internal request of Newcourt dated September 2, 1999 for delivery of $1,626,062.00
- Dealer Credit Requests executed by HEL for the each of the 3 units, invoices attached.
- Request from HEL to Newcourt requesting that the Dealer Credit Requests be processed.

o **Trucks # A7761120, #A7761122, #A7761097, #A7761086, #A7761095, #A7761096:**
- Computer screen print out dated October 21, 2002 noting fund transfers for $446,000.00 on July 28, 1999, August 10, 1999 and September 22, 1999.
- Internal requests of Newcourt dated September 22, 1999 for delivery of $655,174.00., August 10, 1999 for delivery of $670,204.20 and July 28, 1999 for delivery of $675,288.60 (each of these is a calculation of $446,000 USD).
- Dealer Credit Requests executed by HEL for the each of the units, invoices attached.

o **Truck # A7761144:**
- Computer screen print out dated October 21, 2002 noting fund transfers for $223,000.00 on January 13, 2000.
- Internal request of Newcourt dated January 13, 2000 for delivery of $323,394.60 (calculation of $223,000 USD).
- Dealer Credit Requests executed by HEL for the unit, invoice attached.
- Request from HEL to Newcourt for the Dealer Credit Requests be processed.

o **Trucks # A7761181, #A7761182:**
- Computer screen print out dated October 21, 2002 noting fund transfer of $442,000.00 on April 17, 2000.
- Internal request of Newcourt dated April 17, 2000 for delivery of $655,220.80 (calculation of $442,000 USD).
- Dealer Credit Requests executed by HEL for the each of the units, invoices attached.
- Request from HEL to Newcourt for the Dealer Credit Requests be processed.

o **Trucks # A7761166, #A7761186, #A7761187, #A7761188:**

- Computer screen print out dated October 21, 2002 noting fund transfer for $870,000.00 on April 24, 2000.
- Internal request of Newcourt dated April 24, 2000 for delivery of $1,282,032.00 (a calculation of $870,000 USD).
- Dealer Credit Requests executed by HEL for the each of the units, invoices attached.
- Request for delivery of funds dated April 24, 2000.

o **Trucks # A7761195, #A7761196:**
- Computer screen print out dated October 21, 2002 noting fund transfer for $447,000.00 on May 12, 2000.
- Internal request of Newcourt dated May 12, 2000 for delivery of $665,895.90 (a calculation of $447,000 USD).
- Dealer Credit Requests executed by HEL for the each of the units, invoices attached.
- Request from HEL for the Dealer Credit Requests be processed.

o **Trucks # A7761280, #A7761283, #A7761284, #T7911043, #T7811048, #T7811050:**
- Computer screen print out dated October 21, 2002 noting fund transfer for $1,425,630.00 on May 3, 2001.
- Internal request of Newcourt dated May 3, 2001 for delivery of $2,186,631.30 (a calculation of $1,425,630.00 USD).
- Dealer Credit Requests executed by HEL for the each of the units except **#A7761284** invoices attached for all.
- Request from HEL for the Dealer Credit Requests be processed.

vii. Invoice from HEL as follows:

o April 16, 2001 to Marine Contractors Inc. dated for the sale of a Telsmith 44SBS Crusher (s/n C001286). Invoice notes a number of trade ins.

o May 24, 2001 to McNamara Construction – Terex TA35 Articulated Truck (s/n A7761280); Terex A35 Articulated Truck (s/n A7761283); Terex TA35 Articulated Truck (s/n A7761284); Terex TR45 Rigid Truck (s/n T7811043); Terex TR45 Rigid Truck (s/n T7811048); Terex TR45 Rigid Truck (s/n T7811050).

o January 15, 2001 to Hickman Leasing Ltd. – Terex TA35 Articulated Truck (s/n A7761195); Terex TA35 Articulated Truck (s/n A7761196); Terex TA35 Articulated Truck (s/n A7761186); Terex TA35 Articulated Truck (s/n TA7761187); Terex TA35 Articulated Truck (s/n A7761188); Timberjack 1110B Forwarder (s/n 10DH1023); Timberjack 1410 Forwarder (s/n 17DD0305).

o October 26, 2000 to Johnson's Construction – JD 450LC Excavator (s/n FF0450X090370); JD 450LC Excavator (s/n FF0450X090412); JD 330LC Excavator (s/n FF0330X080505); JD 744HMH 4WD Loader (s/n DW744HMS572476); JD 772CH Motor Grader (s/n DW772CH575287); Terex TA35 Articulated Truck (s/n A7761113); Terex TA35 Articulated Truck (s/n A7761144); Terex TA35 Articulated Truck (s/n A7761182); Terex TA35

Articulated Truck (s/n A7761181); Terex TA35 Articulated Truck (s/n A7761166).

- October 11, 1999 to Johnson's Construction – JD 450H Crawler Dozer (s/n T0450HX879838); JD 544H Wheel Loader (s/n DW544HX573462); JD 200LC Excavator (s/n FF0200X500772); JD 370XX Excavator (s/n FF0370X080445); JD 450LC Excavator (s/n FF0450X090428); Terex TA35 Articulated Truck (s/n A7761120); Terex TA35 Articulated Truck (s/n A7761122); Promac Disccutter (s/n 52CMP1297); Tramac V55 Breaker (s/n 120504).
- April 3, 2000 to United Rentals – Terex TA35 Articulated Dump Truck (s/n A7761111).
- April 3, 2000 to United Rentals – Terex TA35 Articulated Dump Truck (s/n A7761112).
- September 20, 2000 to Marine Contractors Inc. – New Telsmith 3042 Crusher (s/n 505M2720); JD 744H Loader (DW744HX577308); Terex TA25 Articulated Truck (s/n A7581103).
- October 27, 2000 to Premier Construction – JD 450LC Excavator (s/n FF0450X090542); JD 450LC Excavator (s/n FF0450X090556); JD450LC Excavator (s/n FF0450X090545); JD 330LC Excavator (s/n FF0330X00076); Terex 2766C Articulated Dump Truck (s/n A7001320-16); Terex TA35 Articulated Dump Truck (s/n A7581118); JD 892ELC Excavator (s/n FF892EX012534); JD 744HMH 4WD Loader (s/n DW744HM572769); JD 200LC Excavator (s/n FF0200X501390); JD 200LC Excavator (s/n FF0200X501393); JD 644H Wheel Loader (s/n DW644HX577276); JD 744H 4WD Loader (s/n DW744HX569129); JD 850C Crawler Dozer (s/n T0850CX850222); JC 50 Ton Trailer (s/n 2J9J7A1F7YK001167); Ingersoll-Rand SD110 Roller (s/n 160665).

viii. CIBC Wallet Deposit dated November 1, 2000 for the deposit to HEL for $3,300,866.07. Particulars reference "G.E. Capital".

ix. Affidavit of Jack Pietropaolo, assistant vice president, Portfolio Management with CIT dated 6 November 2002, and attachments thereto, providing evidence of value passing from CIT to HEL with respect to the above-noted Terex trucks.

9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that the 123 pieces of heavy equipment noted above were held by the debtor for sale or lease and as such, they form part of the inventory (s. 2(x) of the PPSA). The office equipment covered by the 10 lease agreements are equipment (s.2(p) of the PPSA).

10. Application of the PPSA

The above noted documentation provides the necessary evidence to conclude that the transactions between CIT and HEL were secured transactions that are governed by the PPSA (ref: s.4).

11. PRE-PPSA/ Transitioning Issues

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

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor[1].

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?
(i) Value given?
Office Equipment
YES.
As indicated in the list of documents above, the Trustee has been provided with copies of cheque stubs, cheque requisitions and confirmations of electronic transfers for each of the 10 leases that provide the necessary evidence of value passing from CIT to HEL. It is the

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

opinion of the Trustee that this is sufficient evidence of value in accordance with s. 13 of the PPSA and that CIT's security with respect to these leases has attached.

Heavy Equipment

YES.

As concerns the 3 specific security agreements we have been provided with copies of Funding requests and cheques.

As concerns the Terex Trucks, we have been provided with dealer credit requests and funding requests for 33 of the 34 units. In addition to this, the Trustee has been provided with a sworn affidavit from Jack Pietropaolo, assistant vice president, Portfolio Management with CIT dated 6 November 2002, and attachments thereto, providing evidence of value passing from CIT to HEL with respect to the above-noted Terex trucks. It is the opinion of the trustee that this is sufficient evidence of value for purposes of attachment.

(ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2]. HEL held possession of both groups of assets (office equipment and office equipment). Furthermore, as concerns the leases for the office equipment, s.13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the leased goods when s/he obtains possession under the lease.

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

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

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

Is there a perfection step?

a. **The 10 leases for Office Equipment**

YES. While there has been no specific registration in the PPR with respect to the leases, CIT has made a general registration as follows:

Registration # 1365579 dated November 20, 2001 contains the following description:

All of the debtor's present and after acquired personal property

[2] Ibid. at 84.

Since s. 44(5) of the PPSA allows a financing statement to be registered before or after a security agreement is made or a security interest attaches, and since s.44(6) allows a single registration to relate to more than one security agreement, this general registration applies to perfect the security interest in the office equipment leases.

b. **Specific Security Agreement** dated July/00 (assets # 1-56 above)

YES

Registration # 405969 dated July 7/2000 contains the following information:

> *Eleven ECM350 Track Drills and fifteen XP825 Compressors. Together with all accessions, attachments, accessories and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, money or intangibles.*

This was amended by **Registration # 1648729**, dated March 12, 2002 to include a list by serial number of each of the 56 assets.

c. **Specific Security Agreement** dated July 7/00 (assets # 57-72 above)

YES

Registration #405993 dated July 7, 2000 contains the following information:

> *Five John Deere 200LC Excavators, three 744H John Deere loaders, one John Deere 450H Crawler Dozer, one John Deere 850c Crawler Dozer, one John Deere TC Loader, one John Deere 644H loader, two John Deere 310SE backhoe loader, one John Deere 624H loader and one John Deere 544H Loader. Together with all accessions, attachments, accessories and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, money or intangibles.*

There is also included in this registration a list of all 16 assets by serial number in the "*Serial Numbered Collateral*" section of the financing statement.

d. **Specific Security Agreement** dated Aug.10/00 (assets # 73-89 above)

YES

Registration # 461285 dated August 2, 2000 contains the following information:

> *Five John Deere 200LC Excavators, two John Deere 310SE backhoe loaders, one John Deere 644H 4WD Loader, one 2000 John Deere TC62H TC Loader and one John Deere 544H 4WD loader. Together with all accessions, attachments, accessories and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, money or intangibles.*

There is also included in this registration a list of all 17 assets by serial number in the "*Serial Numbered Collateral*" section of the financing statement.

This was amended by **registration # 485797**, dated August 16, 2000 to include the following statement:

> *Five 2000 John Deere 330LC Excavators, one 2000 John Deere 450LC excavator and one 2000 John Deere 644H Loader.*

e. **General Security Agreement (Wholesale)** dated Nov.9/01(assets #90-123 above)
YES

Registration # 1579465 dated February 1, 2002, contains the following information:

Secured Party: Tyco Capital (Canada) Inc.

General Description of Collateral:

The following collateral and all proceeds therefrom

1. *1999 Terex Truck Model TA 25 (A7581103)*
2. *1999 Terex Truck Model TA 25 (A7581118)*
3. *2001 Terex Truck Model TA 35 (A7761284)*
4. *1999 Terex Truck Model TA 35 (A7761061)*
5. *1999 Terex Truck Model TA 35 (A7761062)*
6. *1999 Terex Truck Model TA 35 (A7761064)*
7. *1999 Terex Truck Model TA 35 (A7761065)*
8. *1999 Terex Truck Model TA 35 (A7761066)*
9. *1999 Terex Dump (A7761082)*
10. *1999 Terex Truck Model TA 35 (A7761086)*
11. *1999 Terex Truck Model TA 35 (A7761095)*
12. *1999 Terex Truck Model TA 35 (A7761096)*
13. *1999 Terex Truck Model TA 35 (A7761097)*
14. *1999 Terex Truck Model TA 35 (A7761111)*
15. *1999 Terex Truck Model TA 35 (A7761112)*
16. *1999 Terex Truck Model TA 35 (A7761113)*
17. *1999 Terex Truck Model TA 35 (A7761114)*
18. *1999 Terex Truck Model TA 35 (A7761119)*
19. *1999 Terex Truck Model TA 35 (A7761120)*
20. *1999 Terex Truck Model TA 35 (A7761122)*
21. *1999 Terex Truck Model TA 35 (A7761144)*
22. *2000 Terex Truck Model TA 35 (A7761166)*
23. *2000 Terex Truck Model TA 35 (A7761181)*
24. *2000 Terex Truck Model TA 35 (A7761182)*
25. *2000 Terex Truck Model TA 35 (A7761186)*
26. *2000 Terex Truck Model TA 35 (A7761187)*
27. *2000 Terex Truck Model TA 35 (A7761188)*
28. *2000 Terex Truck Model TA 35 (A7761195)*
29. *2000 Terex Truck Model TA 35 (A7761196)*
30. *2001 Terex Truck Model TA 35 (A7761280)*
31. *2001 Terex Truck Model TA 35 (A7761283)*
32. *2001 Terex Truck Model TA 45 (A7811048)*
33. *2001 Terex Truck Model TA 45 (A77811050)*
34. *2001 Terex Truck Model TA 45 (A7911043)*

There is also included in this registration a list of all of these assets by serial number in the "*Serial Numbered Collateral*" section of the financing statement.

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

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

[3] Ibid. at p.140.

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral (Reference: Catherine Walsh, p.140).

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as CIT may be entitled to claim a super-priority status (ref: s. 35(2)). CIT has not provided evidentiary support for such an entitlement. Counsel for CIT claims that this constitutes an unperfected pmsi in the heavy equipment. The Trustee makes no determination with respect to this issue.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of CIT's interest in the assets is the date of registration of its financing statement in the PPR:
    1. Specific Security Agreement dated July/00: **July 7, 2000**
    2. Specific Security Agreement dated July 7/00: **July 7, 2000**
    3. Specific Security Agreement dated Aug. 10/00: **Aug. 2, 2000.**
    4. General Security Agreement dated Nov.9/01: **Nov. 20, 2001.**
    5. Office Equipment Leases: Nov. 20, 2001.

15. Auction Results

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

1. ECM350 Air Track Drill (CB7361) - $8,500.00
2. ECM350 Air Track Drill (BY7085) - $10,000.00
3. ECM350 Air Track Drill (R10025) - $4,000.00
4. ECM350 Air Track Drill (CB7385) - $600.00
5. ECM350 Air Track Drill (4184) - $600.00

6. ECM350 Air Track Drill (242657) - $2,500.00
7. ECM350 Air Track Drill (4260) - $18,000.00
8. ECM350 Air Track Drill (4259) - $12,070.00
9. ECM350 Air Track Drill (CB7240) - $13,500.00
10. ECM350 Air Track Drill (R10062) - $16,000.00
11. ECM350 Air Track Drill (R10063) - $12,070.00
12. ECM350 Air Track Drill (CB7497) - $12,070.00
13. ECM350 Air Track Drill (CB7242) - $15,000.00
14. ECM350 Air Track Drill (4244) - $2,500.00
15. ECM350 Air Track Drill (242648) - $600.00
16. ECM350 Air Track Drill (S4257) - $10,000.00
17. ECM350 Air Track Drill (T38076) - $14,000.00
18. ECM350 Air Track Drill (CB7238) - $12,070.00
19. EMC350 Air Track Drill (CB7371) - $12,070.00
20. ECM350 Air Track Drill (R10064) - $12,070.00
21. ECM350 Air Track Drill (R10061) - $14,000.00
22. ECM350 Air Track Drill (BY7073) - $12,070.00
23. ECM350 Air Track Drill (S4201) - $14,000.00
24. ECM350 Air Track Drill (CB7369) - $12,070.00
25. ECM350 Air Track Drill (BY7146) - $12,070.00
26. XP825WCU Compressor (175545) - $11,000.00
27. XP825WCU Compressor (184609) - $15,500.00
28. XP825WCU Compressor (178926) - $3,000.00
29. XP825WCU Compressor (183168) - $12,500.00
30. XP825WCU Compressor (186847) - $14,500.00
31. XP825WCU Compressor (175544) - $2,500.00
32. XP825WCU Compressor (184608) - $9,656.00
33. XP825WCU Compressor (186846) - $5,500.00
34. XP825WCU Compressor (183210) - $12,070.00
35. XP825WCU Compressor (189179) - $12,070.00
36. XP825WCU Compressor (193577) -$11,500.00
37. XP825WCU Compressor (207010) - $19,000.00
38. XP825WCU Compressor (207880) - $8,000.00
39. XP825WCU Compressor (173645) - $16,500.00
40. XP825WCU Compressor (V88497) - $14,000.00
41. XP825WCU Compressor (152924) - $5,500.00
42. XP825WCU Compressor (178925) -$14,000.00
43. XP825WCU Compressor (183169) - $4,500.00
44. XP825WCU Compressor (186186) - $15,000.00
45. XP825WCU Compressor (192567) - $9,656.00
46. XP825WCU Compressor (191994) - $13,000.00
47. XP825WCU Compressor (189165) - $2,500.00
48. XP825WCU Compressor (173406) - $12,070.00
49. XP825WCU Compressor (173408) - $12,070.00
50. XP825WCU Compressor (173411) - $12,070.00
51. XP825WCU Compressor (206742) - $16,500.00

52. XP825WCU Compressor (192810) - $14,000.00
53. XP825WCU Compressor (206642) -$ 1,500.00
54. XP825WCU Compressor (206842) - $12,070.00
55. XP825WCU Compressor (209490) - $8,000.00
56. 2000 JD 850C (T0850CX888907) - $160,000.00
57. 2000 JD 450H (T0450HX889199) - $127,500.00
58. 2000 JD 200LC (FF0200X501362) - $135,000.00
59. 2000 JD 330LC (FF0330X080747) - $199,500.00
60. 2000 Terex Truck Model TA 35 (A7761186) - $190,000.00
61. 2000 Terex Truck Model TA 35 (A7761187) - $190,000.00
62. 2000 Terex Truck Model TA 35 (A7761188) - $190,000.00
63. 2000 Terex Truck Model TA 35 (A7761195) - $190,000.00
64. 2000 Terex Truck Model TA 35 (A7761196) - $190,000.00

Total $ 2,144,162.00

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **CONTRACT FUNDING GROUP INC. ("CFG")**

1. Introduction

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

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

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

2. Summary Final Determination

As CFG has been unable to provide evidence of value having passed from it to HEL, it is the position of the Trustee that CFG's security interest has not attached, is therefore unperfected and is disallowed as a valid claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms

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

"CSA"	-	*Conditional Sales Act*, R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"LEMS"	-	Labrador Equipment and Mining Supplies Limited
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages

"PMSI"	-	Purchase Money Security Interest
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. The Assets

10 pieces of heavy equipment. Only one piece remained in the inventory for HEL and was sold at the Trustee's auction (as described below).

1. 892E Excavator (FF892EX012642)
2. 892E Excavator (FF892EX012643)[1]
3. 892E Excavator (FF892EX012455)
4. 310SE Backhoe Loader (T0310SE877721)
5. 301SE Backhoe Loader (T0310SE877726)
6. 160LC Excavator (P00160S041035)
7. 450LC Base Excavator (FF0450X090370)
8. 200LC Excavator (s/n FF0200X501668)
9. 608B Harvester (s/n 10BA1221)
10. 127B Harvester (s/n 01AB2086)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

[1]This piece of equipment was the only one remaining in the HEL inventory.

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

CFG claims that it holds a perfected security interest in the 10 assets listed above arising from four (4) Lease Agreements entered into in 1998, 1999, 2000 and 2001. Specifically, in 1998, Cyber Lease leased assets (supplied by HEL) to HEL and LEMS as lessees. Again, in 1999, Cyber Lease leased assets (supplied by HEL) to HEL as lessee. These leases were assigned to CFG. As well, CFG leased assets on 2000 and 2001 (supplied by HEL) to HEL as lessee. CFG takes the position that it has satisfied all the requirements to attach and perfect a security interest, including registration of the security interests in the PPR.

The Proof of Claim dated 16 May 2002, and the documents attached thereto (more particularly described below) indicate a total claim of **$1,619,421.90.** This is exclusively a secured claim. This relates to 4 Leases as follows:

- Lease No. 11-889-0 (securing 3 assets, #1 -3 above). Balance outstanding of **$61,410.37.**

- Lease No. 11-89-2 (securing 4 assets, #4 - 7 above). Balance outstanding of **$372,641.29.**

- Lease No. 11-174-0 (securing 1 asset # 8 above). Balance outstanding of **$199,084.26.**

- Lease No. 11-89-3 (securing 2 assets, #9-10 above). Balance outstanding of **$986.286.14.**

CFG has not set out any specific claim with respect to proceeds/tracing.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.

ii. Proof of Claim dated 16 May 2002.

iii. Correspondence dated April 5, 2002, August 1, 2002 and October 25, 2002 from Mark Klar of Chaiton & Chaiton setting out the claim of CFG.

iv. The 4 leases:

a. **Lease # 11-889-0** (assets #1-3 above)
- Copy of lease
- Certificate of acceptance dated 9 June/98
- Option to purchase
- Correspondence dated June 11/98 from John Deere Credit to Cyberlease confirming that John Deere Credit Inc. holds no interest in the 3 assets.
- Correspondence dated May 6, 1998 between Cyber Lease and CIBC addressing priorities.

b. **Lease # 11-89-2** (assets #4-7 above)
- Copy of lease
- Certificate of acceptance dated 9 July/99
- Option to purchase

c. **Lease # 11-174-0** (asset #8 above)
- Copy of lease
- Delivery and Acceptance Certificate dated Feb.16/01
- Pre-Authorized Payment Authorization dated Feb.16/01
- Confirmation of Insurance for the asset.
- Correspondence dated Feb 15/01 from CFG to CIBC setting out the priorities.
- Invoice from HEL dated May 31/01 to Marine Contractors Inc. for 3 Excavators (s/n FF0200X501636, FF0200X501668 and FF0200X501676.) Trade Ins were the following: CAT 320B Excavator, Serial # 06CR04707, CAT 320B Excavator, Serial # 06CR05244, and CAT 320B Excavator, Serial # 06CR05245.

d. **Lease #11-89-3** (assets # 9-10 above)
- Copy of Lease
- Delivery and Acceptance Certificate dated Sept.14/00
- Pre-Authorized Payment Authorization dated Sept.14/00

9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. In this regard, it is the opinion of

the Trustee that all of the assets in the list above were held by HEL for sale or lease and as such, form part of the inventory (s. 2(x) of the PPSA).
Note: Counsel for CFG maintains that these assets were used by HEL as equipment in accordance with s. 2 (p) of the PPSA. This is not accepted by the Trustee.

10. Application of the PPSA

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

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13,2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest relates and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-ppsa registration for purposes of priority. There are a number of conditions however. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for 2 of the 4 CFG Leases.

The dates for the 4 CFG leases are: June 1998 (#11-889-0), July 1999 (#11-89-2), September 2000 (#11-89-3) and February 2001 (#11-174-0). Transitioning issues are relevant for lease # 11-889-0 and # 11-89-2.

Lease #11-89-2

This transaction took place on 9 July 1999, prior to the coming into force of the PPSA. The Certificate of Acceptance executed 9 July 1999 indicates acceptance of the goods by HEL. Upon review of the lease, it is the opinion of the Trustee that it complies with the requirements of s. 5 of the CSA.

In accordance with the Regulations, CFG has registered a financing statement in the PPR (#80931) on Jan.31/00 which includes the following description:

> ***General Description of Collateral**: (1) 310SE Backhoe Loader S/N T0310SE877721; (1) 310SE Backhoe Loader S/N T0310SE677726; (1) 160LC Excavator S/N P00160X041035; (1) 450LC Base Excavator S/N FF0450X090370.*
> *Pre-PPSA registration information continued by this registration.*
> *733722 1999-07-15 Conditional Sales Act.*

This registration indicates that prior to the PPR, this transaction was supported by a registration pursuant to the CSA on July 15, 1999, being registration # 733722. The Trustee has confirmed this registration with a search of the Old Registry. It is the opinion of the Trustee that the relevant date for purposes of perfection is the date of registration in the Old Registry.

Lease #11-889-0

This transaction took place on 5 June 1998, prior to the coming into force of the PPSA. The Certificate of Acceptance executed 9 June 1998 confirms acceptance of the goods by HEL. Upon review of the lease, it is the opinion of the Trustee that it complies with the requirements of s. 5 of the CSA.

In accordance with the Regulations, CFG has registered a financing statement in the PPR (#80913) on Jan.31/00 which includes the following description:

> ***General Description of Collateral**:" (3) 892E Excavators, 32IN (800MM) Shoes, Standard Boom 4.00M (13' 1") ARM, Vandal Protection S/N FF892EX012642, S/N FF092EX012643, S/N FF892EX012455, DEERE ENG: RG6076A596348; RG6076A596350; RG6076A592086.*
> *Pre-PPSA registration information continued by this registration.*
> *697920 1998-06-11 Conditional Sales Act.*
> (Emphasis Added)

This registration indicates that prior to the PPR, this transaction was supported by a registration pursuant to the Conditional Sales Act on June 11, 1998, being registration # 697920. The Trustee has confirmed this registration with a search of the Old Registry. It is the opinion of the Trustee that the relevant date for purposes of perfection is the date of registration in the Old Registry.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[2]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

Each of the leases contains a confirmation from HEL that the assets were received and accepted by them. However, the leases further indicate that the supplier of the assets was HEL itself. That is, the assets financed by CFG were already in the possession of HEL. We have not been provided with any evidence of value passing from CFG to HEL with respect to these transactions. Unless CFG is able to provide the Trustee with such evidence, the Trustee maintains that value has not passed and consequently, CFG's security interest has not attached. However, if CFG can provide the Trustee with the required evidence of value, then, in combination with the satisfaction of the other 2 requirements for attachment (set out below), the Trustee's position would be that CFG's security interest has attached.

(ii) Rights in the collateral?

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

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

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

YES The evidentiary requirements of s. 11, required for attachment, are established by the 4 leases. Specifically, in accordance with s.11(1) (b), the 4 leases are in

[2] C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.
[3] Ibid. at 84.

writing, they have been signed by HEL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?

a. Lease No. 11-889-0(assets # 1-3 above)
YES.
Registration # 80913 described above.
Registration #1581161 dated Feb.4/02 contains the following information

Description: All inventory, products or other personal property supplied to or purchased by the Debtors, or either one of them, from the Secured Parties, or either one of them, including three 892E Excavators, 32IN (800MM) Shoes, Standard Boom 4.00M (13' 1")ARM, Vandal Protection, S/N FF892EX012642, S/N FF092EX012643, S/N FF892EX012455, DEERE ENG: RG6076A596348; RG6076A596350; RG6076A592086, and includes all attachments replacements, substitutions, accessories, accessions and additions thereto, together with all personal property received directly or indirectly as proceeds therefrom.

b. Lease No. 11-89-2(assets # 4-7 above)
YES.
Registration #80931 described above
Registration #1581602 dated February 4/02 contains the following information

Description: All inventory, products or other personal property supplied to or purchased by the Debtor from the Secured Parties or either of them including one (1) 310SE Backhoe Loader – S/N T0310SE877721, one (1) 310SE Backhoe Loader – S/N T0310SE677726, one (1) 160LC Excavator – S/N P00160X041035, and one (1) 450LC Base Excavator – S/N FF0450X090370, and includes all attachments, replacements, substitutions, accessories, accessions and additions thereto, together with all personal property received directly or indirectly as proceeds therefrom.

Motor Vehicle	*One (1) 450LC Base Excavator*	*FF0450X090370*
Motor Vehicle	*One (1) 160LC Excavator*	*P00160X041035*
Motor Vehicle	*One (1) 310SE Backhoe Loader*	*T0310SE677726*
Motor Vehicle	*One (1) 310SE Backhoe Loader*	*T0310SE877721*

c. Lease No. 11-174-0(asset # 8 above)
YES
Registration #803940 dated February 16/01contains the following information

Description: "One 200LC Excavator Unit #C001071 s/n FF0200X501668"

d. Lease No. 11-89-3(assets # 9-10 above)
YES
Registration #551721 dated September 20/00 contains the following information

Description:"1 Model 608B Harvester s/n10BA1221 Unit #C000760. 1 Model 1270B Harvester s/n 01AB2086 Unit #C000745"

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

13. Proceeds

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

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

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.[4]

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

[4] Ibid. at p.140.

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.[5]

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

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

14. Additional Comments on Priorities

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

- The documents indicate that in all 4 leases the assets secured were supplied by HEL and then leased back to HEL by CFG. Although such sale and lease-back arrangements appear to entitle CFG to claim a PMSI, subsection 2(hh) of the PPSA specifically excludes "a transaction of sale by and lease back to the seller" from being a PMSI.

- If these leases were not sale/leaseback type transactions, there are instances whereby an inventory financier such as CFG may be entitled to claim a super-priority status (ref: s. 35(2)). CFG has not provided evidentiary support for such an entitlement.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of CFG's interest in the assets are:
    - **Lease # 11-889-0**: June 11, 1998
    - **Lease # 11-89-2:** July 15, 1999
    - **Lease # 11-174-0:** February 16, 2001
    - **Lease # 11-89-3:**September 20, 2000

15. Auction Results

One Excavator (FF892EX012643) was sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium) was **$145,000.00.**

[5] Ibid. at 140.

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **CULEASE FINANCIAL SERVICES ("Culease")**

1. Introduction

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

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

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

2. Summary Final Determination

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

3. Defined Terms

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

"HEL"	-	Hickman Equipment (1985) Ltd.
"HLRL"	-	Hickman Leasing and Rentals Limited
"JD"	-	John Deere
"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PMSI"	-	Purchase Money Security Interest
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. Assets

Culease has made a claim to 19 pieces of heavy equipment. At the time of bankruptcy 10 pieces remained in the inventory of HEL (indicated by "*") and the rest had been sold to third parties.

1) 2001 JD 1050C Dozer* (LU1050C005288)
2) 2000 JD 160LC Excavator* (P00160X041361)[1]
3) 2001 JD 850C Dozer* (T0850CX900908)
4) 2001 JD 200LC Excavator* (FF0200X502017)
5) 2001 JD 160LC Excavator* (P00160X041793)
6) 2001 JD 160LC Excavator* (P00160X041792)
7) 2001 JD 160LC Excavator* (P00160X041741)
8) 2001 JD 450LC Base Excavator (FF0450X090590)
9) 2001 JD 310SG Backhoe Loader (T0310SG895252)
10) 2001 JD 310SG Backhoe Loader (T0310SG895027)
11) 2000 JD 160LC Excavator* (P00160X041555)
12) 2000 JD 200LC Excavator (FF0200X501636)
13) 2000 JD 670CH Motor Grader (DW670CH578392)[2]
14) 2000 JD 310SE Backhoe Loader (T0310SE892994)
15) 2000 JD 544H Loader (DW544HX578389)
16) 2000 JD 330LC Excavator* (FF0330X080964)
17) 2000 JD 330LC Excavator (FF0300X080941)
18) TC54H T.C. Loader (DWTC54H579078)
19) 624H 4WD Loader* (DW624HX579048)

5. Assumptions

[1] This is the correct serial number for this asset; the Financing Statement registered with respect to this item incorrectly listed the serial number as FF0160X041361.

[2] Though this is the description in the Lease Agreement, the Financing Statement lists this asset as a 670LC Excavator; however the serial number is the same in both documents.

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

Both the PPSA, and the *Conditional Sales Act* (the latter statute being part of the “prior law”) provide that property in goods pass to a purchaser from a seller or trader where the sale is in the ordinary course of business of the seller or trader. In some instances HEL transferred equipment subject to a security interest to a purchaser without discharging the security interest. In some cases the purchaser granted a security interest to another lender, while in other cases the purchaser transferred the equipment to a third party who, in turn granted a security interest to a lender. Due to the lack of evidence concerning all transactions involving

the Assets, we are unable to determine if sales by HEL were “in the ordinary course of business” such as to enable the purchaser to receive clear title to the equipment in order to allow a subsequent lender to obtain a valid security interest or a subsequent transferee to obtain clear title.

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

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

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

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

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

7. Overview of Claim

Culease claims that it holds perfected security interest in the 19 Assets arising from four (4) Lease Agreements entered into during the years 2000 and 2001. Culease states that in addition to satisfying all the requirements to attach and perfect a security interest, including registration of the security interests on the PPR, they also hold PMSI’s over all of the Assets. Furthermore, Culease has put forward a claim that they are entitled to trace proceeds from the disposition of the Assets prior to the bankruptcy.

There is a further issue with respect to Assets #1-7 listed above because on the date of HEL’s bankruptcy, these 7 pieces were in the possession of HLRL rather than HEL who Culease had leased them to in December 2001. Culease states that HEL transferred the Assets to HLRL without their knowledge or consent and contends that the transfer was not an arms-length transaction and therefore the transfer should be invalid. Culease has also presented correspondence in which the original Monitor stated that he had no interest in the 7 Assets since it was not listed as assets of HEL. Culease relies on this opinion and argues that the Assets should not form part of these bankruptcy proceedings and Culease should be permitted to seize the equipment.

The Proof of Claim, dated 16 April 2002, indicates a total claim of $4,690,163.49 comprised of an Unsecured Claim in the amount of $3,638,203.49 and a Secured Claim (Property) in the amount of $1,051,960.00. The Amended Proof of Claim dated October 29, 2002 indicated a total claim of $4,690,163.49 and states that this is exclusively a secured claim. The total claim results from 4 separate lease agreements:

1. Lease #4234 - 3 (securing Assets #1-7 in the list above). Balance outstanding of: **$2,347,124.38**

2. Lease #4322 - 3 (securing Assets #8-10 in the list above). Balance outstanding of: **$666,574.00. This is revised in the Amended Proof of Claim to be $660,547.00.**

3. Lease #4322 - 4 (securing Assets #11-13 in the list above). Balance outstanding of: **$553,088.81**

4. Lease #4234 - 2 (securing Assets #14-17 in the list above plus 2 other pieces of equipment not in the list above). Balance outstanding of: **$1,129,376.30**

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.

ii. Proof of Claim (Form 33) dated 16 April 2002

iii. Proof of Claim (Property) dated 16 May 2002.

iv. Proof of Claim (Form 33) dated 29 October 2002.

v. Sales Invoice, dated 31 December 2001, evidencing the sale of Assets #1-7 to HLRL by HEL

vi. Sub-Lease Agreement, undated, evidencing a lease of Assets #1-7 to HLRL by HEL; signed by both HLRL and HEL

vii. Correspondence from John French dated 26 March 2002 attaching:
   - DRV Lease Agreement dated 4 December 2000 between HEL and Town of Labrador City
   - Fixed Rate Retail Installment Contract dated 15 December 2000 between HEL and Abbott Brothers Equipment Inc.

- DRV Lease Agreement dated 21 December 2000 between HEL and Convoy Services Ltd.
- Fixed Rate Retail Installment Contract dated 22 December 2000 between HEL and Glenn Corporation Limited
- Fixed Rate Retail Installment Contract dated 1 March 2001 between HEL and BCL Construction Ltd.
- John Deere Credit Agreement dated 12 April 2001 between HEL and Complete Paving Limited
- John Deere Commercial Lease Agreement (with Purchase Option) dated 15 June 2001 between HEL and Curtis Shane White and James William White
- John Deere Commercial Lease Agreement (with Purchase Option) dated 28 June 2001 between HEL and Penney Construction Ltd.
- DRV Lease Agreement dated 27 December 2001 between HEL and J&N Excavating and Contracting Inc.

viii. **Lease #4234- 2** (for Assets #14-17 above)

- Lease Agreement dated 14 November 2000 evidencing the lease of Assets #14-17 plus 2 other pieces of equipment to HEL by Culease. The Lease Agreement is signed by both Culease and HEL
- Lease Agreement dated 10 December 2001 evidencing the lease of Assets #14-17 plus 2 other pieces of equipment to HEL by Culease. The Lease Agreement is signed by both Culease and HEL
- Bill of Sale, stamped "PAID", dated 14 November 2000 evidencing the sale of Assets #14-17 plus 2 other pieces of equipment to Culease by HEL. The Bill is signed by HEL
- Waiver Letters:
  - From CIBC dated 10 November 2000 relating to Assets #14-17 plus 2 other pieces of equipment
  - From John Deere Limited dated 20 November 2000 relating to Assets #14-17 plus 2 other pieces of equipment
- Substitution Agreement dated 13 February 2001 evidencing the substitution of Assets #18 & 19 for the 2 non-listed pieces of equipment referred to in the Bill of Sale and Lease Agreement dated 13 December 2000. This Agreement is signed by HEL but not by Culease
- PPR Verification Statement (Registration No. 661355)
- PPR Amendment Verification Statement (Registration No. 661371)
- PPR Amendment Verification Statement (Registration No. 695239)
- PPR Amendment Verification Statement (Registration No. 840363)
- 7 Requests for Amendment to Existing Lease dated 20, 21 or 22 November 2001
- Letter of Direction dated 8 November 2000 to Culease from HEL directing disbursement of proceeds of Bill of Sale (attached are 2 cheques from Culease to HEL for $676,797.16)

ix. **Lease #4322- 4** (for Assets #11-13 above)

- Lease Agreement dated 14 December 2001 evidencing the lease of equipment #11-13 to HEL by Culease. The Lease Agreement is signed by both Culease and HEL
- Bill of Sale, stamped "PAID", dated 14 December 2000 evidencing the sale of equipment #11-13 to Culease by HEL. The Bill is signed by HEL
- Waiver Letters:
  - From John Deere Credit dated 8 December 2000 relating to Assets #11-13
  - From CIBC dated 8 December 2000 relating Assets #11-13
  - From John Deere Limited dated 18 December 2000 relating to Assets #11-13
- 2 Requests for Amendment to Existing Lease dated 20 November 2001
- PPR Verification statement (Registration No. 726158)
- Letter of Direction dated 7 December 2000 to Culease from HEL directing disbursement of proceeds of Bill of Sale (attached is a cheque from Culease to HEL for $670,959.88 and a payment order showing the cheque was deposited directly into HEL's account with CIBC)

x. **Lease #4322- 3** (for Assets #8-10, 18 and 19 above)
- Lease Agreement dated 9 December 2001 evidencing the lease of equipment #8-10 to HEL by Culease. The Lease Agreement is signed by both Culease and HEL
- Bill of Sale, stamped "PAID", dated 9 February 2001 evidencing the sale of equipment #8-10 to Culease by HEL. The Bill is signed by HEL
- Lease Agreement dated 9 February 2001 evidencing the lease of equipment #11-13 to HEL by Culease. The Lease Agreement is signed by both Culease and HEL
- Waiver Letters:
  - Priority Agreement from CIBC dated 13 February 2001 relating to Assets #11-13 plus Assets #18 & 19
  - From John Deere Limited dated 15 February 2001 relating to Assets #11-13 plus Assets #18 & 19
- 2 Requests for Amendment to Existing Lease dated 20 and 21 November 2001
- PPR Verification Statement (Registration No. 809178)
- Waiver letters from various credit unions to CIBC Equipment Financing Ltd. relating to various pieces of equipment none of which are the Assets listed above
- Letter of Direction dated 7 February 2001 to Culease from HEL directing disbursement of proceeds of Bill of Sale (attached is a cheque from Culease to HEL for $723,386.56 and a payment order showing the cheque was deposited directly into HEL's account with CIBC)

xi. **Lease #4234- 3** (for Assets #1-7 above)
- Bill of Sale dated 13 December 2001 evidencing the sale of equipment #1-7 to Culease by HEL. The Bill is signed by HEL
- Lease Agreement dated 13 December 2001 evidencing the lease of equipment #1-7 to HEL by Culease. The Lease Agreement is signed by both Culease and HEL
- Waiver Letters:

- From Daimler Chrysler Capital Services dated 31 December 2001 only for asset #2
- From CIBC dated 110 January 2002 encompassing Assets #1-7
- From John Deere Limited dated 11 January 2002 encompassing Assets #1-7

- PPR Verification Statement (Registration No. 1544225)
- Letter of Direction dated 13 December 2001 to Culease from HEL directing disbursement of proceeds of Bill of Sale (attached cheque from Culease to HEL for $2,151,552.63)

9. Classification of the Assets

The actual subjective use to which the assets are put by the debtor dictates whether the assets will be classified as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that all 19 Assets were held by HEL for sale or lease and as such, form part of the inventory of HEL (s. 2(x) of the PPSA).

10. Application of the PPSA

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

11. PRE-PPSA / Transitioning Issues

Not applicable in this instance as all transactions took place in 2000 and 2001 and therefore were subsequent to the coming into force of the PPSA in the Province.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a

binding commitment to extend the loan or purchase money credited to the debtor.[3]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Was value given?

YES Culease did provide the Trustee with copies of Bill of Sales and cheques from Culease to HEL, evidencing the sale of the Assets to Culease by HEL. The Assets were then leased back to HEL who then had possession of goods to which Culease had acquired title. This is sufficient evidence of value being given by Culease to HEL in exchange for the security interest granted by HEL.

(ii) Rights in the collateral?

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

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

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

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

Is there a perfection step?

Lease No. 4234 - 3 (for Assets # 1-7 above)

[3] C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.
[4] Ibid. at p.84.

YES

Registration number 1544225 contains the following information:

- **General Description of Collateral:** "Equipment; Proceeds including but not limited to: goods, chattel paper, securities, documents of title, instruments, money, intangibles, insurance and all other proceeds arising directly or indirectly from the disposition, exchange, loss, replacement, renewal, destruction of or dealing with the collateral."
- **Serial Numbered Collateral: "**2001 JD 1050C Dozer (s/n LU1050C005288), 2000 JD 160LC Excavator (s/n FF0160X041361), 2001 JD 850C Dozer (s/n T0850CX900908), 2001 JD 200LC Excavator (s/n FF0200X502017), 3 - 2001 JD 160LC Excavator (s/n P00160X041793, P00160X041792, P00160X041741)"

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Culease's security interest in the 7 Assets in lease #4234-3. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23 (1) (e) of the Regulations, items of inventory must be described in accordance with s.24 (1) and s.24 (2). There is a question as to the adequacy of the description of Asset #2 since it is described by an incorrect serial number. However, as the debtor name is correct in the financing statement and the incorrect serial number would appear as a Close Match when a search was conducted, the Trustee is of the opinion that this error is not a seriously misleading error. It is the opinion of the Trustee that the collateral description in the above-noted financing statement satisfies these requirements.

Lease No. 4322 - 3 (for Assets # 8-10 above)

YES

Registration number 809178 contains the following information:

- **General Description of Collateral:** "Equipment; Proceeds including but not limited to: goods, chattel paper, securities, documents of title, instruments, money, intangibles, insurance and all other proceeds arising directly or indirectly from the disposition, exchange, loss, replacement, renewal, destruction of or dealing with the collateral."
- **Serial Numbered Collateral: "**2001 JD 450LC Base Excavator (s/n FF0450X090590), 2 - 2001 JD 310SG Backhoe Loader (s/n T0310SG895252, T0310SG895027)"

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Culease's security interest in the 3 Assets in Lease #4322-3. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23 (1) (e) of the Regulations, items of inventory must be described in accordance with s.24 (1) and s.24 (2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement satisfies these requirements.

Lease No. 4322 – 4 (for Assets #11-13 above)

YES

Registration number 726158 contains the following information:

- **General Description of Collateral:** "Equipment; Proceeds including but not limited to: goods, chattel paper, securities, documents of title, instruments, money, intangibles, insurance and all other proceeds arising directly or indirectly from the disposition, exchange, loss, replacement, renewal, destruction of or dealing with the collateral."
- **Serial Numbered Collateral: "**2000 JD 160LC Excavator (s/n DW670CH578392) - deleted, 2000 JD 160LC Excavator (s/n P00160X041555), 2000 JD 200LC Excavator (s/n FF0200X501636), 2000 JD 670LC Excavator (s/n DW670CH578392)"

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Culease's security interest in the 3 Assets in lease #4322-4. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23 (1) (e) of the Regulations, items of inventory must be described in accordance with s.24 (1) and s.24 (2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement satisfies these requirements.

Lease No. 4234-2 (for Assets # 14-19 above)

YES

Registration number 661355 contains the following information:

- **General Description of Collateral:** "Consumer goods, inventory, equipment, accounts, other proceeds including but not limited to: goods, chattel paper, securities, documents of title, instruments, money, intangibles, insurance and all other proceeds arising directly or indirectly from the disposition, exchange, loss, replacement, renewal, destruction of or dealing with the collateral."
- **Serial Numbered Collateral: "**2 - 2000 JD 310SE Backhoe Loader (s/n T0310SE892994, T0310SE892985 - deleted), 2000 JD 644H Loader (s/n DW644HX578388) - deleted, 2000 JD 544H Loader (s/n DW544HX578389), 2 - 2000 JD 330LC Excavator (s/n FF0300X080964, FF0300X080941), TC54H T.C. Loader (s/n DWTC54H579078), 624H 4WD Loader (s/n DW624HX579048)"

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Culease's security interest in the 8 Assets in lease #4234-2. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23 (1) (e) of the Regulations, items of inventory must be described in accordance with s.24 (1) and s.24 (2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement satisfies these requirements.

13. Proceeds

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

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

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.[5]

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

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.[6]

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

[5] Ibid. at p.140.
[6] Ibid.

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

Note: If a secured creditor fails to perfect its interest in collateral prior to disposition of the collateral by the debtor, the secured party must perfect its security interest in the proceeds as original collateral either by registration or taking possession for the secured party to have a security interest in the proceeds.[7]

14. Additional Comments on Priorities

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

- The documents indicate that in all 4 leases the Assets secured were first sold to Culease by HEL and then leased back to HEL. Bills of sale have been provided for all 4 leases. Although such sale and lease-back arrangements appear to entitle Culease to claim a PMSI, subsection 2(hh) of the PPSA specifically excludes "a transaction of sale by and lease back to the seller" from being a PMSI. Therefore the residual priority rules apply.

- If these leases were not sale/leaseback type transactions, there are instances whereby an inventory financier such as Culease may be entitled to claim a super-priority status (ref: s. 35(2)). As Culease is unable to provide evidentiary support for such an entitlement, its security interest is subject to the residual priority rules of the PPSA.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of Culease's interest in the Assets are the dates of registration of the various financing statements on the PPR:

    - **Lease #4234- 3** – 20 November 2000
    - **Lease #4322- 3** – 29 December 2000
    - **Lease #4322- 4** – 20 February 2001
    - **Lease #4234- 2** – 20 November 2000

Through discussion with Counsel for Daimler Chrysler the Trustee has been advised of a potential dispute between Culease and Daimler Chrysler with respect to asset #2, 2000 JD 160LC Excavator (s/n P00160X041361). The dispute arises with respect to the identification of this unit in Culease's financing statement #1544225 and also with

[7] Ibid.

respect to a waiver of interest letter dated 31 December 2001 and secured by Daimler Chrysler Capital Services. The Trustee expresses no opinion on this issue.

15. Auction Results

The following original Assets were sold at the Trustee's auction on July 12, 2002, in Halifax, Nova Scotia.

(Asset #5)	**2001 JD 160LC Excavator** (s/n P00160X041793)	$132,500
(Asset #6)	**2001 JD 160LC Excavator** (s/n P00160X041792)	$132,500
(Asset #7)	**2001 JD 160LC Excavator** (s/n P00160X041741)	$120,000
(Asset #11)	**2000 JD 160LC Excavator** (s/n P00160X041555)	$110,000
(Asset #2)	**2000 JD 160LC Excavator** (s/n P00160X041361)	$110,000
(Asset #16)	**2000 JD 330LC Excavator** (s/n FF0330X080964)	$199,500
(Asset #4)	**2001 JD 200LC Excavator** (s/n FF0200X502017)	$131,100
(Asset #3)	**2001 JD 850C Dozer** (s/n T0850CX900908)	$222,500
(Asset #1)	**2001 JD 1050C Dozer** (s/n LU1050C005288)	$330,000
(Asset #19)	**624H 4WD Loader** (s/n DW624HX579048)	$152,500

Net amount obtained (bid amount less LVG buyer's premium) **$1,640,600.00.**

The following trade-ins on original Assets were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia.

I/R XP825 Compressor (s/n 172821)	$9,656.00
I/R EXM350 Air Track (s/n R10031)	$12,070.00
Terex Articulated Truck (s/n 74TDC7364)	$800.00
CAT D8N Dozer (s/n 5TJ02858)	$165,149.00
CAT 320B Excavator (s/n 06CR04706)	$135,000.00
CAT 320B Excavator (s/n 06CR05244)	$140,000.00
CAT 320B Excavator (s/n 06CR05245)	$135,000.00
JD 992E Excavator (s/n FF992EX007040)	$100,000.00

Net amount obtained (bid amount less LVG buyer's premium) **$697,675**.

SCHEDULE A
FINAL DETERMINATION

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

Secured Party: **DAIMLER CHRYSLER ("Chrysler")**

1. Introduction

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

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

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

2. Summary Final Determination

As Chrysler's claim is allowed as a valid secured claim in all of the Assets, the Trustee claims no interest in the assets that are the subject of the claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms

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

"Debis"	-	Debis, a division of Mercedes Benz Credit of Canada Inc.
"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PMSI"	-	Purchase Money Security Interest
"Province"	-	Newfoundland and Labrador

“Regulations”	-	Personal Property Security Regulations (103/99)
“s/n”	-	serial number

4. Assets

Chrysler has made a claim to 24 pieces of heavy equipment. At the time of bankruptcy only 1 of the pieces remained in the inventory of HEL (indicated by “*”) and the rest had been sold to third parties.

1) JD 624H Loader (DW624HX574946)

2) JD 200LC Excavator (FF0200XX501010)

3) JD 270LC Excavator (FF0270X070608)

4) JD 35 Compact Excavator (FF035ZX230108)

5) JD 35 Compact Excavator (FF035ZX230109)

6) JD 27 Compact Excavator (FF027ZX220096)

7) JD 27 Compact Excavator (FF027ZX220097)

8) JD 310E Loaders (T0310EX883019)

9) JD 310E Loader (T0310EX883008)

10) JD 310SE Loader (T0310SE883022)

11) JD 310SE Loader (T0310SE883024)

12) JD 644H Loader (DW644HX575363)

13) JD 644H Loader (DW644HX575384)

14) JD 644H Loader (DW644HX575403)

15) JD 644H Loader (DW644HX575494)

16) JD 644H Loader (DW644HX575479)

17) JD 200LC Excavator (FF0200X501097)

18) JD 200LC Excavator (FF0200X501094)

19) JD 450H Crawler Dozer (TO450HX883089)

20) JD 50 Compactor Excavator (TFF050ZX240118)

21) JD 250C Articulated Truck (BE250CT200116)

22) JD 250C Articulated Truck (BE250CT200117

23) JD 160LC Excavator* (P00160X041361)

24) JD 310SE Loader (T0310SE887336)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

Chrysler claims it holds a first security position with respect to all the Assets listed above that were still in the possession of HEL at the time of bankruptcy. In addition, Chrysler claims a right to trace proceeds from the sale of the Assets that were not in the possession of HEL at the time of bankruptcy.

The Proof of Claim dated 16 April 2002, indicates a total claim of $2,324,926.76 comprised entirely of a Secured Claim (Property) in the amount of $2,324,926.76. The total claim results from 3 separate lease agreements:

1. Lease #1 (securing Assets #1-7). Balance outstanding of **$519,105.85**.

2. Lease #2 (securing Assets #8-19). Balance outstanding of **$1,307,983.66**.

3. Lease #3 (securing Assets #20-25). Balance outstanding of **$497,837.25**.

8. Documentation

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

i) PPR search conducted in the name of the debtor on March 21, 2002

ii) Notice of Waiver of Twenty Day Notice Period to Dispose of Collateral to PricewaterhouseCoopers Inc. dated 26 April 2002

iii) Spreadsheet with relevant information on the Assets listed above

iv) A document entitled Schedule "D" listing 14 various Assets and their cost

v) Correspondence from Phil Buckingham of Goodland, O'Flaherty to White, Ottenheimer & Baker dated March 21, 2002 requesting that the Trustee/Trustee in Bankruptcy make inquiries to determine what documents exist with respect to 14 various Assets (the same as in (iv) above)

vi) Correspondence from Edward Head of HEL to Cindy Dewitt dated September 6, 2000 requesting a transfer from HEL to Holt Equipment Co. of Asset #20

vii) Affidavit of Timothy Gilligan, dated 19 November 2002.

viii) Correspondence dated 5 May 2000 from Debis to HEL enclosing the following documents:
- Lease Schedule No. 3
- Equipment Acceptance Certificate signed by HEL as Lessee
- Disbursement of Funds Approval signed by HEL as Lessee
- Invoice from Complete Goods dated 19 April 2000 for a Compact Excavator (FF050ZX240118) indicating that the recipient of the Excavator was HEL
- Invoice from Complete Goods dated 26 April 2000 for a 250C Articulated Truck (BE250CT200117) indicating that the recipient of the Truck was HEL
- Invoice from Complete Goods dated April 20, 2000 for a 250C Articulated Truck (BE250CT200116) indicating that the recipient of the Truck was HEL

- Invoice from Complete Goods dated April 28, 2000 for a 160LC Excavator (P00160X041361) indicating that the recipient of the Excavator was HEL
- Invoice from Complete Goods dated 28 April, 2000 for a 310SE Backhoe Loader (T0310SE887336) indicating that the recipient of the Backhoe was HEL

ix) We were provided with the following HEL invoices:

- Invoice from HEL to Hickey Construction for JD 624H Loader (DW624HX574946). Trade-in was a used CAT 930 Loader (41K03558)
- Invoice from HEL to Harbour Construction Limited for John Deere Excavator (FF0200XX501010). Trade-ins were a CAT 213 Excavator (1EJ00061) and a John Deere 644B Loader (JD644B350269)
- Invoice from HEL to Budgell's Equipment & Rental for a 240 LC Excavator (FF0270X070608). Trade-in was a Hitachi EX270 Excavator (158-6412)
- Invoice from HEL to RDO Equipment Co. for two Compact Excavators (FF035ZX230108) and (FF035ZX230109)
- Invoice from HEL to Rod White for an Excavator (FF027ZX200976)
- Unidentified computer printout for Compact Excavator (FF027ZX220097)
- Invoice from HEL to College of the North Atlantic for a Backhoe (T0310EX883019)
- Invoice from HEL to the Grand Concourse Authority for a Backhoe (T0310EX883008)
- Invoice from HEL to Stanley Bruce Murley operating as Corner Stone Construction for a Backhoe (T0310SE883022)
- Invoice from HEL to Donovan Homes Limited for Excavator (FF0200X501453), Backhoe (T0310SE883024); Trailer (2J9C3VSD2WK001160)
- Invoice from HEL to the College of the North Atlantic for Excavator (P00160X041295); Excavator (P00160X041308); Excavator (P00160X041309); Wheel Loader (DW644HX575363); Wheel Loader (DW644HX575384); Wheel Loader (DW644HX575403); Motor Grader (DW670CH575568); Motor Grader (DW670CH575569); Dozer (T0850CX883924); Dozer (T0850CX883656)
- Invoice from HEL to Butler's Sand & Stone Co. Limited for a Loader (DW644HX575479)
- Invoice from HEL to Ray Murrin Limited for a Loader (DW644HX575494). Trade-in was a CAT 966B Loader (57H00345)
- Invoice from HEL to Central Forest Products for an Excavator (FF0200X501097). Trade-in was a John Deere 690E Excavator (DW690EL549523)
- Invoice from HEL to Central Forest Products for an Excavator (FF0200X501094). Trade-in was a John Deere 690E Excavator (DW690EL556734)
- Invoice from HEL to Island Aggregates & Ready Mix for a Motor Grader (DW772CH579123); Crawler Dozer (T0450HX883089). Trade-ins were a

John Deere 450G Dozer (T0450GW809815) and a John Deere 772CH Grader (DW772CH567061)

- Invoice from HEL to Johnson's Construction for: Excavator (FF0450X090370); Excavator (FF0450X090412) Excavator (FF0330X080505); Loader (DW744HM572476); Motor Grader (DW772CH575287); Articulated Truck (A7761113); Articulated Truck (A7761144); Articulated Truck (A7761182) Articulated Truck (A77661181); Articulated Truck (A7761166)
- Invoice from HEL to Debis for Excavator (FF050ZX240118); Articulated Truck (BE250CT200116); Articulated Truck (BE250CT200117); Excavator (P00160X041361); Backhoe (T0310SE887336)
- Invoice from HEL to Complete Paving Ltd. for an Excavator (P00160X041361). Trade-in was a John Deere 590D Excavator (FF590DS001968)
- Invoice from HEL to Allard Distributing Limited for a 310SE Backhoe (T0310SE887336)

x) **Master Equipment Lease Agreement #1** (Assets #1-7)

- Lease Agreement dated February 14, 2000 between HEL as Lessee and Debis as Lessor
- Lease Schedule No. 1 listing Assets #1-7 and indicating that it is a lease for a 48-month term, commencing February 14, 2000 at a cost of $824,378.68 and a residual value of $10.00
- Waiver letters:
  - From John Deere Limited to Cyberlease dated February 17, 2000 consenting to HEL granting Cyberlease a security interest in Assets #1-7 and further agreeing that Cyberlease's security as it relates to these seven pieces shall rank in priority to the John Deere Limited security
  - From John Deere Credit to Debis dated February 9, 2000 confirming that John Deere Credit holds no interest in Assets #1-7
  - From Debis to Canadian Imperial Bank of Commerce dated February 7, 2000; signed by CIBC on February 24, 2000; and stating that CIBC consents that its various present and future security interests in the assets of HEL do not and will not operate as a perfected security interest as against Debis with respect to Assets #1-7

xi) **Master Equipment Lease Agreement #2** (Assets #8-19)

- Lease Agreement dated March 14, 2000 between HEL as Lessee and Debis as Lessor
- Lease Schedule No. 2 listing Assets #8-19 and indicating that it is a lease for a 48-month term, commencing March 14, 2000 at a cost of $2,348,268.69 and a residual value of $10.00
- Waiver letters:
  - From John Deere Credit to Debis dated March 13, 2000 confirming that John Deere Credit holds no interest in Assets #8-19
  - From John Deere Limited ("JDL") to Debis dated March 14, 2000

consenting to HEL granting a security interest in Assets #8-19 to Debis and agreeing to subordinate JDL's security interest to Debis

- From Debis to Canadian Imperial Bank of Commerce dated March 7, 2000; signed by CIBC on March 13, 2000; and stating that CIBC consents that its various present and future security interests in the assets of HEL do not and will not operate as a perfected security interest as against Debis with respect to Assets #8-19

xii) **Master Equipment Lease Agreement #3** (Assets #20-24)

- Lease Agreement dated March 14, 2000 between HEL as Lessee and Debis as Lessor
- Lease Schedule No. 3 listing Assets #20-24 and indicating that it is a lease for a 48-month term, commencing March 14, 2000 at a cost of $869,338.74 and a residual value of $10.00
- Waiver letters:
  - From John Deere Credit to Debis dated May 9, 2000 confirming that John Deere Credit holds no interest in Assets #20-24
  - From John Deere Construction Equipment Company to Debis dated 19 May 2000 stating that John Deere Construction Equipment Company subordinates its security interests to DEBIS with respect to Assets #20-24
  - From Debis to Canadian Imperial Bank of Commerce dated May 9, 2000; signed by CIBC on May 11, 2000; and stating CIBC consents that its various present and future security interests in the assets of HEL do not and will not operate as a perfected security interest as against Debis with respect to Assets #20-24

9. Classification of the Assets

The actual subjective use to which the assets are put by the debtor dictates whether the assets will be classified as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that all 24 Assets were held by HEL for sale or lease and as such, form part of the inventory of HEL (s. 2(x) of the PPSA).

10. Application of the PPSA

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

11. PRE-PPSA/ Transitioning Issues

Not applicable in this instance as all transactions took place in 2000 and therefore were subsequent to the coming into force of the PPSA in the Province.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

<u>Is there attachment?</u>

(i) Was value given?

YES The Trustee has been provided with affidavit evidence from Timothy Gilligan, Commercial Credit Analyst for Chrysler, which provides evidence of value passing from Chrysler to HEL with respect to these transactions.

(ii) Rights in the collateral?

YES HEL held possession of the Assets and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.[2]

[1] C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.
[2] Ibid. at 84.

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

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

YES The evidentiary requirements of s. 11, required for attachment, are established by the 3 leases. Specifically, in accordance with s.11(1)(b), the 3 leases are in writing, they have been signed by HEL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?

Master Equipment Lease Agreement #1 (for Assets #1-7)

YES

Registration number 201913 contains the following information:

- **General Description of Collateral:** "2000 John Deere 624H Loader, serial number DW624HX574946, 2000 John Deere 2000 John Deere 200 LC Excavator, serial number FF0200X501010, 2000 John Deere 270 LC Excavator serial numbered FF0270X070608, 2000 John Deere 35 Excavator, serial number FF035ZX230109, 2000 John Deere 27 Excavator, serial number FF027ZX220096, 2000 John Deere 27 Excavator, serial number FF027ZX220097. Together with all engines, components, accessories, parts, additions, attachments, replacements and substitutions which are intended to, are nor or may hereafter be attached thereto, all books, records and documents relating to the property referred to above, all leases or subleases with respect to the property referred to above, all representations, warranties, covenants and indemnities of any manufacturer or vendor of and with respect to the property referred to above, proceeds: goods, inventory, chattel paper, securities, documents of title, instruments, money, intangibles and accounts (all as defined in the PPSA) and insurance proceeds."
- **Serial Numbered Collateral: "**JD 624H Loader (s/n DW624HX574946), JD 200LC Excavator (s/n FF0200XX501010), JD 270LC Excavator (s/n FF0270X070608), 2 - JD 35 Compact Excavators (s/n FF035ZX230108 & FF035ZX230109), 2 - JD 27 Compact Excavators (s/n FF027ZX220096 & FF027ZX220097)"

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Chrysler's security interest in Assets #1-7. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Master Equipment Lease Agreement #2 (for Assets #8-19)

YES

Registration number 175554 contains the following information:

- **General Description of Collateral:** "Two (2) new 2000 John Deere Backhoe Loader, model 310E, S/N T0310EX883019 and T0310EX883008. Two (2) new 2000 John Deere Backhoe Loader, model 310SE S/N T0310SE883022 and T0310SE883024. Five (5) new 2000 John Deere 4WD motor model 644H S/N DW644HX575363, DW644HX575384, DW644HX575403, DW644HX575479, DW644HX575494. Two (2) new 2000 John Deere Excavators, model 200LC S/N FF0200X501097 and FF0200X501094. One (1) new 2000 John Deere Crawler Dozer model 450H S/N T045HX883089. One (1) new John Deere Motor Grater Model 772CH S/N DW772CH575287. Together with all engines, components, accessories, parts, additions, attachments, replacements and substitutions which are intended to, are nor or may hereafter be attached thereto, all books, records and documents relating to the property referred to above, all leases or subleases with respect to the property referred to above, all representations, warranties, covenants and indemnities of any manufacturer or vendor of and with respect to the property referred to above, proceeds: goods, inventory, chattel paper, securities, documents of title, instruments, money, intangibles and accounts (all as defined in the PPSA) and insurance proceeds."
- **Serial Numbered Collateral:** Blank

Amendment number 201608 contains the following information:

- **General Description of Collateral:** "In addition to listing serial number collateral under the general collateral classification we are also listing the serial number collateral under vehicle/serial collateral classification."
- **Serial Numbered Collateral: "**JD 310E Loader (s/n T0310EX883008), 2 - JD 310SE Loaders (s/n T0310SE883022 & T0310SE883024), 5 - JD 644H Loaders (s/n DW644HX575363, DW644HX575384, DW644HX575403, DW644HX575494 & D644HX575479), 2 - JD 200LC Excavators (s/n FF0200X501097 & FF0200X501094), JD 450H Crawler Dozer (s/n T045HX883089), JD 772CH Motor Grader (s/n DW772CH575287)"

Amendment number 696112 contains the following information:

- **Serial Numbered Collateral:** Deletes "JD 772CH Motor Grader (s/n DW772CH575287)"

Amendment number 1585546 contains the following information:

- **General Description of Collateral:** "In addition to listing serial number collateral under the general collateral classification we are also completing the listing of the serial number collateral under vehicle/serial collateral classification."
- **Serial Numbered Collateral:** Adds "JD 310E Loader (s/n T0310EX883019)"

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Chrysler's security interest in Assets #8-18. There is a question as to the adequacy of the description of Asset #19 since it is described by an incorrect serial number in both the General Description and Serial Numbered Collateral. However, as the debtor name is correct in the financing statement and the incorrect serial number would appear as a Close Match when a search was conducted, the Trustee is of the opinion that this error is not a

seriously misleading error. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions, noting the special circumstances of Asset #19, in the above-noted financing statements satisfy these requirements.

Registration number 1585733 contains the following information:

- **General Description of Collateral:** "All attachments, accessories, additions, alterations, replacements & repairs (whether present or future) to the vehicle collateral. Proceeds: All cash and non-cash proceeds of the vehicle collateral including without limitation proceeds derived directly or indirectly from any dealing with the vehicle collateral or that indemnified or compensates the Debtor(s) for the destruction or damage to or loss of the vehicle collateral. The proceeds may take the form of any one or more of the following: goods, document of title, chattel paper, instruments, money, securities or intangibles, Accordingly, any of the Debtor(s) after-acquired personal property may be proceeds and therefore subject to the Secured Party's security interest."
- **Serial Numbered Collateral:** "JD 450H Crawler Dozer (s/n T0450HX883089)"

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Chrysler's security interest in Asset #19. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions in the above-noted financing statements satisfy these requirements.

Master Equipment Lease Agreement #3 (for Assets #20-24)

YES

Registration number 284372 contains the following information:

- **General Description of Collateral:** One (1) new 2000 John Deere Compactor Excavator, serial number FF050ZX240118, One (1) new 2000 John Deere 250C, serial number BE250CT200116, One (1) new 2000 John Deere 250C, serial number BE250CT200117, One (1) new 2000 John Deere 160LC Excavator, serial number P00160X041361, One (1) new 2000 John Deere 310 SE Loader, serial number T0310SE887336. Together with all engines, components, accessories, parts, additions, attachments, replacements and substitutions which are intended to, are nor or may hereafter be attached thereto, all books, records and documents relating to the property referred to above, all leases or subleases with respect to the property referred to above, all representations, warranties, covenants and indemnities of any manufacturer or vendor of and with respect to the property referred to above, proceeds: goods, inventory, chattel paper, securities, documents of title, instruments, money, intangibles and accounts (all as defined in the PPSA) and insurance proceeds.
- **Serial Numbered Collateral:** JD 50 Compactor Excavator (s/n FF050ZX240118), 2 - JD 250C Articulated Trucks (s/n BE250CT200116 &

BE250CT200117), JD 160LC Excavator (s/n P00160X041361), JD 310SE Loader (s/n T0310SE887336)

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to Chrysler's security interest in Assets #20-24. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

[3] Ibid. at p.140.

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

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

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as Chrysler may be entitled to claim a super-priority status (ref: s. 35(2)). As Chrysler is unable to provide evidentiary support for such an entitlement, its security interest is subject to the residual priority rules of the PPSA.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of Chrysler's interest in the Assets are the dates of registration of the various financing statements on the PPR:

  - **Lease Agreement #1** (for Assets #1-7) - 6 April 2000
  - **Lease Agreement #2** (for Assets #9-19) - 3 March 2000
  - **Lease Agreement #2** (for Asset #8) - 5 February 2002
  - **Lease Agreement #2** (for Asset #19) - 5 February 2002
  - **Lease Agreement #3** (for Assets #20-24) - 16 May 2000

15. Auction Results

The following Assets were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia:

[4] Ibid.

(Asset #23) **2000 JD 160LC Excavator** (s/n P00160X041361) $110,000

Net amount obtained (bid amount less LVG buyer's premium) **$110,000.00**.

SCHEDULE A
FINAL DETERMINATION

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

Secured Party: **G. E. CAPITAL EQUIPMENT FINANCE INC. ("GE")**

1. Introduction

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

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

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

2. Summary Final Determination

As GE has been unable to provide evidence of value having passed from it to HEL, it is the position of the Trustee that GE's security interest has not attached, is therefore unperfected and as such is disallowed as a valid claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms

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

"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PPR"	-	Personal Property Registry

"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PMSI"	-	Purchase Money Security Interest
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. Assets

The Trustee believes GE's claim to be over the 11 pieces of heavy equipment listed below. At the time of bankruptcy none of the pieces remained in the inventory of HEL and all had been sold to third parties.

1) JD 892E-LC Excavator (FF892EX012437)
2) JD 200LC Excavator (FF0200X500199)
3) JD 270LC Excavator (FF0270X070157)
4) JD 892E-LC Excavator (FF892EX012600)
5) JD 310E Backhoe Loader (T0310EX842483)
6) JD 230LC Excavator (FF0230X060262)
7) JD 310SE Backhoe Loader (T0310SE846499)
8) JD 200LC Excavator (FF0200X500384)
9) JD 892E-LC Excavator (FF892EX012262)
10) JD 450LC Excavator (FF0450X090087)
11) JD 200LC Excavator (FF0200X060658)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in

accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

Pursuant to the terms of the Court Order establishing the Claims Plan, this Final Determination determines the validity of security claimed and whether such security has been properly perfected. For the assistance of readers, the Trustee has sometimes provided comments concerning the priority of such security vis-à-vis other parties but such

priority-related comments are made without prejudice to any position which may be taken at any future date by any other party in regards to priorities.

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

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

7. Overview of Claim

GE did not provide the Trustee with any correspondence outlining its position with respect to the Assets other than to provide documentation relating thereto. The Trustee has therefore assumed that GE takes the position that it has security over the Assets. Whether or not GE contends that this security interest is a first charge over the Assets is unknown. Furthermore, GE has not put forward any claim that they are entitled to trace proceeds from the disposition of the Assets.

GE also did not provide the Trustee with a Proof of Claim outlining the amount owed by HEL as of 13 March 2002.

8. Documentation

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

i) PPR search conducted in the name of the debtor on March 21, 2002.

ii) Customer Purchase Order for JD Industrial Products for Pyramid Construction Limited dated August 7, 1998 with respect to the following two assets: JD 892E Excavator (s/n FF892EX012268) and JD 892E Excavator (s/n FF892EX012600).

iii) Customer Purchase Order for JD Industrial Products for Glen Corp Limited dated July 1, 1998 with respect to the following two assets: JD 270 Excavator (s/n FF02701070157) and JD 892E LC Excavator (s/n FF8892EX012437).

iv) Customer Purchase Order for JD Construction Products for Coady Construction & Excavating Limited dated October 20, 1998 with respect to the following asset: JD 450LC Excavator (s/n FF0450X090027).

v) Invoice from HEL to Spracklin Enterprises dated August 4, 1998 for the purchase of a JD 230LC Excavator (s/n FF0230X060262) and with a trade-in of a used JD 790D Excavator and a used Drott 40 Loader.

vi) Equipment Loan and Security Agreement No. 5345675-001 dated July 30, 1998. The Agreement indicates that it is for a 60-month term, commencing August 30, 1998 for a total amount of $2,529,842.75.

vii) Facsimile correspondence from GE to Geanette Savard dated May 22, 1998 regarding delivery of a cheque to pay for the Assets.

9. Classification of the Assets

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

10. Application of the PPSA

As indicated by the above-noted documentation the secured transaction between GE and HEL was in the form of an inventory financing loan. The Equipment Loan and Security Agreement, which secured the specific items listed therein, was for a term of more than one year and was a financing lease as opposed to a true lease. Section 4 of the PPSA confirms that such a secured transaction is governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dated the PPSA (and the PPR registration system) were given a 2-year grace period from the date of the coming into force of the Act (i.e. until December 13, 2001) in which to perfect their pre-PPSA security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicated, *inter alia*, under which prior registration law the security interest related and also provide the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-PPSA registration for purposes of priority. There are a number of conditions however. For example, defects in the pre-PPSA security could not be cured by the operation of the PPSA.

Transitioning issues are relevant in this instance since the date of the Equipment Loan and Security Agreement was signed on July 30, 1998, prior to the coming into force of the PPSA. and therefore would have been subject to the pre-PPSA *Conditional Sales Act*, R.S.N.L. 1990, c. C-28. The Agreement complied with the requirements outlined in s.5 of the *Conditional Sales* Act including registration in the Old Registry on August 7, 1998 (Registration #703686). However, the financing statement registered does not refer to this prior registration and therefore does not meet the requirements of s.26 of the Regulations. As such, it is the opinion of the Trustee that the earliest date for purposes of determining priorities must be the date of registration in the PPR and not prior.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

UNDETERMINED The Trustee has not been provided with any evidence of value passing from GE to HEL with respect to this transaction. Relying on the facsimile from GE to Geanette Savard, it appears that the Assets were paid for by GE and delivered directly to HEL. However, there is no evidence that GE actually paid for the Assets. Unless GE is able to provide the Trustee with evidence that they in fact paid for the Assets, the Trustee

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

maintains that value has not passed and consequently, GE's security interest has not attached. However, if GE can provide the Trustee with the required evidence of value, then, in combination with the satisfaction of the other 2 requirements for attachment (set out below), the Trustee's position would be that GE's security interest has attached.

(ii) Rights in the collateral?

YES HEL held possession of the assets and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.[2] Furthermore, section 13(2) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the leased goods when s/he obtains possession under the lease.

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

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

YES The evidentiary requirements of s. 11, required for attachment, are established by the Equipment Loan and Security Agreement. Specifically, in accordance with s.11(1)(b), this agreement is in writing, has been signed by HEL as the debtor and provides an adequate description of the collateral that is secured.

Is there a perfection step?

YES

Registration number 1396769 contains the following information:

- **General Description of Collateral**: "John Deere Excavator model 892ELC s/n FF892EX012437; John Deere Excavator model 200LC s/n FF0200X500199; John Deere Excavator model 270LC s/n FF0270X070157; John Deere Excavator model 892ELC s/n FF892EX012600; John Deere Backhoe Loader model 310E s/n T0310EX842483; John Deere Excavator model 230LC s/n FF0230X060262; John Deere Excavator model 310SE s/n T0310SE846499; John Deere Excavator model 200LC s/n FF0200X500384; John Deere Excavator model 892LC s/n FF892EX012262; John Deere Excavator model 450LC s/n FF0450X090087; John Deere Excavator model 200LC s/n FF0200X060658. The goods described herein, wherever situated , and all present and after-acquired intellectual property, intangibles, attachments, accessories, exchanges and trade-ins therefore, and all rights, receivables and chattel paper derived from or evidencing the lease or rental thereof by the debtor to third parties, and all proceeds relating thereto. Proceeds: All of the debtor's present and after-acquired personal property which is derived directly or

[2] Ibid. at p.84.

indirectly from any dealing with or disposition of the above-described collateral, including, without limiting the generality of the foregoing, all insurance and other payments payable as indemnity or compensation for loss or damage thereto and all chattel paper, documents of title, goods, instruments, intangibles, money and securities."

- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to GE's security interest in the Assets. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Note: GE has an additional financing statement registered on the PPR.

Registration number 1396778 contains the following information:

- All debts and liabilities, present and future, of Hickman Equipment (1985) Limited of any nature including all instruments evidencing, and chattel paper, intangibles, accounts, money and securities and other property and security relating to or securing such debts and liabilities, and all proceeds relating thereto. Proceeds: All of the debtor's present and after-acquired personal property which is derived directly or indirectly from any dealing with or disposition of the above-described collateral, including, without limiting the generality of the foregoing, all insurance and other payments payable as indemnity or compensation for loss or damage thereto and all chattel paper, documents of title, goods, instruments, intangibles, money and securities.
- **Serial Numbered Collateral:** Blank

The Trustee has not been provided with any documentation to support this registration and therefore the Trustee has deemed that it fails to meet the attachment requirements.

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

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

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as GE may be entitled to claim a super-priority status (ref: s. 35(2)). As GE is unable to

[3] Ibid. at p.140.
[4] Ibid.

provide evidentiary support for such an entitlement, its security interest is subject to the residual priority rules of the PPSA.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of GE's interest in the Assets is typically the date of registration of its financing statement in the PPR:

  - **Equipment Loan and Security Agreement** - 27 November 2001

  Since GE had a prior registration on the Old Registry it was possible to extend their date for the determination of priority back to August 7, 1998. However, as a result of GE's failure to include a reference to the prior registration and GE's failure to perfect its security interest, GE's interest is subordinated to all validly perfected security interests in the Assets existing as of the date of bankruptcy.

15. Auction Results

The following Assets were sold at the Trustee's auction on July 12, 2002, in Halifax, Nova Scotia.

None

Net amount obtained (bid amount less LVG buyer's premium) **$0.00**.

SCHEDULE A
FINAL DETERMINATION

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

Secured Party: **G. E. CAPITAL LEASING SERVICES INC. ("GE")**

1. Introduction

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

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

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

2. Summary Final Determination

As GE has been only able to provide evidence of value having passed to HEL with respect of two of the Equipment Schedules, it is the position of the Trustee that GE's security interest has attached only with respect to the assets listed in these Equipment Schedules and GE's security interest in the remainder of the assets is therefore unperfected and must be disallowed as a valid claim. Furthermore, as a result of GE's failure to properly describe the collateral in its financing statements, it is the position of the Trustee that GE's security interest has not been perfected and must be disallowed as a valid claim.

However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms:

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

“HEL”	-	Hickman Equipment (1985) Ltd.
“JD”	-	John Deere
“PPR”	-	Personal Property Registry
“PPSA” or “Act”	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
“PMSI”	-	Purchase Money Security Interest
“Province”	-	Newfoundland and Labrador
“Regulations”	-	Personal Property Security Regulations (103/99)
“s/n”	-	serial number

4. Assets

All of the assets to which GE asserts a claim are goods used by Show Tech Audio, a division of HEL. The Assets were goods typically used in the audio/visual industry and included speakers, microphones, staging, amplifiers, CD players, and similar audio/visual equipment. Due to the large quantity of the Assets, the Trustee has deemed it unnecessary to list them all for the purposes of this Final Determination.

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

GE has not provided the Trustee with any correspondence outlining its position with respect to the Assets other than to provide us with documentation relating thereto. The Trustee has therefore assumed that GE takes the position that it has security over the Assets. Whether or not GE contends that this security interest is a first charge over the Assets is unknown. Furthermore, GE has not put forward any claim that they are entitled to trace proceeds from the disposition of the Assets.

GE has also not provided the Trustee with a Proof of Claim outlining the amount owed by HEL as of 13 March 2002.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.

ii. Master Lease Agreement dated March 23, 2000 between Mellon Leasing, a division of Mellon Bank Canada as Lessor and HEL as Lessee. This Lease Agreement states that the residual value of any equipment rented under this agreement shall be the fair market value of the goods at that time.

iii. Agency Agreement dated March 23, 2000 between Mellon Leasing, a division of Mellon Bank Canada as Lessor and HEL as Agent.

iv. Internal memorandum of Griffith Roberts dated February 27, 2002 regarding a review of the security documentation for GE.

v. Facsimile correspondence from Greg Gosse, PricewaterhouseCoopers attaching:
   - Equipment Schedule dated July 13, 2000
   - Cash Receipts Update from HEL showing payment by various customers including a $487,395.47 payment by Mellon Bank on July 19, 2000
   - Equipment Schedule dated April 14, 2000
   - Credit Memo from CIBC showing an interbranch payment of $543,490.25 by Mellon Leasing to HEL

vi. **Lease No. 70000061**
   - Equipment Schedule dated April 14, 2000 incorporating by reference the Master Lease Agreement dated March 23, 2000
   - Indicates that this is a lease for a 60-month term, commencing April 19, 2000

at a cost of $543,490.25

vii. **Lease No. 70000068**
- Equipment Schedule dated May 2000 incorporating by reference the Master Lease Agreement dated March 23, 2000
- Indicates that this is a lease for a 60-month term, the commencement date is eligible and at a cost of $384,857.03

viii. **Lease No. 70000077**
- Equipment Schedule dated June 1, 2000 incorporating by reference the Master Lease Agreement dated March 23, 2000
- Indicates that this is a lease for a 60-month term, the commencement date is eligible and at a cost of $92,777.83

ix. **Lease No. 70000083**
- Equipment Schedule dated July 13, 2000 incorporating by reference the Master Lease Agreement dated March 23, 2000
- Indicates that this is a lease for a 60-month term, the commencement date is eligible and at a cost of $487,395.47

9. Classification of the Assets

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

10. Application of the PPSA

As indicated by the above-noted documentation the secured transactions between GE and HEL were in the form of inventory financing leases. The Equipment Schedules, which secured the specific items listed therein, were all for a term of more than one year and were, in essence, financing leases as opposed to true leases. Section 4 of the PPSA confirms that such secured transactions are governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

Not applicable in this instance as all transactions took place in 2000 and therefore were subsequent to the coming into force of the PPSA in the Province.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

YES **The Trustee has been provided with evidence of value passing from Mellon to HEL with respect to two of the Equipment Schedules, dated July 13, 2000 and April 14, 2000.** Relying on the invoices supplied by GE, it appears that the assets listed in the Equipment Schedules noted above were delivered directly to HEL and HEL was invoiced accordingly. **The Cash Receipts Update and Credit Memo show payment by Mellon to HEL** repaying HEL for these goods as contemplated by the Agency Agreement.

UNDETERMINED The Trustee was not provided with any evidence of value passing from GE to HEL with respect to the Equipment Schedules dated May 2000 and June 1st, 2000. Relying on the invoices supplied by GE, it appears that the assets listed in the Equipment Schedules noted above were delivered directly to HEL and HEL was invoiced accordingly. However, there is no evidence that GE in turn repaid HEL for these goods as contemplated by the Agency Agreement. Unless GE is able to provide the Trustee with evidence that they in fact paid for the Assets, the Trustee maintains that value has not passed and consequently, GE's security interest has not attached. However, if GE can provide the Trustee with the required evidence of value, then, in combination with the satisfaction of the other 2 requirements for attachment (set out below), the Trustee's position would be that GE's security interest has attached.

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

(ii) Rights in the collateral?

YES HEL held possession of the assets and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s.13.[2] Furthermore, section 13(2) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the leased goods when s/he obtains possession under the lease.

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

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

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

Is there a perfection step?

Lease No. 70000061

NO

Registration number 240903 contains the following information:

- **General Description of Collateral:** "Equipment as described in lease schedule #70000061 together with all proceeds thereof."

Amendment number 1592976 contains the following information:

- Deleted Mellon Leasing as the Secured Party and added GE Capital Canada Leasing Services, Inc. as the Secured Party

Amendment number 1593118 contains the following information:

- Deleted GE Capital Canada Leasing Services, Inc. as the Secured Party and added GE as the Secured Party

What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions in the above-noted financing statement does not satisfy these requirements and therefore does not qualify as a perfection step under s.26 of the Act.

Lease No. 70000068

[2] Ibid. at p.84.

NO

Registration number 275198 contains the following information:

- **General Description of Collateral:** "Equipment as described in lease schedule #70000068 together with all proceeds thereof."

Amendment number 1593047 contains the following information:

- Deleted Mellon Leasing as the Secured Party and added GE as the Secured Party

What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions in the above-noted financing statement does not satisfy these requirements and therefore does not qualify as a perfection step under s.26 of the Act.

Lease No. 70000077

NO

Registration number 1595937 contains the following information:

- **General Description of Collateral:** "Equipment as described in lease schedule #70000077 together with all proceeds thereof."

What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions in the above-noted financing statement does not satisfy these requirements and therefore does not qualify as a perfection step under s.26 of the Act.

Lease No. 70000083

NO

Registration number 437459 contains the following information:

- **General Description of Collateral:** "Equipment as described in lease schedule #70000083 together with all proceeds thereof."

Amendment number 1593065 contains the following information:

- Deleted Mellon Leasing as the Secured Party and added GE as the Secured Party

What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions in the above-noted financing statement does not satisfy these requirements and therefore does not qualify as a perfection step under s.26 of the Act.

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

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

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

[3] Ibid. at p.140.
[4] Ibid.

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as GE may be entitled to claim a super-priority status (ref: s. 35(2)). As GE is unable to provide evidentiary support for such an entitlement, its security interest is subject to the residual priority rules of the PPSA.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of GE's interest in the Assets is typically the date of registration of its financing statement in the PPR:

  - **Lease No. 70000061** - 26 April 2000
  - **Lease No. 70000068** - 11 May 2000
  - **Lease No. 70000077** - 11 February 2002
  - **Lease No. 70000083** - 21 July 2000

  However, as a result of GE's failure to perfect its security interest, GE's interest is subordinated to all validly perfected security interests in the Assets existing as of the date of bankruptcy.

15. Auction Results

The Assets were sold along with all the other assets of Show Tech Audio in May, 2002.

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **General Motors Acceptance Corporation of Canada Limited ("GMAC") & GMAC LEASECO LTD. ("Leaseco")**

1. Introduction

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

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

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

2. Summary Final Determination

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

Leaseco:
The Claim is allowed with exception of the 3 Silverados (serial #'s 1GCEC14WXXE141298, 1GCEK14W7XE154285 and 1GCEC14WOXE150527. The Trustee claims no interest in the assets that are the subject of the claim.

As concerns the 3 Silverados, it is the position of the Trustee that as there has been no perfection step, Leaseco's security interest is unperfected and as such is disallowed as a valid claim. However, proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms

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

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

4. The Assets

Leaseco 17 units, broken into 2 groups as follows. Those that were in the Trustee's opening inventory are indicated by "*":

1. Chevy Silverado, s/n 1GCEC14WXXE141298*;
2. Chevy Silverado, s/n 1GCEK14W7XE154285*;
3. Chevy Silverado, s/n 1GCEC14W0XE150527*.

4. 2001 Chevrolet Silverado 1GCEK19T21E323537*
5. 2001 Chevrolet Silverado 1GCEK19T01E277450*
6. 2001 GMC 5500 J8DE5B14617900087*
7. 2001 Chevrolet Silverado 1GCEK14W71Z209690*
8. 2001 Chevrolet Cavalier 3G1JC52481S103145*
9. 2001 Chevrolet Silverado 1GCEK14V2YE379061*
10. 2001 Chevrolet Blazer 1GNDT13W7Y2285480*
11. 2001 GMC 5500 J8DE5B14717900082*
12. 2000 Chevrolet Cavalier 1G1JC5242Y7302829*
13. 2000 Chevrolet Silverado 1GCEK14W5YZ245386*
14. 2000 Chevrolet Silverado 1GCEK14WXYZ168084*
15. 2000 Chevrolet Express Van 1GCFG15M1Y1169229*
16. 2000 Chevrolet K1500 3GNFK16TXYG107437*
17. 2000 Isuzu Rodeo 4S2DM58W0Y4700167*

Note that asset #16 was sold to HML.

GMAC 22 units, broken into 3 groups as follows. Those that were in the Trustee's opening inventory are indicated by "*":

1. Loader DWTC54H580116
2. Loader DWTC44H580032
3. 544H Wheel Loader DW544HX580192
4. 330LC Excavator FF0330X081149
5. 270LC Excavator FF0270X070880
6. 330LC Excavator FF0330X081129
7. 330LC Excavator FF0330X081131
8. 550LC Excavator FF0550X950060
9. 200LC Excavator FF0200X501970
10. 310SG Backhoe TO310SG897579
11. 310G Backhoe T0310GX897512
12. 850C Crawler Dozer TO850CX898748
13. 1050C Crawler Dozer LU1050C005072
14. Loader DWTC62H579785*
15. Excavator FF0450X090627*
16. Excavator FF0200X501969*

17. Terex Truck A7761187*
18. Terex Truck A7761196*
19. Terex Truck A7761186*
20. Terex Truck A7761195*

21. 2001 GMC Sierra 2GTEK69U511307260*
22. 1999 GMC Medium Truck 1GDL7H1C7XJ502066*

Note that the lease with respect to asset # 21 has been assumed by Ontrac Equipment.

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not

be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

Notwithstanding the findings in this Final Determination concerning the validity of the Claim as secured or otherwise, PricewaterhouseCoopers Inc. is not precluded by such

determination from challenging the Claim as being reviewable or fraudulent pursuant to the provisions of the BIA or any applicable provincial legislation.

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

7. Overview of Claim

Leaseco

Leaseco's claim with respect to the 3 Silverados (#1-3 in the list above) arises from 3 individual lease agreements entered into in April, May and July 1999. In this regard, Leaseco has filed a Proof of Claim (Property) dated July 31, 2002.

Leaseco's claim with respect to the 14 units (#4-17 in the list above) also arises from 14 individual lease agreements, entered into in 2000 and 2001. In this regard, Leaseco has filed a Proof of Claim (Property) dated July 31, 2002.

GMAC

GMAC's claim with respect to the 22 units arises from a number of transactions as follows:

- GMAC claims a security interest by way of a transitioned Demand Debenture and Supplemental Debenture dated November 20, 1998 and March 12, 1999 respectively, over all equipment specifically financed by it. It also claims a general interest over all Vehicles supplied by any supplier regardless of the financing of it under a Security Agreement (Leasing) dated July 25, 2000. The definition of "Vehicle" is set forth in that agreement.
- In addition to the Demand Debenture and Supplemental Debenture and the Security Agreement (Leasing), the 16 pieces of heavy equipment (#1-16 in the list above) were secured by 2 leasing inventory chattel mortgages, dated May 14, 2001.
- In addition to the Demand Debenture and Supplemental Debenture and the Security Agreement (Leasing), the 4 Terex Trucks (#17-20 in the list above) were specifically secured by 4 separate leases, dated January 14, 2001 under which the four units were leased from HLL to HEL and 4 leasing chattel mortgages dated February 9, 2001 granted by HLL to GMAC, which chattel mortgages contained an assignment of the rentals and other moneys payable under the referenced lease as well as to all proceeds of sale of the collateral. The four lease agreements all contained a provision that permitted the assignment and a further provision that acknowledged the priority of any security granted to GMAC by HLL over the lessees rights under the lease.
- In addition to the Demand Debenture and Supplemental Debenture and the Security Agreement (Leasing), the GMC Medium (#21 in the list above) was specifically secured by a lease from HLL to HEL dated November 30, 1999 and a leasing inventory chattel mortgage dated December 2, 1999 from HLL to GMAC which chattel mortgage contained an assignment of the rentals and other moneys

payable under the under the referenced lease as well as to all proceeds of sale of the collateral. The lease agreement contained a provision that permitted the assignment to GMAC by HLL.

- In addition to the Demand Debenture and Supplemental Debenture and the Security Agreement (Leasing), the GMC Sierra (#22 in the list above) was secured by a lease dated October 4, 2001 from HLL to HEL and a leasing inventory chattel mortgage dated October 29, 2001 granted by HLL to GMAC, which chattel mortgage contained an assignment of the rentals and other moneys payable under the under the referenced lease as well as to all proceeds of sale of the collateral. The lease agreement contained a provision that permitted the assignment to GMAC by HLL

The Amended Proof of Claim dated July 29 2002 asserts a total claim in the amount of **$4,603,804.86.** This is comprised of an unsecured claim in the amount of $1,000.00 and a secured claim in the amount of $**4,602,804.86.**

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.
ii. Proofs of Claim (referenced above).
iii. Document entitled "Hickman Equipment Outstanding Smartleases"
iv. Lease Plan Dealer Agreement between Leaseco and HML dated April 7, 1989.
v. Copy of a cheque from GMAC to John Deere Limited in the amount of $1,679,817.74. Cheque No. 30250. The bank stamp is May 16, 2001.
vi. Copy of a cheque dated May 14, 2001. Cheque No. 30251 from GMAC to John Deere Limited in the amount of $3,384,461.61.
vii. Affidavit from Ron Polley dated 3 July 2002 re: 2000 Chev Van s/n 1GCFG15M1Y1169229. Exhibits include a full disclosure Lease Agreement between HML (Lessor) and HEL (Lessee), Bill of Sale between HML and Leasco.
viii. Lease Plan Dealer Agreement between HML and Leaseco dated April 7, 1989.
ix. Leasing Inventory Chattel Mortgage in the amount of $2,649,985.93 between GMAC and HEL for 10 pieces of JD heavy equipment (T0310SE871368, T0310SE871285, FF0330X080076, FF0230X060284, FF0200X500580, FF0370X080138, FF0230X600117, FF0230X600179, FF0270X070372, T0850CX848745.
x. Invoices from HEL as follows:
    a. October 31, 2001 to W & J Construction for a JD tool carrier s/n DWTC54H580116.
    b. May 24, 2001 to McNamara Construction for 4 excavators (FF0330X081131, FF0450X090629, FF0550X950060, FF0750X970041, and 2 dozers (T0850CX898748, LU1050C005072.)
    c. November 28, 2001 to Neuwest Rentals Ltd. for 8 excavators (FF0270X070880, FF0330X081150, FF0330X081129, FF0330X081149, FF0330X081243, FF0270X070962, FF0330X081248, FF0330X081278).

d. May 30, 2001 to City of Mount Pearl for Backhoe s/n T0310GX897512. Trade-in was a used JCB 1400B Backhoe s/n 14BT4030/351980/7.
e. May 30, 2001 to Kelloway Construction Limited for a backhoe T0310SG897579
f. June 15, 2001 to Stuckless & Stuckless Inc. for a loader DWTC44H580032.
g. June 12, 2001 to Marine Contractors Inc. for Excavator s/n FF0200X501970, Wheel Loader s/n DW544HX580192, Excavator s/n FF050ZX240042, paver s/n PF875-01-069. Trade ins were JD 330LC Excavator s/n FF0330X080964, JD 544G TC Loader s/n DW544GD558724, Hydraulic Hammer, Bombardier FN20 s/n 721830001, Go-Track GT100 s/n 78-3-40.

Leasco

xi. Lease Agreements (HEL as Lessee and HML as Lessor) for the 3 Units as follows:
   a. **No. 3014-76564** dated April 28, 1999 for 1999 Chevy Silverado, s/n 1GCEC14WXXE141298.
   b. **No. 3014-78827** dated 20 May 1999 for 1999 Chevy Silverado, s/n 1GCEK14WXE154285.
   c. **No. 3014-86143** dated July 28, 1999 for 1999 Chevy Silverado serial number 1GCEC14W0XE150527.

xii. Lease Agreements (HEL as Lessee and HML or Hickman Saturn as Lessor) for the 14 Units as follows:
   a. **No. 3014-02962** dated March 28, 2000 for Chevy Suburban, s/n 3GNFK16TXYG107437.
   b. **No. 3014-28931** dated January 14, 2001 for Chevy Silverado, s/n 1GCEK14W71Z209690.
   c. **No. 3014-31714** dated February 27, 2001 for 2001 GMC 5500, J8DE5B14617900087.
   d. **No. 3014-01431** dated 7 March 2000 for Isuzu Rodeo, 4S2DM58W0Y4700167.
   e. **No. 3014-03901** dated April 7, 2000 for Chevy Silverado, serial number 1GCEK14WXYZ188084.
   f. **No. 3014-03379** dated 31 March 2000 for Chevrolet Express Van, 1GCFG15M1Y1169229.
   g. **No. 3014-06350** dated May 3, 2000 for a Chevrolet Silverado 1GCEK14W5YZ245386.
   h. **No. 3014-08124** dated 19 May 2000 for Chevrolet Cavalier, 1G1JC5242Y7302829.
   i. **No. 3014-09624** dated 10 May 2000 for GMC 5500, J8DE5B14717900082.
   j. **No. 3014-12315** dated 27 June 2000 for Chevrolet Blazer, 1GNDT13W7Y2285480.
   k. **No. 3014-13661** dated 5 July 2000 for Chevrolet Silverado, 1GCEK14V2YE379061.
   l. **No. 3014-24337** dated November 17, 2000 for Chevrolet Cavalier, 3G1JC52481S103145.
   m. **No. 3014-48311** dated 28 August 2001 for Chevrolet Silverado, 1GCEK19T01E277450.

n. **No. 3014-49308** dated 7 September 2001 for Chevrolet Silverado, 1GCEK19T21E323537.

All 17 lease agreements contained an assignment of the rights clause under the lease from the lessor to Leasco, 16 of which contained a signature assigning it. Smartleases, in relation to unit with s/n1GCFG15M1Y1169229, did not have a signature in the assignment section. In this case, the lessor's name is typed, but there is no actual signature. GMAC has provided affidavits which state that the lack of signature was due to inadvertence and that since March 2000 the parties have acted as if the Smartlease was properly assigned. Section 11 of the Act requires a security agreement in writing signed by the debtor but does not require a signature to assign the rights under a security agreement.

GMAC

xiii. Priority Agreement dated November 12, 1998 between GMAC and CIBC
xiv. Demand Debenture dated November 19, 1998
xv. 2 Leasing inventory chattel mortgages dated May 14, 2001 for the 16 pieces of heavy equipment.
xvi. Supplemental Debenture dated February 16, 1999
xvii. Cross Default Cross Collateralization Agreement dated March 12, 1999
xviii. Security Agreement (Leasing) between GMAC and HEL dated July 25, 2000.
xix. Leases for the 2 GM Trucks as follows:
    a. 1999 GMC Medium –dated November 30, 1999, leasing inventory chattel mortgage dated December 2, 1999.
    b. 2001 GMC Sierra –dated October 4 2001, leasing inventory chattel mortgage dated October 29, 2001.
xx. Security Agreement (Leasing) dated March 6, 2000 between GMAC and HLL.
xxi. 4 leases dated January 14, 2001 between HLL and HEL for the 4 Terex Trucks.
xxii. 4 leasing chattel mortgages dated February 9, 2001 between GMAC and HLL for the 4 Terex Trucks.

9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. By operation of the definitions of "inventory", "equipment" and "consumer goods" provided in the PPSA, it is the opinion of the Trustee that:

GMAC

- The 2 GM Trucks (#21-22 above) were held as equipment.
- The 4 Terex Trucks (#17-20 above) were held as inventory.
- The 16 pieces of heavy equipment (#1-16 above) were held as inventory.

Leaseco

- The 17 cars and trucks (#1-17 above) were held as equipment.

10. Application of the PPSA

As indicated by the above-noted documentation the secured transactions between GMAC and HEL were in the form of debenture security, equipment leases, chattel mortgages and security agreements (leasing). Section 4 of the PPSA confirms that such secured transactions are governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province of Newfoundland and Labrador on December 13, 1999. From that date, all secured transactions (and registrations with respect to same) have been governed by the PPSA and the PPR. Nevertheless, it was necessary to establish certain transition provisions to enable those secured parties whose security was registered in the pre-PPSA registry system to move their security from the old system to the new system. Part VII of the Act sets out the transition provisions. In essence, by operation of s.75, secured creditors were given until December 13, 2001 to bring their pre-PPSA security into the new system. If this transitioning was done properly, the PRE-PPSA secured creditor could enjoy a priority position dated back to the old security.

Transitioning issues are relevant for the claim of GMAC to the GMC Medium (#21 above), the GMAC Demand Debenture dated November 20, 1998 and the Supplemental Debenture dated 16 February, 1999.

In accordance with the transitioning provisions, GMAC registered a financing statement relative to the Demand Debenture and the Supplemental Debenture under **registration #168880** that contained the following collateral description:

> *"All present and after acquired personal property of the Debtor and the proceeds thereof"*
>
> *"Pre-PPSA registration information continued by this registration: 17572227 1999-03-12 Registration of Deeds Act; 17191910 1998-11-20 Registration of Deeds Act."*

The registration, relative to the Demand Debenture and the Supplemental Debenture, appears to properly transition the security instruments to which they relate and we have been provided proof of registration in the Old Registry. There has been provided no proof of proper transitioning relative to the GMC Medium and therefore it is the opinion of the Trustee that the earliest date of perfection relative to the GMC Medium is the date of first registration by GMAC in the PPR; that date being **December 13, 1999 under registration #1081.**

The Leaseco claims that would be relevant for transitioning issues relate to 3 Smartleases held under lease numbers 3014-76564, 3014-78827, and 3014-86143 for vehicles with s/n's of 1GCEC14WXXE141298, 1GCEK14W7XE154285 and 1GCEC14WOXE150527. There has been provided no proof of proper transitioning or specific registrations relative to these units in the PPR and no registration of a general security nature over all collateral in favour of Leaseco. The Claimants, Leaseco and GMAC, claim an agency relationship in relation to

each other and the benefit of the general registration in favour of GMAC under registration #1081 to perfect the security. Given the information in the possession of the Trustee it is our opinion that there have not been adequate perfection steps to protect the security interest of Leaseco in those units.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

Yes We have been provided with copies of cheques for all the security agreements under which the collateral claimed by GMAC has been financed. For the equipment claimed by Leaseco, the equipment was supplied under true leases and the actual advance of equipment was made by the dealer under each Smart Lease. In turn, the dealer assigned those rights to Leaseco. For the 4 Terex Trucks, the GMC Medium (#22 above) and GMC Sierra (#21 above) the advance was made by GMAC by cheque to HLL who assigned the rights under the leases to GMAC thereby providing value to support the claim of GMAC to the units by way of assignment from HLL.

(ii) Rights in the collateral?

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

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.[2] HEL held possession of the assets. Furthermore, s. 13 (3) of the PPSA confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when s/he obtains possession of them under the lease.

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

(iii) Have the evidentiary requirements of s. 11 been met?
YES The evidentiary requirements of s. 11, required for attachment, are established by the security documents. Specifically, in accordance with s.11 (1) (b), the leases, chattel mortgages and security agreements (leasing) are in writing, they have been signed by HEL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?
GMAC
Yes.

- **Reg. #1081** dated December 13, 1999, contains the following description:
  All present and after acquired personal property of the Debtor and proceeds thereof.

In addition to that, GMAC has registered a number of additional financing statements, as follows:

- **Registration # 1571329**, dated January 29, 2002 contains the following description:
  Loader DWTC54H580116
  LoaderDWTC44H580032
  544H Wheel LoaderDW544HX580192
  330LC ExcavatorFF0330X081149
  270LC Excavator FF0270X070880
  330LC Excavator FF0330X081129
  330LC ExcavatorFF0330X081131
  550LC ExcavatorFF0550X950060
  200LC ExcavatorFF0200X501970
  310SG BackhoeTO310SG897579
  310G BackhoeT0310GX897512
  850C Crawler DozerTO850CX898748
  1050C Crawler DozerLU1050C005072
  This list is also repeated in the "serial numbered collateral" section of the financing

[2] Ibid. at 84.

statement.

- **Reg. #1571258**, dated January 29, 2002 contains the following description:

  1- John Deere Loader DWTC62H579785

  1- John Deere Excavator FF0450X090627

  1- John Deere Excavator FF0200501969[3]

  This list is also repeated in the "serial numbered collateral" section of the financing statement.

- **Reg. # 798967** dated February 13, 2001 (amended by **Reg. # 1571249** dated January 29, 2002 to amend the name of the secured party from Leaseco to GMAC) contains the following description:

  Terex Truck A7761187 and all proceeds therefrom

- **Reg. # 798942** dated February 13, 2001 (amended by **Reg. # 1571230** dated January 29, 2002 to amend the name of the secured party from Leaseco to GMAC) contains the following description:

  Terex Truck A7761196 and all proceeds therefrom

- **Reg. # 798900** dated February 13, 2001 (amended by **Reg. # 1571221** dated January 29, 2002 to amend the name of the secured party from Leaseco to GMAC) contains the following description:

  Terex Truck A7761186 and all proceeds therefrom

- **Reg. # 798926** dated February 13, 2001 and amended by **Reg. # 1571212** dated January 29, 2002 contains the following description:

  Terex Truck A7761195 and all proceeds therefrom

- **Reg. # 973859** dated May 18, 2001, (amended by **Reg. # 1551957** dated January 16, 2002 to amend the name of the secured party from Leaseco to GMAC) contains the following description:

  2001 John Deere FF0450X090627 and all proceeds therefrom

- **Reg # 973800** dated May 18, 2001, (amended by **Reg. # 1551948** dated January 16, 2002 to amend the name of the secured party from Leaseco to GMAC) contains the following description:

  2001 John Deere T0310GX897512 and all proceeds therefrom

- **Reg # 973743** dated May 18, 2001, (amended by **Reg. # 1551920** dated January 16, 2002 to amend the name of the secured party from Leaseco to GMAC) contains the following description:

  2001 John Deere DWTC62H579785 and all proceeds therefrom

[3] There is a question as to the adequacy of the description of this asset, since it is described by an incorrect serial number. Descriptions of inventory items in financing statements are not required to include serial numbers. However, as the debtor name is correct in the financing statement and the incorrect serial number would appear as a Close Match when a search was conducted, the Trustee is of the opinion that this error is not a seriously misleading error.

- **Reg. #168880** dated March 21, 2000, contains the following description:
  All present and after acquired personal property of the Debtor and the proceeds thereof.
  Pre-PPSA registration information continued by this registration:
  17572227 – March 12, 1999 – Registration of Deeds Act.
  17191910 – November 20, 1998 – Registration of Deeds Act

LEASECO

- **Lease # 3014-49308**
  YES. Reg.#1238119 dated September 21, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK19T21E323537 and all proceeds therefrom.

- **Lease # 3014-48311**
  YES. Reg.#1217893 dated September 11, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK19T01E277450 and all proceeds therefrom.

- **Lease # 3014-24337**
  YES. Reg.#1145736 dated August 7, 2001 contains the following description:
  2001 Chevrolet Silverado s/n 1GCGK13UX1F181345 and all proceeds therefrom.

- **Lease # 3014-31714**
  YES. Reg. #870022 dated March 29, 2001 contains the following description:
  2001 GMC 5500, s/n J8DE5B14617900087 and all proceeds therefrom.

- **Lease # 3014-28931**
  YES. Reg. #785030 dated February 5, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W71Z209690 and all proceeds therefrom.

- **Lease # 3014-13661**
  YES. Reg. #436048 dated July 20, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEK14V2YE379061 and all proceeds therefrom.

- **Lease # 301-12315**
  YES. Reg. #409565 dated July 10, 2000, contains the following description:
  2000 Chevrolet Blazer, s/n 1GNDT13W7Y2285480 and all proceeds therefrom.

- **Lease # 3014-09624**
  YES. Reg. #353912 dated June 15, 2000, contains the following description:
  2001 GMC 5500, s/n J8DE5B14717900082 and all proceeds therefrom.

- **Lease # 3014-08124**
  YES. Reg. #319921 dated June 1, 2000, contains the following description:
  2000 Chevrolet Cavalier, s/n 1G1JC5242Y7302829 and all proceeds therefrom.

- **Lease #3014-06350**
  YES. Reg. #278218 dated May 12, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEK14W5YZ245386 and all proceeds therefrom.

- **Lease # 3014-03901**
  Yes. Reg. #224691 dated April 17, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEK14WXYZ188084 and all proceeds therefrom.

- **Lease # 3014-03379**
  YES. Reg. #215665 dated April 12, 2000, contains the following description:
  2000 Chevrolet Express Van, s/n 1GCFG15M1Y1169229 and all proceeds therefrom.

- **Lease # 3014-02962**
  YES. Reg. #205443 dated April 7, 2000, contains the following description:
  2000 Chevrolet K1500, s/n 3GNFK16TXYG107437 and all proceeds therefrom.

- **Lease # 3014-01431**
  YES. Reg.#168286 dated March 21,2000, contains the following description:
  2000 Isuzu Rodeo, s/n 4S2DM58W0Y4700167 and all proceeds therefrom
  .

Leaseco has also registered the following additional financing statements:

- **Reg. # 1496517** dated December 12, 2001 contains the following description:
  2002 Chevrolet Silverado, s/n 1GCGK13U42F101538 and all proceeds therefrom.

- **Reg. #1333042** dated November 6, 2001 contains the following description:
  2002 Chevrolet Silverado, s/n 2GCEK19V121174333 and all proceeds therefrom.
  This was <u>discharged</u> by reg # 1634967 dated March 4, 2002.

- **Reg.#1332855** dated November 6, 2001 contains the following description:
  2001 GMC Sierra, s/n 2GTEK69U511307260 and all proceeds therefrom.

- **Reg. #1271153** dated October 10, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W01Z280665 and all proceeds therefrom.

- **Reg.# 1163902** dated August 15, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W21Z284037 and all proceeds therefrom.

- **Reg. #1142613** dated August 3, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W11Z281274 and all proceeds therefrom.

- **Reg. #1051104** dated June 25, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W31Z131036 and all proceeds therefrom.

- **Reg. #1039637** dated June 19, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W41Z231985 and all proceeds therefrom.

- **Reg#1025054** dated June 12, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W71Z210127 and all proceeds therefrom.

- **Reg. #1014663** dated June 7, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEK14W21Z130637 and all proceeds therefrom.

- **Reg. #894725** dated April 11, 2001 contains the following description:
  2001 Chevrolet Silverado, s/n 1GCEC14W21Z167863 and all proceeds therefrom.

- **Reg. #786673** dated February 6, 2001 contains the following description:
  2001 Chevrolet K1500, s/n 3GNFK16T11G106795 and all proceeds therefrom.

- **Reg. #667030** dated November 22, 2000, contains the following description:
  2001 Chevrolet Cavalier, s/n 3G1JC52481S103145 and all proceeds therefrom.

- **Reg. #436063** dated July 20, 2000, contains the following description:

2000 Chevrolet Silverado, s/n 1GCEK14V5YE378356 and all proceeds therefrom.

- **Reg. #409961** dated July 10, 2000, contains the following description:
  2000 GMC Sierra, s/n 1GTEK19V0YE315075 and all proceeds therefrom.

- **Reg. #409623** dated July 10, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEK14WYZ248648 and all proceeds therefrom.

- **Reg. #409607** dated July 10, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEC14W9YZ239118 and all proceeds therefrom.

- **Reg. #342196** dated June 9, 2000, contains the following description:
  2000 Chevrolet K1500, s/n 3GNFK16T9YG147511 and all proceeds therefrom.
  This was discharged by Reg # 1654392 dated March 14, 2002.

- **Reg. #278143** dated May 12, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEK14W5YZ243072 and all proceeds therefrom.

- **Reg. #249185** dated April 28, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEK14W0YE230155 and all proceeds therefrom.

- **Reg. #237859** dated April 24, 2000, contains the following description:
  2000 Terex, s/n A7761181and all proceeds therefrom.

- **Reg. #237842** dated April 24, 2000, contains the following description:
  2000 Terex, s/n A7761182 and all proceeds therefrom.

- **Reg. #137174** dated March 3, 2000, contains the following description:
  2000 Chevrolet Silverado, s/n 1GCEC14W8YZ163679 and all proceeds therefrom.
  This was discharged by Reg. # 1617646 dated February 22, 2002.

- **Reg. #116137** dated February 21, 2000, contains the following description:
  2000 John Deere, s/n FF0200X501046 and all proceeds therefrom.

- **Reg. #116145** dated February 21, 2000, contains the following description:
  2000 John Deere, s/n FF0200X501048 and all proceeds therefrom.

- **Reg. #116129** dated February 21, 2000, contains the following description:
  2000 John Deere, s/n DW670CH575052 and all proceeds therefrom.

- **Reg. #116111** dated February 21, 2000, contains the following description:

2000 John Deere, s/n T0750CX882592 and all proceeds therefrom.

- **Reg. #73761** dated January 26, 2000, contains the following description:
  2000 Cadillac Escalade, s/n 1GYEK13R8YR157633 and all proceeds therefrom.

There do not appear to be any serial number registrations in the PPR that relate to the 3 Smartleases that are for vehicles held under lease numbers 3014-76564, 3014-78827, and 3014-86143 for vehicles with s/n's of 1GCEC14WXXE141298, 1GCEK14W7XE154285 and 1GCEC14WOXE150527. There has been provided no proof of specific registrations relative to these units in the PPR and no registration of a general security nature over all collateral in favour of Leaseco. The Claimants, Leaseco and GMAC, claim an agency relationship in relation to each other and the benefit of the general registration in favour of GMAC under registration #1081 to perfect the security. Given the information in the possession of the Trustee it is our opinion that there have not been adequate perfection steps to protect the security interest of Leaseco in those units

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

There have been issues raised by the collateral description in the Security Agreement (Leasing) as to the extent of the security granted by use of the following charging language in that agreement:

> *"new and used vehicles (including chassis) from manufacturers, distributors and others which [Hickman] will hold for lease or which now or may be leased to the public, all of which are hereinafter referred to as "Vehicles", which term shall include all vehicles of like kinds or types now or hereafter acquired by [Hickman] (including all accessories and attachments thereto) and all replacements and substitutions therefore and all additions and accessions thereto."*

The Trustee expresses no opinion on any of the issues that may be raised by any secured party relating to this charging language.

13. Proceeds

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

The Trustee has not made any determination as to GMAC's/Leaseco's entitlement to proceeds with respect to other creditors as this is an issue of priority and not within the

Trustee's mandate under the Claims Plan. However, the Trustee has outlined below the statutory requirements that must be met by a secured party in order to assert a claim to proceeds from the disposition of collateral as against other secured creditors.

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.[4]

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral. [5]

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

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

14. Additional Comments on Priorities

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

[4] Ibid. at p.140.
[5] Ibid. at 140.

GMAC's claim is based upon two general security agreements and certain specific security agreements. It has the first in time PPR registration of a financing statement covering "All present and after acquired personal property of the Debtor and the proceeds thereof." It is a properly transitioned Demand Debenture dating to November 20th, 1998 which covers assets financed directly by it. There are priority agreements between it at CIBC, who appears to have the first in time registration of a general type security. Therefore, GMAC has potentially various interests it may claim to units other than the specific assets directly financed by it, which issue has not been dealt with in this opinion, except with respect to the validity, perfection and granting of value of those interests as described in this determination.

15. Auction Results

The following assets from the list above were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. Amounts listed are the net amount obtained (bid amount less LVG buyer's premium):

- Terex Truck A7761187 - **$190,000.00**
- Terex Truck A7761196 - **$190,000.00**
- Terex Truck A7761186 - **$190,000.00**
- Terex Truck A7761195 - **$190,000.00**
- Loader DWTC62H579785 - **$155,000.00**
- Excavator FF0450X090627 - **$240,000.00**
- Excavator FF0200X501969 - **$131,100.00**

Total: $1,286,100.00

SCHEDULE A
FINAL DETERMINATION

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

Secured Party: **Ingersoll Rand ("I/R")**

1. Introduction

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

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

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

2. Summary Final Determination

I/R's claim is allowed as a valid secured claim in all of the Assets except for Assets #16, 17 and 26.

The Trustee disallows I/R's claim in Assets #16, 17 and 26 because the Trustee has not been supplied with documentation sufficient to satisfy the attachment requirements under s.11 of the PPSA. However, proceeds from the sale of Assets, net of liquidation costs, are insufficient to satisfy the claims of secured creditors claiming an interest in each of the Assets of the estate. Accordingly, no funds are available to satisfy any of the claims of unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

3. Defined Terms

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

"CSA"	-	Conditional Sales Agreement
"CSR"	-	Conditional Sales Registry
"HEL"	-	Hickman Equipment (1985) Ltd.
"HLRL"	-	Hickman Leasing and Rentals Limited

"JD"	-	John Deere
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PMSI"	-	Purchase Money Security Interest
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. Assets

I/R has made a claim to 28 pieces of heavy equipment. At the time of bankruptcy 5 pieces (indicated by "*") remained in the inventory of HEL and the rest had been sold to third parties. However, the proceeds from the sale of Asset #21 were held in trust by the Monitor and subsequently are now held in trust by the Trustee.

1) 1998 I/R ECM590 Hydraulic Drill* (R14246FF)

2) 1998 I/R ECM590 Hydraulic Drill* (R14245FF)

3) 1998 I/R ECM490 Hydraulic Drill (R14186AE)

4) 1997 I/R ECM490/YH70 Hydraulic Drill (R14200DE)

5) 1999 I/R ECM590 Hydraulic Drill (R11212GG)

6) I/R Model ECM590 Hydraulic Drill (R11237DH)

7) 2000 I/R ECM590 Hydraulic Drill (R11241EH)

8) 2000 I/R ECM590 Hydraulic Drill (11245EH)

9) 2000 I/R ECM590 Hydraulic Drill (R11246EH)

10) I/R ECM590, Hydraulic Drill (R11247EH)

11) 1998 I/R ECM590 Hydraulic Drill* (R11115EF)

12) 1998 I/R ECM590 Hydraulic Drill (R11116EF)

13) 1999 I/R ECM590 Hydraulic Drill (R11189CG)

14) 1999 I/R ECM590 Hydraulic Drill (R11209FG)

15) 1999 I/R ECM590 Hydraulic Drill (R11183CG)

16) 1999 I/R ECM590 Hydraulic Drill (R11205EG)

17) 1999 I/R ECM590 Hydraulic Drill (R11185CG)

18) 1999 I/R ECM 590/592 Hydraulic Drill (R11206EG)

19) 2000 I/R ECM590 Hydraulic Drill (R11224AH)

20) 1999 I/R DD110 Compactor* (160180)

21) 1999 I/R SD100DA Compactor (163713)

22) 2001 I/R SD110D Compactor* (167316)

23) 2001 I/R SD110D Roller (167317)

24) I/R Model SD115D Compactor (161154)

25) 1999 I/R VR642 Forklift (154621)

26) 2000 I/R PF5510 Paver (55102864)

27) 2001 I/R PF5510 Forklift (55103033)

28) 1999 I/R PF5510 Paver/Finisher (55102843)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

I/R claims that it holds perfected security interests in the 28 assets listed above arising from various conditional sales contracts entered into between 1997 and 2001. I/R has not put forward any contention that it holds a PMSI over any of the Assets. Furthermore, I/R has not put forward any claim that they are entitled to trace proceeds from the disposition of the Assets.

The Proof of Claim dated, 16 April 2002, indicates a total claim of $4,870,959.30 comprised of an Unsecured Claim in the amount of $72,428.56 and a Secured Claim in the amount of $4,798,530.74.

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002

ii. Proof of Claim (Form 33) dated 16 April 2002

iii. We have been provided with the following HEL invoices:
- from HEL to Johnsons Construction for an I/R ECM490 Hydraulic Drill (s/n R14186AE)
- from HEL to United Rentals and ABN/AMRO for an I/R ECM590 Hydraulic Drill (s/n RR11212GG)
- from HEL to Johnsons Construction for an I/R SD115-D Vib Compactor (s/n 161154)
- from HEL to Hickman Leasing Ltd. for a JD 200LC Excavator (s/n FF0200X501362); JD 200LC Excavator (s/n FF0200X501391); JD 200LC Excavator (s/n FF0200X501453); JD 330LC Excavator (s/n FF0330X080747); JD 450HC Dozer (s/n T0450HX889199); JD 850C Crawler Dozer (s/n T0850CX888907); JD TC62H Band TC Loader (s/n DWTC62H577315); JD TC54H Tool Carrier (s/n DWTC54H575868); Blaw-Knox PF-5510 Paver (s/n 551028-64)
- from HEL to United Rentals and ABN/AMRO for an I/R ECM590 Hydraulic Drill (s/n R11237DH)
- from HEL to United Rentals and ABN/AMRO for an I/R ECM590 Hydraulic Drill (s/n R11224AH)
- from HEL to Hickman Leasing Ltd. for Fabtek 546C Forwarder (s/n 546C-56-29308-00)

- from HEL to Hickman Leasing Ltd. for Fabteck 546C Forwarder (s/n 546C-72-29483-00); JD 200 LC Excavator (s/n FTFT0200X500457); I/R SD100-DA Asphalt Compactor (s/n 163713); I/R DD110 Roller (s/n 160180)
- from HEL to Westside Asphalt and Concrete Inc. for an I/R SD100-DA Asphalt Compacter (s/n 163713)
- from HEL to United Rentals and ABN/AMRO for an I/R ECM590 Hydraulic Drill (s/n R11241EH)
- from HEL to United Rentals and ABN/AMRO for an I/R ECM590 Hydraulic Drill (s/n R11245EH)
- from HEL to United Rentals and ABN/AMRO for an I/R ECM590 Hydraulic Drill (s/n R11246EH)
- from HEL to United Rentals and ABN/AMRO for an I/R ECM590 Hydraulic Drill (s/n R11247EH)
- from HEL to Pyramid Construction Ltd. for an SD110D Roller (s/n 167317); Traumac V55 Hydraulic Hammer (s/n 11933M); Promac 52CMP Rotary Disc Cutter (s/n 1339QFSS). Trade-in was a used Dyna Pac CA251A Roller (s/n 58311028)

iv. Binder from I/R containing separate documentation for each Asset:

- **Asset #1**
  - Registration Statement dated January 23, 2001
  - Conditional Sales Contract dated January 22, 2001
  - Invoice to HEL dated January 16, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #2**
  - PPR Registration Statement dated January 23, 2001
  - Conditional Sales Agreement dated January 22, 2001
  - Invoice to HEL dated January 16, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #3**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated June 18, 1998
  - HEL Invoice # 000524
  - Invoice to HEL dated May 13, 1998
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #4**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated June 20, 1997
  - Invoice to HEL dated May 29, 1997
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #5**
  - PPR Registration Statement dated January 25, 2002

- Conditional Sales Agreement dated September 21, 1999
- HEL Invoice # 000471
- Invoice to HEL dated September 1, 1999
- Customer Accounts Payable Report dated February 27, 2002

- **Asset #6**
  - PPR Registration Statement dated May 12, 2000
  - Conditional Sales Agreement dated May 12, 2000
  - HEL Invoice # 000487
  - Invoice to HEL dated April 13, 2000
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #7**
  - PPR Registration Statement dated June 7, 2000
  - HEL Invoice # 000519
  - Conditional Sales Agreement dated January 22, 2001
  - Invoice to HEL dated January 2, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #8**
  - PPR Registration Statement dated January 23, 2001 (#764969)
  - Conditional Sales Agreement dated January 22, 2001
  - PPR Registration Statement dated June 7, 2000 (#334714)
  - HEL Invoice # 000506
  - Invoice to HEL dated January 2, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #9**
  - PPR Registration Statement dated June 7, 2000 (#764969)
  - HEL Invoice # 000507
  - PPR Registration Statement dated January 23, 2001 (#334714)
  - Conditional Sales Agreement dated January 22, 2001
  - Invoice to HEL dated January 2, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset # 10**
  - PPR Registration Statement dated January 23, 2001 (#764969)
  - Conditional Sales Agreement dated January 22, 2001
  - PPR Registration Statement dated June 7, 2000 (#334714)
  - HEL Invoice # 000508
  - Invoice to HEL dated January 2, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset # 11**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated June 18, 1998

- Invoice to HEL dated May 19, 1998
- Customer Accounts Payable Report dated February 27, 2002

- **Asset #12**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated July 14, 1998
  - Invoice to HEL dated June 3, 1998
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #13**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated July 9, 1999
  - Invoice to HEL dated June 8, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #14**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated July 9, 1999
  - Invoice to HEL dated June 14, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #15**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated July 9, 1999
  - Invoice to HEL dated June 16, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Assets #16**
  - PPR Registration Statement dated January 25, 2002
  - Invoice to HEL dated July 30, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #17**
  - PPR Registration Statement dated January 25, 2002
  - Invoice to HEL dated July 30, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #18**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated July 9, 1999
  - Invoice to HEL dated June 3, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset # 19**
  - PPR Registration Statement dated May 12, 2000
  - Conditional Sales Agreement dated May 12, 2000

- HEL Invoice # 000486
- Invoice to HEL dated April 13, 2000
- Customer Accounts Payable Report dated February 27, 2002

- **Asset #20**
  - PPR Registration Statement dated June 7, 2000
  - Conditional Sales Agreement dated June 7, 2000
  - Invoice to HEL dated May 31, 2000
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #21**
  - PPR Registration Statement dated June 28, 2000 (# 390278)
  - Conditional Sales Agreement dated June 28, 2000
  - Invoice to HEL dated June 20, 2000
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #22**
  - PPR Registration Statement dated March 30, 2001
  - Conditional Sales Agreement dated March 30, 2001
  - Invoice to HEL dated March 27, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #23**
  - PPR Registration Statement dated April 9, 2001
  - Conditional Sales Agreement dated April 9, 2001
  - HEL Invoice # 000848
  - Invoice to HEL dated March 30, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #24**
  - PPR Registration Statement dated May 12, 2000
  - Conditional Sales Agreement dated May 12, 2000
  - HEL Invoice # 000875
  - Invoice to HEL dated December 14, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #25**
  - PPR Registration Statement dated January 25, 2002
  - Conditional Sales Agreement dated January. 22. 1999
  - Invoice to HEL dated January 6, 1999
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #26**
  - PPR Registration Statement dated January 25, 2002
  - Invoice to HEL — January 18, 2000

- Conditional Sales Agreement undated
- Customer Accounts Payable Report dated February 27, 2002

- **Asset #27**
  - PPR Registration Statement dated March 30, 2001
  - Conditional Sales Agreement dated March 30, 2000
  - Invoice to HEL dated March 28, 2001
  - Customer Accounts Payable Report dated February 27, 2002

- **Asset #28**
  - PPR Registration Statement dated May 15, 2000
  - Conditional Sales Agreement dated May 12, 2000
  - HEL Invoice # 000405
  - Invoice to HEL dated December 6, 1999
  - Customer Accounts Payable Report dated February 27, 2002

9. Classification of the Assets

The actual subjective use to which the assets are put by the debtor dictates whether the assets will be classified as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that all 28 pieces of equipment were held by HEL for sale or lease and as such, form part of the inventory of HEL (s. 2(x) of the PPSA).

10. Application of the PPSA

By operation of s.4 of the PPSA, the Conditional Sales Contracts contain an appropriate charging clause and qualify as security agreements governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dated the PPSA (and the PPR registration system) were given a 2-year grace period from the date of the coming into force of the Act (i.e. until December 13, 2001) in which to perfect their pre-PPSA security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicated, *inter alia*, under which prior registration law the security interest related and also provide the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-PPSA registration for purposes of priority. There are a number of conditions however. For example, defects in the pre-PPSA security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for ten of the Assets:

- Asset #3 - 18 June 1998
- Asset #4 - 20 June 1997
- Asset #5 - 21 September 1999
- Asset #11 - 18 June 1998
- Asset #12 - 14 July 1998
- Asset #13 - 9 July 1999
- Asset #14 - 9 July 1999
- Asset #15 - 9 July 1999
- Asset #18 - 30 July 1999
- Asset # 25 - 22 January 1999

All of these Conditional Sales Agreements were executed prior to the coming into force of the PPSA and therefore would have been subject to the pre-PPSA *Conditional Sales Act*, R.S.N.L. 1990, c. C-28.

Conditional Sales Agreement – 18 June 1998 (Asset #3)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on June 19, 1998 (registration #698840).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567511) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1998 I/R ECM490 Hydraulic Drill (s/n R14186AE)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 20 June 1997 (Asset #4)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on June 27, 1997 (registration #371138).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567520) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1997 I/R ECM490/YH70 Hydraulic Drill (s/n R14200DE)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 21 September 1999 (Asset #5)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on October 1, 1999 (registration #742356).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567548) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 18 June 1998 (Asset #11)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on June 19, 1998 (registration #698841).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567557) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been

properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 14 July 1998 (Asset #12)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on July 21, 1998 (registration #701716).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567566) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 9 July 1999 (Asset #13)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on July 13, 1999 (registration #733029).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567584) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 9 July 1999 (Asset #14)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on July 13, 1999 (registration #733031).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567593) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 9 July 1999 (Asset #15)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on July 13, 1999 (registration #733030).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567600) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 9 July 1999 (Asset #18)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on July 13, 1999 (registration #733032).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567637) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

Conditional Sales Agreement – 19 January 1999 (Asset #25)

The security agreement satisfies the requirements in s.5 of C*onditional Sales Act* (R.S.N.L. 1990, c. C-28) and according to the stamp on the CSA, it was registered in the CSR on January 26, 1999 (registration #716832).

In accordance with the Regulations, I/R registered a financing statement in the PPR (#1567646) on January 25, 2002 which included the following description:

- **Serial Numbered Collateral**: "1999 I/R ECM590 Hydraulic Drill (s/n R11212GG)"
- **Pre-PPSA registration information continued by this registration:** Blank

This registration does not include any reference to the registration of the CSA in the CSR and therefore does not satisfy the requirements under s.26(2) of the Regulations. Further, the registration of this financing statement on the PPR was after the grace period. It is therefore the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the CSR.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a

binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

YES I/R has provided copies of invoices sent to HEL for each Asset listed above. Given that I/R was a direct supplier of the goods, such invoices suffice as evidence that value was in fact given by I/R to HEL in exchange for security interest claimed by I/R.

(ii) Rights in the collateral?

YES HEL held possession of the assets and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2] Furthermore, section 13(2) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the leased goods when s/he obtains possession under the lease.

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

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

YES The evidentiary requirements of s.11, required for attachment, are established by the CSAs provided. Specifically, in accordance with s.11(1)(b), I/R has provided copies of agreements evidencing security interests being taken in all but three (3) of the Assets (see below). These CSAs are in writing, have been signed by HEL as the debtor and provide an adequate description of the collateral that is secured.

NO I/R have not provided copies of CSAs relating to the security interests claimed in Asset #16, 17 or 26.

Is there a Perfection Step?

[1] C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.
[2] Ibid. at p.84.

Conditional Sales Agreement – 20 June 1997 (Asset #4)

YES (see Section 10)

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

Conditional Sales Agreement – 18 June 1998 (Assets #3 & 11)

YES (see Section 10)

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

Conditional Sales Agreement – 14 July 1998 (Asset #12)

YES (see Section 10)

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

Conditional Sales Agreement – 19 January 1999 (Asset #25)

YES (see Section 10)

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

Conditional Sales Agreement – 9 July 1999 (Assets #13, 14, 15 & 18)

YES (see Section 10)

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

Conditional Sales Agreement – 21 September 1999 (Asset #5)

YES (see Section 10)

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

Conditional Sales Agreement – 30 March 2000 (Asset #27)

YES

Registration number 201913, dated March 30, 2001, contains the following information:

- **General Description of Collateral:** "2001 Ingersoll-Rand PF5510 Forklift (s/n 55103033)"
- **Serial Numbered Collateral:** Blank

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

Conditional Sales Agreement – 12 May 2000 (Assets #6, 19, 24 & 28)

YES

(Asset #6) Registration number 279513, dated May 12, 2000, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral: "**One Ingersoll-Rand Model ECM590 Hydraulic Drill Serial Number R11237H"

(Asset #19) Registration number 279497, dated May 12, 2000 contains the following information:

- **General Description of Collateral:** "One Ingersoll-Rand Model ECM590 Hydraulic Drill Serial Number R11224AH"
- **Serial Numbered Collateral:** Blank

(Asset #24) Registration number 27947, dated May 12, 2000, contains the following information:

- **General Description of Collateral:** "One Ingersoll-Rand Model SD115D Compactor Serial Number R11237H"
- **Serial Numbered Collateral:** Blank

(Asset #28) Registration number 280305, dated May 15, 2000 contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "1999 Ingersoll-Rand PF5510 Paver/Finish (s/n 55102843)"

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

Conditional Sales Agreement – 7 June 2000 (Asset #20)

YES

Registration number 334706, June 7, 2000, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "1999 Ingersoll-Rand DD110 Compactor (s/n 160180)"

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

Conditional Sales Agreement – 28 June 2000 (Asset #21)

YES

Registration number 201913, June 28, 2000, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "1999 Ingersoll-Rand SD100DA Compactor (s/n 163713)"

What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of

inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Conditional Sales Agreement – 22 January 2001 (Assets #1, 2, 7, 8, 9 & 10)

YES

(Asset #1) Registration number 764969, dated January 23, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11242EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11245EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11246EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11247EH); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14245FF); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14246FF)"

(Asset #2) Registration number 764969, dated January 23, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11242EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11245EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11246EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11247EH); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14245FF); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14246FF)"

(Asset #7) Registration number 764969, dated January 23, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11242EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11245EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11246EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11247EH); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14245FF); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14246FF)"

(Asset #8) Registration number 764969, dated January 23, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11242EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11245EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11246EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11247EH); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14245FF); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14246FF)"

(Asset #9) Registration number 764969, dated January 23, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11242EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11245EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11246EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11247EH); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14245FF); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14246FF)"

(Asset #10) Registration number 764969, dated January 23, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11242EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11245EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11246EH); 2000 Ingersoll-Rand ECM590 Hydraulic Drill (s/n R11247EH); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14245FF); 1998 Ingersoll-Rand ECM490 Hydraulic Drill (s/n R14246FF)"

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

Conditional Sales Agreement – 30 March 2001 (Asset #22)

YES

Registration number 872754, dated March 30, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral: "**2001 Ingersoll-Rand SD110D Compactor (s/n 167316); 2001 Ingersoll-Rand PF5510 Forklift (s/n 55103033)"

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

Conditional Sales Agreement – 9 April 2001(Asset #23)

YES

Registration number 889139, dated April 9, 2001, contains the following information:

- **General Description of Collateral:** Blank
- **Serial Numbered Collateral:** "2001 Ingersoll-Rand SD110D (s/n 167317)"

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

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

[3] Ibid. at p.140.

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

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as I/R may be entitled to claim a super-priority status (ref: s. 35(2)). However, I/R has not made any claim for super-priority status nor have they provided any evidentiary support for such an entitlement.

- As established by s. 36 of the PPSA and the residual priority rules of the PPSA, the relevant date for the determination of the priority of I/R's interest in the Assets is the date of registration of its financing statement in the PPR:

  - **Asset #1** - 23 January 2001
  - **Asset #2** - 23 January 2001
  - **Asset #3** - 25 January 2002
  - **Asset #4** - 25 January 2002
  - **Asset #5** - 25 January 2002
  - **Asset #6** - 12 May 2000
  - **Asset #7** - 23 January 2001
  - **Asset #8** - 23 January 2001
  - **Asset #9** - 23 January 2001
  - **Asset #10** - 23 January 2001
  - **Asset #11** - 25 January 2002
  - **Asset #12** - 25 January 2002
  - **Asset #13** - 25 January 2002
  - **Asset #14** - 25 January 2002
  - **Asset #15** - 25 January 2002

[4] Ibid. at p.140.

- **Asset #16** - 25 January 2002
- **Asset #17** - 25 January 2002
- **Asset #18** - 25 January 2002
- **Asset #19** - 12 May 2000
- **Asset #20** - 7 June 2000
- **Asset #21** - 28 June 2000
- **Asset #22** - 30 March 2001
- **Asset #23** - 9 April 2001
- **Asset #24** - 12 May 2000
- **Asset #25** - 25 January 2002
- **Asset #26** - 25 January 2002
- **Asset #27** - 30 March 2001
- **Asset #28** - 15 May 2000

Since I/R had a prior registration on the Old Registry for a number of these agreements it was possible to extend their date for the determination of priority back to August 7, 1998. However, as a result of I/R's failure to include a reference to the prior registration I/R's interest is subordinated to all validly perfected security interests in the Assets existing as of the date of registration of the financing statement.

15. Auction Results

The following Assets were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia.

(#1) 1998 I/R ECM590 Hydraulic Drill (s/n R14246FF)	-	$68,400.00
(#2) 1998 I/R ECM590 Hydraulic Drill (s/n R14245FF)	-	$79,800.00
(#11) 1998 I/R ECM590 Hydraulic Drill (s/n R11115EF)	-	$117,963.00
(#20) 1999 I/R DD110 Compactor (s/n 160180)	-	$95,000.00
(#22) 2001 I/R SD110D Compactor (s/n 167316)	-	$110,000.00

Net amount obtained (bid amount less LVG buyer's premium) **$471,163.00**.

Also, as noted above, the proceeds from the sale of Asset #21, being **$95,000**, are being held in trust.

FINAL DETERMINATION
RE: JOHN DEERE CREDIT INC. CLAIMS

Final Determination
November 27, 2002

Re: PricewaterhouseCoopers Inc. ("PWC") as Trustee of Hickman Equipment (1985) Limited in respect of the Claims of John Deere Credit Inc. (the "JDCI") to Security Interests

1. Introduction

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

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

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

2. Summary Final Determination

JDCI's claim:

(a) to be owed $17,443,004.25 (the "Total Debt") by HEL, as at the Date of Bankruptcy, is allowed, subject to the taxation of legal fees in the amount of $101,730.69 and subject to any adjustment to the PowerPlan for receipts by JDCI in respect of the PowerPlan debt;

(b) to be owed the Individual Debts, as defined herein, by HEL as at the Date of Bankruptcy is allowed;

(c) to a security interest in the items listed in Schedule B as security for the Individual Debts set out in the Column entitled "JDCI Debt" in Schedule B is allowed;

(d) to a security interest in the Assets as security for the Total Debt is allowed; and

(e) to have established that the security interests in the Assets satisfy the *definition* of a PMSI is allowed in respect of the financings for the Assets listed in Schedule A as letters A and B and numbers 2-4, 6, 7, 9-14, 16-25, 27-29, 31, 32, 35-43, 45, 46, 48-54, 55-63, 66 and 82.

3. Defined Terms

When used in this Final Determination the following words or abbreviations shall have the meaning ascribed:

"Asset(s)"	-	the assets listed as items 1 to 8, 10 to 43 and 45 to 63 in Schedule "A" hereto
"BIA"	-	*Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended
"Date of Bankruptcy:	-	March 13, 2002
"Documents"	-	the documentation referred to in paragraph 8
"HEL"	-	Hickman Equipment (1985) Limited
"Individual Debt"	-	the amount owed to JDCI by HEL in respect of individual items listed in Schedule B. The Individual Debt for each item allowed as at the Date of Bankruptcy is the amount set out in the column entitled "JDCI Debt" in Schedule B
"PMSI"	-	Purchase Money Security Interest
"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"Trustee"	-	PricewaterhouseCoopers Inc. in its capacity as Trustee of the Estate of Hickman Equipment (1985) Limited
"Total Debt"	-	means $17,443,004.25

4. The Assets

JDCI claims a security interest in 89 pieces of heavy equipment of which, 25 were identified by JDCI as being sold out of trust and 61 were in the possession of PWC and sold at the auction held on July 12, 2002 for the proceeds set out in Schedule B. The other 3 units, being units identified as A, B and 65 in Schedule A, were not in inventory at the commencement of the receivership and did not come into the Receiver's possession.

5. Assumptions

For the purposes of this Final Determination, PWC has assumed:

(a) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

(b) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

(c) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

(d) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

(e) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

Notwithstanding the findings in this Final Determination concerning the validity of JDCI's Claim, the Trustee is not precluded by such determination from taking proceedings in respect of the Debt, Security Interest or Assets dealt with herein pursuant to the provisions of the BIA or any provincial or other legislation dealing with preferences, reviewable or fraudulent transactions or settlements.

Except where a specific claim to proceeds has been made out and material provided in support of that claim, the Trustee expresses no opinion with respect to claims to proceeds or claims involving tracing. An outline of the proceeds claims process and issues are set out in paragraph 18.

7. Overview of Claim

JDCI claims that it has a perfected general security interest in the amount of $18,160,829.50 secured by each of the Assets; and that it has a perfected specific security interest in each of the Assets for the Individual Debts to the extent of the indebtedness set out in the column entitled "Total Debt" in Schedule A. The indebtedness arises from a series of financings that JDCI made on behalf of HEL, amounts for which HEL is responsible under the PowerPlan Agreement and legal fees. JDCI maintains that it has satisfied all of the requirements to attach and perfect a security interest in 89 pieces of equipment, including registration of the security interests in the PPR. JDCI further asserts a PMSI in each of the 89 pieces of equipment including the Assets.

Three of the Assets are the subject of double financings by JDCI and HEL. The three Assets and the financings are those numbered 5 and 82; 8 and 9; and 26 and 66 in Schedule A.

JDCI says that there may be other assets that are or were in the possession of the Receiver which are in the nature of proceeds to which JDCI claims a security interest. Any such assets that may constitute proceeds and have not been identified are not the subject of this Final Determination.

8. Documentation

For the purposes of this Final Determination PWC has been provided with, reviewed, considered and relied upon the following:

(a) Proof of Claim (Form 31) of JDCI dated April 17, 2002, filed in the bankruptcy of HEL together with the following attachments:

(i) Inventory Security Agreement;
(ii) JDC Wholesale Finance Agreement;
(iii) Timberjack Finance Wholesale Finance Agreement;
(iv) Floor Plan Notes and the Chattel Mortgages;
(v) Schedule B to Claim setting out particulars of claim in respect of the 94 financings (listed in Schedule A to this Final Determination);

(b) Repurchase agreement dated December 7, 1984 between HEL and John Deere Limited.

(c) Repurchase agreement dated September 10, 1993 between HEL and John Deere Finance Limited (the "Repurchase Agreement").

(d) Letter dated January 23, 1995 from Canadian Equipment Finance Corporation to HEL offering a revolving line of credit for a John Deere Equipment, Inventory Finance Program (the "CEFC Line of Credit Agreement").

(e) PowerPlan Credit Program Merchant Agreement between JDCI and HEL, agreement dated October 1, 1999 (the "PowerPlan Agreement") and related correspondence, together with weekly PowerPlan statements from December 14, 2001– April 5, 2002.

(f) Purchase Money Security Interest Notices by JDCI, all dated December 14, 1999, addressed to:

(i) CIBC Equipment Finance Limited;
(ii) Bombardier Capital Leasing Limited;
(iii) ABM AMRO Leasing, a Division of ABM AMRO Bank Canada;
(iv) Canadian Imperial Bank of Commerce;
(v) General Motors Acceptance Corporation of Canada, Limited.

(g) Inventory Security Agreement made between JDCI and HEL dated May 9, 2000 (the "Inventory Security Agreement");

(h) John Deere Credit Wholesale Finance Agreement for Construction Dealers made between JDCI and HEL dated August 24, 2001 (the "JDC Wholesale Finance Agreement");

(i) Timberjack Finance Wholesale Finance Agreement made between JDCI and HEL dated August 24, 2001 (the "Timberjack Wholesale Finance Agreement");

(j) 59 Chattel Mortgage Agreements made between HEL as Mortgagor and JDCI as Mortgagee (the "Chattel Mortgages")

34 Floor Plan Notes issued by HEL in favour of JDCI some referencing the agreement described in paragraph 8(b) (the "JD Floor Plan Notes) and others referencing the agreement described in paragraph 8(c) (the "Timberjack Floor Plan Notes"); (collectively the "Floor Plan Notes")

3 Conditional Sale Agreements made between Timberjack Corporation as the Conditional Vendor and HEL as the Dealer (or Purchaser) and assigned to the JDCI (the "Timberjack Conditional Sale Agreements")

Note: A. All documents except the Timberjack Conditional Sale Agreements and two of the Chattel Mortgages were signed by JDCI acting as HEL's attorney;

B. The Chattel Mortgages all pre-date August 24, 2001. The Floor Plan Notes are all dated subsequent to August 24, 2001.

(k) for each of the 94 financings, documents evidencing the request for financing from HEL with any supporting documentation; a loan amortization schedule; wholesale input control sheet; directions to pay (in some instances) and a settlement printout showing the application of the financing funds;

(l) PPR search report for the Province conducted in the name of HEL dated March 21, 2002;

(m) confidential responses from JDCI to PWC concerning additional information and the Initial Opinion;

(n) PPR search report for Nova Scotia conducted in the name of HEL dated October 22, 2002 indicating no registrations.

It should be noted that JDCI was created by the amalgamation of John Deere Finance Limited and Canadian Equipment Finance Corporation on October 28, 1996.

9. The Claim

A. The Debt:

(a) Claimed

JDCI has set out in its Proof of Claim the sum of $18,160,829.50 consisting of the amounts advanced and unpaid on the various equipment financings ("Wholesale") totalling $17,588,600.24, amounts due under the PowerPlan Agreement totalling $470,498.57 and legal fees totalling $101,730.69. JDCI subsequently advised that financings numbered 44 and 64 in its Schedule A were paid out, in effect reducing the outstanding Wholesale claim by $619,182.75 ($149,105.67 for item 44 and $470,077.08 for item 64). JDCI provided no information for another unnumbered financing on its schedule B to the Proof of Claim (serial number T0310SG895252 which appears to also have been paid out).

The Total Debt calculated by the Trustee based on the foregoing is $17,443,004.25, consisting of Wholesale Debt of $16,870,774.99; PowerPlan indebtedness of $470,498.57 and legal fees of $101,730.69.

JDCI has provided additional information concerning the accrual of interest and legal expenses after the Date of Bankruptcy, which will not be determined by this Final Determination.

JDCI claims that the amount owed to it by HEL as of March 13, 2002 in respect of the financing of the individual items listed in Schedule B is the amount set out in the column entitled "Total Debt" in Schedule A opposite the Asset.

(b) Allowed or Disallowed

JDCI's claim for the Total Debt, and the Individual Debts is allowed by the Trustee based on the Documents reviewed by or on behalf of the Trustee and referred to in paragraph 8, subject to the taxation of the legal fee component of Total Debt.

Wholesale Debt

JDCI relies upon the CEFC Line of Credit Agreement, Inventory Security Agreement, the John Deere Credit Wholesale Finance Contract, the Timberjack Wholesale Agreement, the Floor Plan Notes, the Chattel Mortgage Agreements and the Timberjack Conditional Sale Agreement to establish its Claim to the Wholesale Debt.

These documents evidence a financing arrangement between JDCI and HEL where JDCI would finance the purchase of new or used equipment inventory supplied to HEL by John Deere Limited or acquired from third parties or traded in by customers. On some occasions

HEL was required to purchase used units from JDCI pursuant to its obligations under the Repurchase Agreement (e.g. where units were repossessed from retail purchasers).

The Chattel Mortgage Agreements were granted under the terms of the CEFC Line of Credit Agreement and the Floor Plan Notes were provided pursuant to the terms of the Wholesale Finance Agreements.

The material provisions of the Wholesale Debt Documents for the purposes of this Final Determination follow.

The CEFC Line of Credit Agreement provides as follows:

> **Facility**: A Secured Revolving Line of Credit (the "Facility") to be used to finance John Deere new, used, and rental products, as well as other products sold by the Dealer, (collectively the "Equipment" or "Collateral", as per the Inventory Security Agreement). This Equipment would be available for sale, lease or rental-purchase, to customers of the Dealer in Canada.
>
> **Security:** 1. An Inventory Security Agreement, providing a first fixed charge on all equipment to be financed for the Dealer, as well as a chattel mortgage agreement for equipment initially financed by CEFC;
> 2. Subordination agreements from all other lenders will be required, with respect to the initial secured equipment financed;
> 3. A Priorities Agreement among the Dealer, the Dealer's Bank, John Deere Limited, and, CEFC;
>
> **Sale of Equipment:** Whenever, one or more of the financed pieces of equipment is sold, the full principal and accrued interest on that portion of the Facility must be immediately paid to the Lender.

The Inventory Security Agreement contains the following concerning security, its execution and attachment:

> (a) "Definitions..." "Obligations" means all indebtedness, obligations, liabilities, covenants and agreements (including, without limitation, this Agreement) of any kind whatsoever of Customer to JDCI...
>
> (b) Grant of Security. As general continuing security for the payment, performance and observance of all Obligations, and in addition to, and not in substitution for, any other security now or hereafter held by JDCI, Customer hereby grants, assigns, conveys, transfers, pledges, hypothecates, charges and otherwise grants a security interest (the "Security Interest") to and in favour of JDCI in the following property now owned or hereafter acquired by Customer wherever located (the "Collateral"): (a) each item of Customer's Inventory sold or distributed by JDCI to, or financed by JDCI for, Customer, until paid for in full, including without limitation, new and used Goods sold by JDCI to Customer and financed by JDCI, new or used Goods owned by Customer and financed by JDCI and Customer's Inventory described on Schedule

"A" attached, if any; (b) each item of Customer's Equipment that is not held for rental, lease sale or resale but which has been financed by JDCI, until paid for in full, including without limitation, the Equipment described on Schedule "A" attached, if any; (c) all attachments, accessions, additions to, and substitutions for, Goods acquired by Customer as trade-ins for, the property referred to in (a) and (b) above; (d) all right, title and interest of Customer in, to and under any and all instalment sale contracts, rental agreements and leases entered into by Customer covering the sale, resale, rental, lease or other disposition of any Inventory or Equipment in which JDCI has been granted a Security Interest under (a) or (b) above, together with the benefits, rights and remedies thereunder...

Schedule "A" contains the following description:

All new or used construction and forestry equipment, vehicles, backhoes, crawlers, crawler-dozers, crawler-loaders, four wheel drive loaders, excavators, motor graders, compactors, rollers, paving equipment, skidders, feller bunchers, delimbers, saw-heads, scrapers, forklifts, landscape loaders, articulated dump trucks and other machinery, equipment, implements and construction and forestry products, including without limitation, goods marked with one or more of the brand names John Deere, Tigercat, Valmet, Fabtek, Ingersoll Rand or Blaw Knox, and all attachments, accessories and accessions thereto and repair and spare parts therefor.

(c) Power of Attorney. Customer hereby irrevocably appoints each present and future officer and employee of JDCI to be Customer's attorney with full power of substitution and delegation to execute for and in the name of and on behalf of Customer and register instalment sales contracts, instalment leases and other security agreements which JDCI may use with respect to sales by Customer of Inventory or any Instruments or Chattel Paper.

(d) Attachment. Customer acknowledges that the Security Interest attaches upon the execution of this Agreement (or, in the case of any after-acquired property, upon the date of such acquisition) and that value has been given and that Customer has (or in the case of after-acquired property, will have) rights in Collateral. The parties have not agreed to postpone attachment.

The John Deere Credit Wholesale Finance Contract is described as being offered to assist HEL in financing:

(i) new Deere Inventory
(ii) ADT Longlead Inventory delivered to the Dealer by JDL
(iii) new Non-Deere Inventory and Non-Deere Rental Inventory

(iv) used John Deere construction and forestry equipment and used construction and forestry equipment of like makes and models

The Timberjack Wholesale Agreement is described as being offered by JDCI to assist HEL in financing:

(i) Timberjack Inventory and Timberjack Rental Inventory
(ii) Non-Timberjack Inventory
(iii) Eligible Used Equipment

The Floor Plan Notes are all issued pursuant to the terms of the Wholesale Finance Agreements and reference as security for the sums advanced, the Inventory Finance Agreement.

The Wholesale Agreements set out the steps to be taken to request and obtain wholesale financing.

(a) Both the John Deere Credit Notes and the Notes issued under the Timberjack Finance Agreement contain the following:

> "As security for the Dealer's obligations under the Note, the Dealer has executed and delivered to JDCI an Inventory Security Agreement dated May 9, 2000."

(b) The John Deere Plan Notes provide:

> JDCI is hereby irrevocably authorized and directed to pay Hickman Equipment (1985) Limited the Principal Sum less applicable documentation fees and the Dealer acknowledges and confirms upon JDCI making such payment as directed, the Dealer shall become indebted to JDCI for the Principal Sum and interest thereon pursuant to the terms and conditions thereof.

(c) The Timberjack Plan Notes (of which there are only 3, in respect of items 37, 64 and 89 on Schedule "A") provide:

> JDCI is irrevocably authorized and directed to pay Timberjack Corp. the Principal Sum less applicable documentation fees and the Dealer acknowledges and confirms that upon JDCI making such payment as directed, the Dealer shall become indebted to JDCI for the Principal Sum and interest thereon pursuant to the terms and conditions hereof.

The Chattel Mortgage Agreements are all made between HEL as Mortgagor and JDCI as Mortgagee and provide in part:

(a) "In consideration of:
A loan in the Principal Sum of $_____ being advanced by the Mortgagee to the Mortgagor;"

(b) "The Mortgagor, to secure payment of the Mortgagor's total indebtedness to the Mortgagee as set forth herein and the performance of all other obligations owing by the Mortgagor to the Mortgagee, hereby conveys, mortgages, charges and assigns to the Mortgagee, and grants to the Mortgagee a security interest in, the following chattels, all substitutions therefor, all additions, accessories and accessions thereto, all replacement parts and repairs and all alterations or improvements thereto and any proceeds thereof (all of which are hereinafter referred to as the "Charged Collateral")."

(c) Each Chattel Mortgage Agreement describes by Make, Model and Serial Number a specific piece of equipment which is the "Charged Collateral";

(d) The Chattel Mortgage Agreements provide that:

"The security constituted hereby shall cease and determine if the Mortgagor performs all of its obligations hereunder and under any Guaranteed Agreement, if applicable, and pays to the Mortgagee the Principal Sum: ... provisions for payment as set out."

(e) The Mortgagor represents, covenants and agrees with the Mortgagee that:

"The Mortgagor exclusively possesses and owns the Charged Collateral free and clear of any liens, charges, security interest and other encumbrance of any kind whatsoever, and shall defend the Charged Collateral against all persons claiming an interest therein other than the Mortgagee."

The Timberjack Conditional Sale Agreements provide:

"Timberjack reserves title to, ownership of, and a purchase money security interest in, the goods and all proceeds thereof, until payment in full has been made...The parties have not agreed to postpone the time for attachment of the security interests herein. The Dealer acknowledges receipt of a copy of this Conditional Sale Contract and consents and acquiesces to any assignment of this Conditional Sale Contract by Timberjack to John Deere Credit Inc…"

There is noted on each Timberjack Conditional Sale Agreement: "All Timberjack Corporation's rights under this conditional sale contract and all Timberjack Corporation's interest in the property have been assigned to John Deere Credit Inc."

PowerPlan Debt

A portion of the Claim consists of obligations arising under the PowerPlan Merchant Agreement. This agreement establishes a retail credit facility for HEL's customers financed by JDCI in the nature of a credit card arrangement. Sales would be credited to HEL at a discount and customer payments would be made over time together with interest. Withdrawals and deposits were netted out on each statement and either a deposit was made to HEL's account or a withdrawal was made, depending upon the status of the account at the statement date. In all instances the credit extended to HEL's customers was with full recourse to HEL.

The PowerPlan Agreement states in part:

> 6. Merchant Authorized Accounts and Transactions: Upon Merchant's request and with written consent of PowerPlan, Merchant may establish Merchant Authorized Accounts to which Customers may charge Merchant Authorized Transactions. PowerPlan will have full recourse to Merchant, and Merchant will be liable to PowerPlan, for all amounts charged on a Merchant Authorized Account. Merchant must comply with the Manual in establishing Merchant Authorized Accounts, including the provision of a copy of the PowerPlan credit agreement (the "Credit Agreement") to each Customer for whom the Merchant wishes to establish a Merchant Authorized Account prior to completing the first transaction in respect of such Merchant Authorized Account. PowerPlan reserves the right to accept or reject without prior notice any Merchant Authorized Account or any Merchant Authorized Transaction.
>
> 14. Payment to Merchant: For Customer transactions submitted to and accepted by PowerPlan in accordance with this Agreement, Merchant shall receive payment from PowerPlan in an amount equal to the unpaid principal indebtedness thereunder, less the Discount Charge and any other charges payable by Merchant under this Agreement, when applicable.
> Merchant hereby authorizes PowerPlan to initiate Electronic Funds Transfer (EFT) via Automated Clearing House Credits (ACH Credits) for payment of amount due Merchant. Payments to Merchant transferred through EFT will be deposited in the financial institution account as specified by the Merchant.
>
> 22. Merchant Payments: Merchant acknowledges that PowerPlan has the right to charge back certain Customer Account balances to merchant pursuant to this Agreement. In the event of an obligation arising due to a breach of this Agreement, PowerPlan may demand immediate payment in full of any or all of the Accounts to which the breach relates.
>
> 30. Termination: …The parties agree that this Agreement shall terminate immediately and without further notice to Merchant upon any dissolution, termination of existence, insolvency, bankruptcy or business failure of Merchant or any guarantor of Merchant's obligations to PowerPlan ("Guarantor"), upon the application for or the appointment of a receiver manager of any part of the property of the Merchant or any Guarantor or the commencement by or against the Merchant or any Guarantor of any proceeding under any bankruptcy, arrangement, reorganization, dissolution, liquidation, insolvency, or similar law

> for the relief of or otherwise affecting creditors of Merchant or Guarantor or upon the issued of any writ of execution, attachment, garnishment or similar process against Merchant or Guarantor or any part of the property thereof…

In January 2002 statements reveal that a series of items were charged back to HEL under the PowerPlan agreement. On the February 22, 2002 statement appears the following notice:

> **Balance Due Notice**
>
> Our records show that your account has been in a credit position for approximately 30 days. This means that the payments and/or refunds you have collected have exceeded your sales for that period.
>
> Could you please submit a payment to us for the amount outstanding. To correctly apply your payment please attach a copy of this statement.
>
> If we do not receive a payment, service charges may be applied in accordance with the new policy update.
>
> If you anticipate that sales in the upcoming week will offset your credit balance, please disregard this notice and accept our thanks.
>
> Please remit payment to the above address.

This notice was repeated on all subsequent statements.

The statement for March 8, 2002 shows an outstanding balance due by HEL of $470,498.57. This is the amount claimed by JDCI as a debt due, and as being secured, and is established by the statements.

Customers may continue to make payments on the PowerPlan Debt, which may change the account status between HEL and JDCI. Accordingly, any receipt by JDCI for the PowerPlan Debt would have to be accounted for by JDCI with the Trustee and/or the Receiver.

Legal Fees

A portion of the Claim ($101,730.69) consists of legal fees. PWC has not been provided with the accounts of counsel to JDCI and cannot therefore verify that the accounts have been paid.

Legal fees that qualify as reasonable and incurred for the purposes set out in section 9 of the Inventory Security Agreement are secured under the terms of the Inventory Security Agreement. The courts of the Province reserve the right to tax and allow as reasonable legal fees payable by parties pursuant to the *Rules of the Supreme Court, 1986*. Subject to

such taxation and to a review of the accounts to ensure they fall within the ambit of section 9, the Claim is this respect is allowed as a valid debt.

B. The Security Interest

(a) Asserted

JDCI claims to have a security interest in the Assets. It also claims to have a security interest in the assets listed as items A, B, 65, 67 to 81 and 83 to 92 in Schedule A (as the latter assets were not in the possession of the Receiver, they are not Assets for purposes of this Final Determination).

JDCI claims the Assets in which a security interest is claimed are:

(a) in the nature of Inventory
(b) originally financed goods and not proceeds.

JDCI claims to have a security interest in:

(a) each of the individual Assets as security for the amounts set out in the column entitled "JDCI Debt" in Schedule B in respect of the Individual Asset and in
(b) all of the Assets as security for the Total Debt.

JDCI asserts it has a PMSI in each of the individual Assets for the Individual Debts and a general security interest in all of the Assets, for the Total Debt.

(b) Security Interest – Allowed or Disallowed

1. Determinations

The Trustee has determined that the Assets in which a security interest is claimed are in the nature of inventory.

The basis of this Determination is the actual use to which the goods are put.

The actual use to which goods are put by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. Goods that are held by a person for sale or lease or that have been leased by that person as lessor are inventory. To the best of PWC's knowledge, after reasonable inquiry, all of the Assets were held by HEL as Inventory (PPSA, Section 2(x)).

2. JDCI has a security interest:

(a) in the individual Assets for the Individual Debts; and
(b) all of the Assets as security for the total debt for the reasons set out following:

Wholesale Debt

John Deere Floor Plan Notes

Each John Deere Floor Plan Note evidences a principal sum advanced by JDCI to HEL. HEL promises to pay the principal together with interest according to the stipulated payment terms. The settlement information is further evidence of the advances.

Chattel Mortgages

Each Chattel Mortgage evidences a loan being advanced by JDCI to HEL. HEL promises to pay the principal together with interest, according to the stipulated payment terms. The settlement information is further evidence of the advances.

Timberjack Floor Plan Notes

Each Timberjack Floor Plan Note evidences a principal sum advanced by JDCI to HEL. HEL promises to pay the principal together with interest according to the stipulated payment terms. The settlement information is further evidence of the advances.

Timberjack Conditional Sales Agreement

The Timberjack Conditional Sales Agreement indicates that HEL is buying the goods on terms calling for payment on the earlier of 120 days from the date of the contract or when the goods are sold, leased or otherwise taken out of inventory. These agreements were assigned to JDCI and JDCI has provided settlement information that evidences advances in respect of these purchases.

PowerPlan Debt

The balance due by HEL to JDCI under the PowerPlan Agreement falls within the definition of "Obligations" in Inventory Security Agreement and relates to obligations created after the date of the Inventory Security Agreement. Accordingly it is afforded a secured status under the terms of the Inventory Security Agreement.

Legal Fees

The Inventory Security Agreement in section 9 provides:

> There shall be added to, and deemed part of, the Obligations payable by Customer hereunder: (i) the amount of all reasonable expenses (including, without limitation, legal

> fees and expenses on a solicitor and his own client basis and expenditures incurred by JDCI in exercising its rights and remedies hereunder) made by JDCI at any time in the repossessing, storing, repairing, reconditioning and/or disposing of Collateral, in whole or in part, and in perfecting, preserving and enforcing its Security Interest, rights and remedies hereunder; and (ii) interest on each such expenditure from the date it is made until payment by Customer is received in full, at the rate of 24% per annum.

The Chattel Mortgage Agreements provide in section 5:

> There shall be added to, and deemed part of, the indebtedness payable by Mortgagor hereunder (i) the amount of all reasonable expenditures, (including, without limitation, legal fees and expenses of a solicitor and his own client basis and expenditures incurred by Mortgagee in exercising its rights and remedies hereunder made by Mortgagee at any time in the retaking, repairing, reconditioning, storing, preserving, and/or disposing of Charged Collateral, in whole or in part, and in perfecting, preserving and enforcing its security interests, rights and remedies hereunder, and (ii) interest on each such expenditure from the date it is made until payment by Mortgagor is received in full at the rate of 24% per annum.

The Floor Plan Notes contain the following provision:

> The Dealer shall pay all costs arising or incurred by JDCI as a result of a Default, including reasonable legal fees on a solicitor and his own client basis.

The Trustee is satisfied, based upon the Documents, that JDCI was owed at the Date of Bankruptcy, the Total Debt and JDCI has a security interest in the Assets for both the Individual Debts and the Total Debt.

10. Application of the PPSA

By section 4 of the PPSA, the PPSA applies to every transaction that in substance creates a security interest without regard to form and without regard to who has title to the collateral and includes a chattel mortgage, conditional sale, fixed charge, floating charge, pledge, trust indenture, trust receipt, an assignment, a consignment, lease, trust or transfer of chattel paper where they secure payment or performance of an obligation.

The Documents establish security interests that fall within the ambit of the PPSA for each of the 89 pieces of equipment.

11. Enforceability of the Security Agreement

A security agreement is enforceable against a third party where the debtor has signed a security agreement that contains an appropriate description of the collateral as provided by section 11 of the PPSA.

A representative of Hickman signed the Inventory Security Agreement, the JD Wholesale Finance Agreement, the Timberjack Wholesale Finance Agreement and the Timberjack Conditional Sales Agreement. The Floor Plan Notes and the Chattel Mortgages were all signed by JDCI as HEL's attorney under the authority of the Inventory Security Agreement. The execution by JDCI as HEL's attorney satisfies the PPSA requirements of section 11.

Section 11(b) permits a description of collateral by item or kind *or* by reference to one or more of the following: "goods", "document of title", "chattel paper", "security", "instrument", "money" or "intangible"; a statement that a security interest is taken in all of the debtor's present or after-acquired personal property; or a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except one or more of the following: "goods", "documents of title", "chattel paper", "security", "instrument", "money" or "intangible".

"Goods" are defined by the PPSA s. 2 (u) to include tangible personal property and would be adequate to describe the Assets.

A description of collateral as inventory is adequate only while the collateral is held by the debtor as inventory (PPSA, s.11).

The descriptions of the collateral contained in the Inventory Security Agreement, the Floor Plan Notes, the Chattel Mortgages and the Timberjack Conditional Sale Agreement and set out in paragraph 9 are sufficient to provide an enforceable security agreement for the purposes of section 11 of the PPSA.

12. Effectiveness of the Security Agreement

According to section 10 of the PPSA a security agreement is effective according to its terms. The terms of the Inventory Security Agreement, the Floor Plan Notes, the Chattel Mortgages and the Timberjack Conditional Sale Agreement provide for the security interest claimed by JDCI.

13. Attachment

A security interest in collateral contained in a security agreement attaches when value is given and the Debtor has rights in the collateral. In this case, as indicated in Section 9(B)(2), the Trustee is satisfied that value has been given with respect to the Floor Plan Notes, the Chattel Mortgage Agreement, and the Conditional Sale Agreements, sufficient to attach the security described both in those agreements, and the Inventory Security Agreement.

With respect to HEL's rights in the collateral, all of the Assets were in HEL's possession at the time of its bankruptcy and were in PWC's possession as Receiver of HEL's Assets.

John Deere Floor Plan Notes and Timberjack Floor Plan Notes

Each of the Floor Plan Notes identifies a specific piece of equipment for which the advance is made and in which security is granted under the terms of the Inventory Security Agreement.

Chattel Mortgages

HEL as mortgagor represents that it owns the charged collateral free and clear of encumbrance.

Timberjack Conditional Sales Agreement

These agreements constitute a purchase of the subject goods by HEL, giving HEL rights in the collateral as conditional purchaser.

14. Perfection

A security interest is perfected when it has attached in all steps required for its perfection under the PPSA have occurred (PPSA, s.20).

The Trustee has determined that the security interests claimed by JDCI have been perfected as:

(a) the Trustee has determined that the security interests claimed have attached; and

(b) JDCI has made the following registrations under the provisions of the PPSA:

Registration number 5504 at the PPR dated December 14, 1999 with an expiry date of December 14, 2009 contains the following information:

> **General Description of Collateral**: a security interest is taken in all present and after acquired goods, supplied by the secured party to the debtor or supplied to the debtor by others and financed by the secured party, whether held as inventory or otherwise, all present and after acquired chattel paper, accounts, all money, securities, instruments and intangibles held in or representing the same, together with all attachments, accessories, accessions, replacements, substitutions, additions and improvements thereto and all proceeds of the foregoing in any form, including goods, documents of title, chattel paper, securities, instruments, money and intangibles derived directly or indirectly from any dealing with the collateral and a right to any insurance payment or any other payment that indemnifies or compensates for loss or damage to the collateral or the proceeds of the collateral.

Debtor: Hickman Equipment (1985) Limited

Secured Party: John Deere Credit Inc.

PPSA Registration filing 5504 was amended on January 28, 2002 by filing an Amendment that bears PPSA Amendment Registration Number 1569378 and adds the following to the General Description Collateral:

> the following is added to the current general collateral: without limiting the generality of the foregoing, a security interest is taken in the following property now or hereafter acquired by the debtor, wherever located: all new or used construction and forestry equipment, vehicles, bachholes, crawlers, crawler-dozer, crawler-loaders, four wheel drive loaders, excavators, motor graders, compactors, rollers, paving equipment, skidders, feller bunchers, delimbers, saw-heads, scrappers, forklifts, landscape loaders, articulated dump truck, and other machinery, equipment, implements and construction and forestry products, including without limitation goods marked with one more of the brand names john deere, tigercat, valmet, fabtek, ingersoll rand, and blaw knox, and all attachments, accessories, and accessions thereto and repair and spare parts therefore and all proceeds therefrom in any form whatsoever.

As indicated previously the Assets are heavy equipment (and may include "serial numbered goods" as defined by section 2(p) of the Regulations), but so long as they are Inventory and remain as such, the collateral need not be described by serial number, but must be described in compliance with section 24 of the Regulations.

Section 24 of the Regulations permits a description of collateral by item or kind *or* by reference to, "goods", "document of title", "chattel paper", "security", "instrument", "money" or "intangible"; a statement that a security interest is taken in all of the debtor's present or after-acquired personal property; or a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property or except one or more of the following: "goods", "documents of title", "chattel paper", "security", "instrument", "money" or "intangible".

"Goods" are defined by the PPSA s. 2 (u) to include tangible personal property and would be adequate to describe the Assets.

A description of collateral as inventory is adequate only while the collateral is held by the debtor as inventory (Regulations s. 24(3)).

The description in the initial registration number 5504 is in compliance with the requirements of the Regulations. By operation of s.26 of the PPSA, the registration qualifies as a perfection step with respect to JDCI's security interest in the Assets.

15. Effective Date of Perfection

It is the Trustee's determination that the effective date of perfection of the security interest claimed by JDCI is December 14, 1999 for the purposes of section 36 of the PPSA.

16. PRE-PPSA/ Transitioning Issues

The transition provisions of the PPSA are not applicable in this instance as all transactions took place subsequent to the coming into force of the PPSA in the Province of Newfoundland and Labrador.

17. PMSI

The definition of PMSI is contained in section 2 (hh) of the PPSA to mean:

> (i) a security interest taken in collateral to the extent that it secures all or part of the purchase price of the collateral;
> (ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights;
> (iii) the interest of a lessor of goods under a lease for a term of more than one year, and
> (iv) the interest of a consignor who delivers goods to a consignee under a commercial consignment,
>
> but does not include a transaction of sale by and lease back to the seller, and for the purpose of this definition, "purchase price" and "value" include interest, credit costs and other charges payable for the purchase or loan credit;

PWC has been asked to determine if the Documents support a finding that the security interests of JDCI fulfill the definition of a PMSI.

Courts have accepted that PMSIs can exist in transaction where loans are made to payout, refinance or consolidate existing secured loans (see McLaren, *Secured Transactions in Personal Property in Canada* (2^{nd}) pp. 5-42 to 5-52.1), as these transactions allow the debtor to acquire title (or more title) and thus give the debtor further rights in the collateral. Transactions are to be examined to determine if value was given to "… enable the debtor to expand its asset base, by enabling it to acquire rights in or the use of collateral."

All of the Floor Plan Notes, and the Chattel Mortgages evidence a security interest taken in a specific Asset where value has been given by JDCI for the purpose of enabling HEL to acquire rights in the specific Asset and the principal amount set out in the Floor Plan Notes and the Chattel Mortgages represents the value given by JDCI to allow HEL to acquire rights in the Assets. In most, but not all cases sufficient evidence has been provided by JDCI to support a conclusion that the value given was in fact used by HEL to acquire interests in the collateral.

The Timberjack Conditional Sale Agreements evidence a security interest taken in a specific Asset to secure all or part of the purchase price of that specific Asset. This security was assigned to JDCI.

The Timberjack Conditional Sale Agreements

The Documents related to these transactions indicate that Timberjack sold equipment to HEL on credit terms subject to a reservation of title. The agreements were assigned by Timberjack to JDCI, who in effect financed the purchase and assumed Timberjack's position as conditional seller. The evidence supports a conclusion that these transactions fall within the paragraph 2(hh)(i) definition of PMSI.

The Chattel Mortgages and Floor Plan Notes

The Chattel Mortgages and the Floor Plan Notes were used as financing agreements by JDCI for HEL a) to acquire equipment, either by way of direct purchase of new or used equipment, by way of trade-in (effectively a sale of used equipment by the purchaser to HEL and a sale of new equipment by HEL to the purchaser) or to acquire repossessed units from retail customers to fulfill HEL's obligations under the Repossession Agreement or b) to refinance HEL equipment.

In the case of acquisitions, the particular unit is identified, a loan amount settled between JDCI and HEL, and an advance is made to the supplier of the unit, to payout a lender holding security over the unit or directly to HEL.

In the case of a refinancing, a loan amount was settled between JDCI and HEL and an advance was made to the credit of HEL that may or may not have been used to discharge a prior security interest.

For the financings set out in Schedule A as numbers 2-4, 6, 7, 9-14, 16-25, 27-29, 31, 32, 35-43, 45, 46, 48-54, and 55-63, 66 and 82, there is sufficient evidence to conclude that the value given by JDCI to HEL was indeed used to allow HEL to acquire rights in the collateral to support a PMSI.

For the financings set out in Schedule A as numbers 1, 15, 30, 33, 34, and 47, there is insufficient evidence to conclude that the value given by JDCI to HEL was indeed used to allow HEL to acquire rights in the collateral to support a PMSI, as it is not possible to

determine if a prior security interest was paid out or if the financing resulted in HEL expanding its asset base. The units financed may well have been in HEL's inventory of assets and not the subject of prior interests, or the loan proceeds may not have been applied to pay out prior interests.

In the case of the double financings the earlier financing in time or number 82 (in respect of financings 5 and 82), number 9 (in respect of financings 8 and 9) and number 66 (in respect of financings 26 and 66) satisfy the definition for a PMSI. It is not necessary in the circumstances to make a determination concerning the PMSI definition for the second financing for the double financings, as the auction proceeds in all cases for the respective units were insufficient to discharge the outstanding indebtedness for the first financing.

JDCI, as part of its financing process, charged HEL a documentation fee in the amount of $50, which was added to the principal amount financed. Under the definition of PMSI "purchase price" and "value" include interest, credit costs and other charges payable for the purchase or loan credit. The documentation fee that comprises a component of JDCI's Claim is included in the PMSI definition of "purchase price" and "value" as either a credit cost or as another charge for the purchase or loan credit.

18. Proceeds

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

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

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

Subsection 29(3) provides for three instances where perfection in proceeds is automatic and continuous. A security interest in proceeds is a continuously perfected security interest where the interest in the original collateral is perfected by a registration of a financing statement under section26 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 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 institutions.

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within 15 days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.

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

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

19. Additional Comments on Priorities

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

> PMSI Notices dated December 14, 1999 referred to in paragraph 8 state:
>
> John Deere Credit Inc. ("Secured Party") has registered a Financing Statement under the *Personal Property Security Act* bearing registration number 5504 and hereby notifies you that it has acquired or expects to acquire a Purchase Money Security Interest in inventory of the Debtor which is supplied from time to time by the Secured Party to the Debtor including:
>
> > All present and after-acquired goods, supplied by the secured party to the debtor or supplied to the debtor by others and financed by the secured party, whether held as inventory or otherwise, all present and after-acquired chattel paper, accounts, all money, securities, instruments and intangibles held in or representing the same, together with all attachments, accessories,

> accessions, replacements, substitutions, additions and improvements thereto and all proceeds of the foregoing in any form, including goods, documents of title, chattel paper, securities, instruments, money and intangibles derived directly or indirectly from any dealing with the collateral and a right to an insurance payment or any other payment that indemnifies or compensates for loss or damage to the collateral or the proceeds of the collateral.

JDCI has provided with its reply materials, the affidavit of Ernest G. Reid, Q.C. sworn on October 16, 2002, indicating that the notices were sent by registered mail on December 14, 1999 to General Motors Acceptance Corporation of Canada, Limited, CIBC Equipment Finance Limited, Canadian Imperial Bank of Commerce, ABN AMRO Leasing, a Division of ABN AMRO Bank Canada and Bombardier Capital Leasing Ltd.

20. Auction Results

The Assets numbered 1-8, 10-43 and 45-63 were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. The Net amount obtained (bid amount less LVG buyer's premium) is as set forth in Schedule B. However, the proceeds from the sale of assets, net of liquidation costs, are insufficient to satisfy claims of secured creditors claiming an interest in each of the assets of the estate. Accordingly, no funds are available out of the proceeds from the sale of assets to satisfy any of the claims or unsecured creditors and the Trustee therefore has no prior claim to any of the assets.

Asset #	Payout Mar 13/02	Per Diem	Dec Payment	Jan Payment	Interest on Dec and Jan Payments not received	Per Diem on Interest on Dec and Jan Payments not received	Total Debt
1	165,999.60	23.74	434.11	770.99	14.76	0.17	167,219.46
2	249,477.14	35.68	978.61	1,158.70	27.16	0.31	251,641.61
3	145,339.80	20.69	6,802.00	6,802.00	175.55	1.96	159,119.35
4	258,363.30	36.78	12,602.00	12,602.00	325.24	3.63	283,892.54
5	323,889.81	46.32					323,889.81
6	288,021.54	41.00	1,405.73	1,331.53	35.50	0.39	290,794.30
7	128,364.31	18.35					128,364.31
8	103,922.49	14.87					103,922.49
9	142,966.87	20.35	8,402.00	8,402.00	216.84	2.42	159,987.71
10	299,752.91	42.67	14,002.00	14,002.00	361.37	4.03	328,118.28
11	261,474.76	31.95					261,474.76
12	55,614.90	7.95					55,614.90
13	42,920.21	6.11	2,402.00	2,402.00	61.99	0.69	47,786.20
14	145,339.80	20.69	6,802.00	6,802.00	175.55	1.96	159,119.35
15	188,629.06	26.98	493.28	876.09	16.78	0.20	190,015.21
16	212,239.69	30.21	1,035.86	981.19	26.16	0.29	214,282.90
17	234,974.15	33.45	12,002.00	12,002.00	309.75	3.45	259,287.90
18	234,974.15	33.45	12,002.00	12,002.00	309.75	3.45	259,287.90
19	262,760.92	37.40	1,282.44	1,214.75	32.38	0.36	265,290.49
20	178,272.65	25.38	10,562.00	10,562.00	272.59	3.04	199,669.24
21	111,011.95	15.81	7,202.00	7,202.00	185.87	2.07	125,601.82
22	282,969.42	40.28	1,381.07	1,308.18	34.87	0.39	285,693.54
23	282,969.42	40.28	1,381.07	1,308.18	34.87	0.39	285,693.54
24	282,969.42	40.28	1,381.07	1,308.18	34.87	0.39	285,693.54
25	165,999.60	23.74	434.11	770.99	14.76	0.17	167,219.46
26	169,801.86	24.17	828.74	785.00	20.93	0.23	171,436.53
27	44,929.98	6.40	2,402.00	2,402.00	61.99	0.69	49,795.97
28	223,387.97	31.80	9,322.00	9,322.00	240.58	2.68	242,272.55
29	237,766.07	33.85	9,922.00	9,922.00	256.07	2.85	257,866.14
30	73,973.17	10.58	193.44	343.57	6.58	0.08	74,516.76
31	73,748.59	13.84	5,122.00	5,122.00	132.19	1.47	84,124.78
32	123,051.61	17.52	6,002.00	6,002.00	154.90	1.73	135,210.51
33	203,715.36	29.14	532.73	946.16	18.12	0.21	205,212.37
34	158,456.46	22.67	414.37	735.95	14.09	0.17	159,620.87
35	256,847.88	36.56	10,718.29	10,718.29	276.62	3.08	278,561.08
36	34,584.97	6.49	2,402.00	2,402.00	61.99	0.69	39,450.96
37	448,598.58	54.90					448,598.58
38	66,981.38	12.57	4,652.00	4,652.00	120.06	1.34	76,405.44
39	135,827.00	19.42	355.20	630.85	12.08	0.14	136,825.13
40	244,475.85	34.80	10,202.00	10,202.00	263.30	2.93	265,143.15

41	297,628.98	42.37	16,602.00	16,602.00	428.47	4.78	331,261.45
42	37,028.03	5.27	1,602.00	1,602.00	41.34	0.46	40,273.37
43	95,923.73	13.72	376.28	445.52	10.44	0.12	96,755.97
44							-
44							-
45	155,942.07	22.30	611.70	724.27	16.98	0.19	157,295.02
46	277,409.88	39.49	12,002.00	12,002.00	309.75	3.45	301,723.63
47	226,344.81	32.37	591.91	1,051.26	20.13	0.24	228,008.11
48	393,667.80		12,563.86	12,563.86	324.25	3.61	419,119.77
49	393,667.80		12,563.86	12,563.86	324.25	3.61	419,119.77
50	38,609.98	5.49	2,287.48	2,287.48	59.04	0.66	43,243.98
51	288,021.54	41.00	1,405.73	1,331.53	35.50	0.39	290,794.30
52	92,258.41	13.14	5,122.00	5,122.00	132.19	1.47	102,634.60
53	149,679.27	21.31	8,002.00	8,002.00	206.52	2.30	165,889.79
54	192,031.21	27.33	937.23	887.77	23.67	0.26	193,879.88
55			6,160.00	83,702.08	978.48	12.93	90,840.56
56	128,689.12	18.32	7,202.00	7,202.00	185.87	2.07	143,278.99
57	216,799.72	30.86	10,602.00	10,602.00	273.62	3.05	238,277.34
58	228,180.67	32.48	9,522.00	9,522.00	245.75	2.74	247,470.42
59	145,339.80	20.69	6,802.00	6,802.00	175.55	1.96	159,119.35
60	190,707.46	27.15	9,302.00	9,302.00	240.07	2.68	209,551.53
61	306,243.24	43.59	17,002.00	17,002.00	438.79	4.89	340,686.03
62	296,244.67	42.37	1,162.06	1,375.91	32.25	0.37	298,814.89
63	84,918.32	12.09	4,142.00	4,142.00	106.90	1.19	93,309.22
64							-
65							-
66	171,531.24	24.53	672.86	796.68	18.67	0.21	173,019.45
82	275,148.79	39.16	17,402.00	17,402.00	449.11	5.01	310,401.90

Control	Serial Number	Year	EQ Description	Model	Make	Payout Mar 13/02	Per Diem	Dec Payment	Jan Payment	Interest	Per Diem	Total Debt
A	17246	1996	CRUSHER	1200				195,140.41		2,973.89		198,114.30
B	41D695	1995	CRUSHER	1482				71,551.47		1,090.42		72,641.89
1	FF0200X051172	1999	EXCAVATORS	200LC	JD	165,999.60	23.74	434.11	770.99	14.76	0.17	167,219.46
2	FF0330X080077	1998	EXCAVATORS	330LC	JD	249,477.14	35.68	978.61	1,158.70	27.16	0.31	251,641.61
3	06CR05244	2000	EXCAVATORS	320	CAT	145,339.80	20.69	6,802.00	6,802.00	175.55	1.96	159,119.35
4	5TJ02858	1995	CRAWLER DOZER	D8N	CAT	258,363.30	36.78	12,602.00	12,602.00	325.24	3.63	283,892.54
5	T0653GX880032	2000	FELLER BUNCHER	653G	JD	323,889.81	46.32					323,889.81
6	DW744HX572946	1999	LOADERS	744H	JD	288,021.54	41.00	1,405.73	1,331.53	35.50	0.39	290,794.30
7	T0850CX834577	1997	DOZER	850C	JD	128,364.31	18.35					128,364.31
8	FF892EX011705	1996	EXCAVATORS	892E	JD	103,922.49	14.87					103,922.49
9	FF892EX011705	1997	ESCAVATORS	JD892E	JD	142,966.87	20.35	8,402.00	8,402.00	216.84	2.42	159,987.71
10	845H0602	1999	HARVESTER	845B	TIGER	299,752.91	42.67	14,002.00	14,002.00	361.37	4.03	328,118.28
11	IODHI027	2000	FORWARDER	1110NA	TJ	261,474.76	31.95					261,474.76
12	CT7296	1991	FORWARDER	230A	TJ	55,614.90	7.95					55,614.90
13	CB7835	1994	FORWARDER	230D	TJ	42,920.21	6.11	2,402.00	2,402.00	61.99	0.69	47,786.20

14	06CR05245	2000	EXCAVATORS	320	CAT	145,339.80	20.69	6,802.00	6,802.00	175.55	1.96	159,119.35
15	9JS00289	2000	EXCAVATORS	320B	CAT	188,629.06	26.98	493.28	876.09	16.78	0.20	190,015.21
16	544B032885899	1999	FORWARDER	544B	FABTEK	212,239.69	30.21	1,035.86	981.19	26.16	0.29	214,282.90
17	546B-40-28894-99	1999	FORWARDER	546B	FABTEK	234,974.15	33.45	12,002.00	12,002.00	309.75	3.45	259,287.90
18	546C-66-29396-00	2000	FORWARDER	546C	FABTEK	234,974.15	33.45	12,002.00	12,002.00	309.75	3.45	259,287.90
19	546C562930800	2000	FORWARDER	546C	FABTEK	262,760.92	37.40	1,282.44	1,214.75	32.38	0.36	265,290.49
20	145-35027	1988	EXCAVATORS	EX200	HITACHI	178,272.65	25.38	10,562.00	10,562.00	272.59	3.04	199,669.24
21	FF0200X050548	1997	EXCAVATORS	200LC	JD	111,011.95	15.81	7,202.00	7,202.00	185.87	2.07	125,601.82
22	FF0200X500536	1999	HARVESTER	200LC	JD	282,969.42	40.28	1,381.07	1,308.18	34.87	0.39	285,693.54
23	FF0200X500923	1999	HARVESTER	200LC	JD	282,969.42	40.28	1,381.07	1,308.18	34.87	0.39	285,693.54
24	FF0200X500924	1999	HARVESTER	200LC	JD	282,969.42	40.28	1,381.07	1,308.18	34.87	0.39	285,693.54
25	FF02DOX051120	1999	EXCAVATORS	200LC	JD	165,999.60	23.74	434.11	770.99	14.76	0.17	167,219.46
26	FF0230X060319	1998	EXCAVATORS	23OLC	JD	169,801.86	24.17	828.74	785.00	20.93	0.23	171,436.53
27	T0450GW809815	1995	CRAWLER DOZER	450G	JD	44,929.98	6.40	2,402.00	2,402.00	61.99	0.69	49,795.97
28	DW690EL562859	1997	EXCAVATORS	690E	JD	223,387.97	31.80	9,322.00	9,322.00	240.58	2.68	242,272.55
29	DW690EL565134	1998	EXCAVATORS	690E	JD	237,766.07	33.85	9,922.00	9,922.00	256.07	2.85	257,866.14
30	FF790EL010023	1992	EXCAVATORS	790E	JD	73,973.17	10.58	193.44	343.57	6.58	0.08	74,516.76
31	FF792DX010221	1997	EXCAVATORS	792D	JD	73,748.59	13.84	5,122.00	5,122.00	132.19	1.47	84,124.78
32	FF892EX007239	1993	EXCAVATORS	892E	JD	123,051.61	17.52	6,002.00	6,002.00	154.90	1.73	135,210.51
33	FF892EX012643	1998	EXCAVATORS	892E	JD	203,715.36	29.14	532.73	946.16	18.12	0.21	205,212.37
34	C10514	1998	EXCAVATORS	PC200-6	KOMATSU	158,456.46	22.67	414.37	735.95	14.09	0.17	159,620.87
35	AT4C761111995	1995	HARVESTER	TM T425B	TIMCO	256,847.88	36.56	10,718.29	10,718.29	276.62	3.08	278,561.08
36	CT7297	1992	EXCAVATORS	230	TJ	34,584.97	6.49	2,402.00	2,402.00	61.99	0.69	39,450.96
37	WC608BX005005	2001	HARVESTER	608BH	TJ	448,598.58	54.90					448,598.58
38	973115	1997	FORWARDER	610	TJ	66,981.38	12.57	4,652.00	4,652.00	120.06	1.34	76,405.44
39	993395	1999	FORWARDER	610	TJ	135,827.00	19.42	355.20	630.85	12.08	0.14	136,825.13
40	860-8220	1998	FORWARDER	860	VALMET	244,475.85	34.80	10,202.00	10,202.00	263.30	2.93	265,143.15
41	911C-4019	1998	HARVESTER	911C	VALMET	297,628.98	42.37	16,602.00	16,602.00	428.47	4.78	331,261.45
42	990097	1989	HARVESTER	990	TJ	37,028.03	5.27	1,602.00	1,602.00	41.34	0.46	40,273.37
43	72VI3959	1991	MOTORGRADERS	140G	CAT	95,923.73	13.72	376.28	445.52	10.44	0.12	96,755.97
												-
												-
45	FF0200X050655	1998	EXCAVATORS	200LC	JD	155,942.07	22.30	611.70	724.27	16.98	0.19	157,295.02
46	FF0330X080964	2000	EXCAVATORS	330LC	JD	277,409.88	39.49	12,002.00	12,002.00	309.75	3.45	301,723.63
47	FF0330X080078	1998	EXCAVATORS	330LC	JD	226,344.81	32.37	591.91	1,051.26	20.13	0.24	228,008.11
48	BE350CT200325	2001	ARTICULATED HAULERS	350C	JD	393,667.80		12,563.86	12,563.86	324.25	3.61	419,119.77
49	BE35OCT200326	2001	ARTICULATED HAULERS	350C	JD	393,667.80		12,563.86	12,563.86	324.25	3.61	419,119.77
50	FFO5OZX240042	1998	EXCAVATORS	50	JD	38,609.98	5.49	2,287.48	2,287.48	59.04	0.66	43,243.98
51	DW744HX572461	1999	LOADERS	744H	JD	288,021.54	41.00	1,405.73	1,331.53	35.50	0.39	290,794.30
52	T0750CX825699	1996	CRAWLER DOZER	750C	JD	92,258.41	13.14	5,122.00	5,122.00	132.19	1.47	102,634.60
53	DW772CH567061	1998	MOTOR GRADERS	772CH	JD	149,679.27	21.31	8,002.00	8,002.00	206.52	2.30	165,889.79
54	T0850CX850222	1998	CRAWLER DOZER	850C	JD	192,031.21	27.33	937.23	887.77	23.67	0.26	193,879.88
55	FF892EX007221	1993	EXCAVATORS	892E	JD			6,160.00	83,702.08	978.48	12.93	90,840.56
56	FF892FXOI 1283	1995	EXCAVATORS	892E	JD	128,689.12	18.32	7,202.00	7,202.00	185.87	2.07	143,278.99
57	FF992EX007040	1997	EXCAVATORS	992E	JD	216,799.72	30.86	10,602.00	10,602.00	273.62	3.05	238,277.34
58	FF892EXO11686	1996	EXCAVATORS	892E	JD	228,180.67	32.48	9,522.00	9,522.00	245.75	2.74	247,470.42

59	06CR04706	2000	EXCAVATORS	320	CAT	145,339.80	20.69	6,802.00	6,802.00	175.55	1.96	159,119.35
60	FF892EX012095	1997	EXCAVATORS	892E	JD	190,707.46	27.15	9,302.00	9,302.00	240.07	2.68	209,551.53
61	FF0450X090408	1999	EXCAVATORS	450LC	JD	306,243.24	43.59	17,002.00	17,002.00	438.79	4.89	340,686.03
62	FF0450X090021	1997	EXCAVATORS	450LC	JD	296,244.67	42.37	1,162.06	1,375.91	32.25	0.37	298,814.89
63	DW690EL538314	1992	EXCAVATORS	690E	JD	84,918.32	12.09	4,142.00	4,142.00	106.90	1.19	93,309.22
												-
65	76A3939	1966	TRACTORS	D6C	CAT			$800.00	$10,898.07	$127.37	$1.68	11,825.44
66	FF0230X060319	1998	EXCAVATORS	230LC	JD	171,531.24	24.53	672.86	796.68	18.67	0.21	173,019.45
67	35NB6911	1992	TRUCKS	D350C	CAT	40,900.46	5.83	2,423.18	2,423.18	62.54	0.70	45,809.36
68	53Y03481	1985	CRAWLER DOZER	D8L	CAT	93,585.36	13.39	367.10	434.66	10.19	0.12	94,397.31
69	45197	1996	CRUSHER	3042	CEDARRAP			9,800.00	133,500.76	1,560.25	20.61	144,861.01
70	11236	1996	CRUSHER	1200	ELIJAY	194,682.94	27.71	14,402.00	14,402.00	371.69	4.14	223,858.63
71	546C-68-29445-00	2000	FORWARDER	546C	FABTEK	234,974.15	33.45	12,002.00	12,002.00	309.75	3.45	259,287.90
72	17CP005162	1998	EXCAVATORS	5X750	HITACHI	277,927.36	36.56	16,466.01	16,466.01	424.96	4.74	311,284.34
73	P00120X030801	1998	EXCAVATORS	120	JD	107,675.29	15.32	5,252.00	5,252.00	135.54	1.51	118,314.83
74	P00160X040198	1997	EXCAVATORS	160LC	JD	78,635.38	11.20	5,102.00	5,102.00	131.67	1.47	88,971.05
75	FF0200X050673	1998	EXCAVATORS	200LC	JD	92,952.08	13.23	5,202.00	5,202.00	134.25	1.50	103,490.33
76	FF0200X502047	2001	EXCAVATORS	200LC	JD	141,509.98	20.14	690.66	654.21	17.44	0.19	142,872.29
77	T0310DG789868	1993	BACKHOELOADERS	316D	JD	18,951.92	2.70	1,402.00	1,402.00	36.18	0.40	21,792.10
78	FF0450X090410	1999	EXCAVATORS	450LC	JD	243,346.90	34.64	18,002.00	18,002.00	464.60	5.18	279,815.50
79	FF490EX025278	1994	EXCAVATORS	490E	JD	71,509.84	10.18	4,002.00	4,002.00	103.28	1.15	79,617.12
80	DW544GD558724	1996	LOADERS	544GTC	JD	78,632.59	11.19	3,402.00	3,402.00	87.80	0.98	85,524.39
81	DW644GB542037	1993	LOADERS	644G	JD	101,379.94	14.50	397.68	470.86	11.04	0.12	102,259.52
82	P0653GX880032	2000	HARVESTER	653G	JD	275,148.79	39.16	17,402.00	17,402.00	449.11	5.01	310,401.90
83	DW690EL563780	1997	EXCAVATORS	690D	JD	164,469.49	23.41	10,402.00	10,402.00	268.46	2.99	185,541.95
84	DW690EL557759	1996	EXCAVATORS	690E	JD	100,099.46	14.25	5,602.00	5,602.00	144.58	1.61	111,448.04
85	DW690EL547632	1994	EXCAVATORS	690E	JD	55,785.54	7.94	3,122.00	3,122.00	80.57	0.90	62,110.11
86	FF590DX002664	1997	EXCAVATORS	JD 590D	JD	71,500.46	10.18	4,202.00	4,202.00	108.45	1.21	80,012.91
87	DW690EL564951	1997	HARVESTER	JD 690E	JD	107,233.68	15.27	6,302.00	6,302.00	162.64	1.81	120,000.32
88	1270BI364	1997	HARVESTER	1270B	JD	144,012.79	27.03	10,002.00	10,002.00	258.13	2.88	164,274.92
89	WJI710X000347	2001	FORWARDER	1710	JD	491,027.20	60.29					491,027.20
90	644S095E	1997	FORWARDER	644	VALMET	57,644.72	8.21	281.34	266.49	7.10	0.08	58,199.65
91	6CROO908	1997	EXCAVATORS	320L	CAT	106,576.94	20.00	7,402.00	7,402.00	191.03	2.13	121,571.97
92	106032	1998	FORWARDER	1010B	TJ	99,377.73	18.64	6,902.00	6,902.00	178.13	1.99	113,359.86

Wholesale	**16,870,774.99**
Power Plan	**470,498.57**
Legal	**101,730.69**
Total	**17,443,004.25**

Schedule "B"

Asset Number from Schedule "A"	Serial Number	Auction Number	Auction Proceeds	JDCI Debt
1	FF0200X051172	C001586	199,500	167,219.46
2	FF0330X080077	C001546	150,000	251,641.61
3	06CR05244	C001340	140,000	159,119.35
4	5TJ02858	C001226	165,149	283,892.54
5 (also financed as item #82)	T0653GX880032	C001653	180,000	323,889.81
6	DW744HX572946	C001485	120,000	290,794.30
7	T0850CX834577	C001655	82,500	128,364.31
8 (also financed as item #9)	FF892EX011705	C001652	40,000	103,922.49
9	FF892EX011705	C001652		159,987.71
10	845H0602	C001102	118,750	328,118.28
11	IODHI027	C001118	190,000	261,474.76
12	CT7296	C001654	25,000	55,614.90
13	CB7835	C00601	31,000	47,786.20
14	06CR05245	C001341	135,000	159,119.35
15	9JS00289	C001532	67,500	190,015.21
16	544B032885899	C001493	65,000	214,282.90
17	546B-40-28894-99	C001230	75,000	259,287.90
18	546C-66-29396-00	C001231	145,000	259,287.90
19	546C562930800	C001494	80,000	265,290.49
20	145-35027	C00959	55,000	199,669.24
21	FF0200X050548	C00852	72,200	125,601.82
22	FF0200X500536	C001495	150,000	285,693.54
23	FF0200X500923	C001496	120,000	285,693.54
24	FF0200X500924	C001497	60,000	285,693.54
25	FF02DOX051120	C001521	86,450	167,219.46

Asset Number from Schedule "A"	Serial Number	Auction Number	Auction Proceeds	JDCI Debt
26 (also financed as item #66)	FF0230X060319	C001491	104,500	171,436.53
27	T0450GW809815	C001158	57,500	49,795.97
28	DW690EL562859	C001398	24,000	242,272.55
29	DW690EL565134	C001399	30,000	257,866.14
30	FF790EL010023	C00226	39,000	74,516.76
31	FF792DX010221	C00898	58,900	84,124.78
32	FF892EX007239	C001603	40,000	135,210.51
33	FF892EX012643	C00345	145,000	205,212.37
34	C10514	C001364	65,000	159,620.87
35	AT4C761111995	C001400	24,000	278,561.08
36	CT7297	C00899	21,000	39,450.96
37	WC608BX005005	C001531	300,000	448,598.58
38	973115	C00900	40,000	76,405.44
39	993395	C001404	95,000	136,825.13
40	860-8220	C001401	30,000	265,143.15
41	911C-4019	C001045	50,000	331,261.45
42	990097	C001406	5,000	40,273.37
43	72VI3959	C001553	95,000	96,755.97
44				-
44				-
45	FF0200X050655	C001547	110,000	157,295.02
46	FF0330X080964	C001381	199,500	301,723.63
47	FF0330X080078	C00356	133,000	228,008.11
48	BE350CT200325	C001365	225,000	419,119.77
49	BE35OCT200326	C001366	230,000	419,119.77
50	FFO5OZX240042	C001474	30,875	43,243.98
51	DW744HX572461	C001373	120,000	290,794.30
52	T0750CX825699	C001022	80,000	102,634.60
53	DW772CH567061	C001159	95,000	165,889.79
54	T0850CX850222	C001392	120,000	193,879.88

Asset Number from Schedule "A"	Serial Number	Auction Number	Auction Proceeds	JDCI Debt
55	FF892EX007221	C00278	45,000	90,840.56
56	FF892FXOI 1283	C00285	40,000	143,278.99
57	FF992EX007040	C001295	100,000	238,277.34
58	FF892EXO11686	C001396	40,000	247,470.42
59	06CR04706	C001339	135,000	159,119.35
60	FF892EX012095	C001696	80,750	209,551.53
61	FF0450X090408	C001023	150,000	340,686.03
62	FF0450X090021	C001545	150,000	298,814.89
63	DW690EL538314	C001042	38,000	93,309.22
64				-
65	76A3939			-
66	FF0230X060319	C001491		173,019.45
82	P0653GX880032	C001653		310,401.90

#188526

FINAL DETERMINATION
RE: JOHN DEERE LIMITED CLAIMS

Final Determination
November 27, 2002

Final Determination of PricewaterhouseCoopers Inc. ("PWC") as Trustee of Hickman Equipment (1985) Limited in respect of the Claims of John Deere Limited ("JDL") to Security Interests

1. Introduction

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

Pursuant to paragraph 14 of the Claims Plan, a Final Determination is to be made by PWC as Trustee either allowing or disallowing a Claim as a valid secured claim under s.135(4) of the *Bankruptcy and Insolvency Act* ("BIA"). This is the Trustee's Final Determination in respect of JDL.

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

2. Summary Determination

JDL's claim:

(a) to be owed $3,591,153.71 (the "Total Debt") by HEL, as at the Date of Bankruptcy, is allowed, subject to taxation of legal fees in the amount of $105,690.75;

(b) to be owed the Individual Debts, as defined herein, by HEL as at the Date of Bankruptcy is allowed;

(c) to a security interest in the items listed in Schedule B as security for the Individual Debts set out in Column 2 of Schedule B is allowed;

(d) to a security interest in the:

(i) Parts as defined herein and described in Schedule C;
(ii) the items listed in Schedule B;
(iii) the paid for goods listed at pages 14-18 in Schedule A;

as security for the Total Debt is allowed;

(e) to a security interest in Deere Parts other than the Parts is disallowed.

The effective date of perfection for purposes of s.36 of the PPSA of:

(a) the security interest created by the $500,000 fixed and floating charge debenture issued by HEL to JDL is March 11, 1985; and

(b) the security interest created by the Other Security Agreements referred to herein is December 14, 1999.

3. Defined Terms

When used in this Final Determination, the following words or abbreviations shall have the meaning ascribed:

"Asset(s)"	-	the Deere Parts, the Paid for Goods (as defined herein), and the items listed in Schedule B identified with an asterisk
"BIA"	-	*Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended
"Date of Bankruptcy:	-	March 13, 2002
"Debenture"	-	the Debenture referred to in paragraph 8(e)
"Deere Parts"	-	those items identified on the computer system maintained by HEL prior to Bankruptcy as John Deere Parts and Timberjack Parts
"Documents"	-	the documentation referred to in paragraph 8
"HEL"	-	Hickman Equipment (1985) Limited
"Individual Debt"		the amount owed to JDL by HEL in respect of individual items listed in Schedule B. The Individual Debt for each item allowed as at the Date of Bankruptcy is the amount set out in Column 2 of Schedule B
"Industrial Dealer Statement	-	a statement dated March 24, 2002 which was attached to JDL's Proof of Claim, a copy of which is attached as Schedule A_1

"Lawn & Ground Care Statement"	-	a statement dated March 22, 2002 which was attached to JDL's Proof of Claim, a copy of which is attached as Schedule A_2
"Other Security Agreements"	-	John Deere Industrial Dealer Agreement, the John Deere Security Agreement - Inventory, the John Deere Skid Steer Loader Agreement referred to in paragraph 8(b), (c) and (h) collectively
"Paid for Goods"	-	items listed at pages 14-18 of the Industrial Dealer Statement as "Paid for Goods" and which are or were in the possession of the Receiver (the Paid for Goods which are or were in the Receiver's possession are those for which auction or sale proceeds are shown in Schedule D)
"Parts"	-	the portion of the Deere Parts in which the Trustee has determined JDL has a security interest (the Parts are described in Schedule C)
"PMSI"	-	Purchase Money Security Interest
"PPR"	-	Personal Property Registry
"PPSA" or "Act"	-	*Personal Property Security Act,* S.N.L. 1998, c.P-7.1
"Province"	-	Newfoundland and Labrador
"Regulations"	-	*Personal Property Security Regulations* (103/99)
"Security Agreements"	-	the Debenture and the Other Security Agreements
"Total Debt"	-	$3,591,153.71
"Trustee"	-	PricewaterhouseCoopers Inc., in its capacity as Trustee of the Estate of Hickman Equipment (1985) Limited

4. Assets

The assets which are the subject of this Final Determination are the Deere Parts, the Paid for Goods, and the items listed in Schedule B.

5. Assumptions

For the purposes of this Final Determination, PWC has assumed:

(a) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

(b) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

(c) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

(d) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

(e) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

Notwithstanding the findings in this Final Determination concerning the validity of JDL's Claim, the Trustee is not precluded by such determination from taking proceedings in respect of the Debt, Security Interest or Assets dealt with herein pursuant to the provisions of the BIA or any provincial or other legislation dealing with preferences, reviewable or fraudulent transactions or settlements.

Except where a specific claim to proceeds has been made and material provided in support of that claim, the Trustee expresses no opinion with respect to claims to proceeds or claims involving tracing. An outline of the proceeds claim process and issues are set out in paragraph 17.

7. Overview of Claim

JDL has filed a Proof of Claim under the provisions of the BIA claiming HEL owed it on the Date of Bankruptcy $3,485,462.96. This amount is set out in the statements attached as Schedules A_1 and A_2, excluding the amounts shown due for Consigned Inventory. JDL also claims to be owed as at the Date of Bankruptcy legal expenses of approximately $105,690.75.

JDL claims that part of the Total Debt owed is the unpaid balance of the purchase price (the "Individual Debts") for non-consigned inventory described in Schedule A_1 as New Machines and in Schedule A_2 as New Machines and Special Term Machines which were supplied to HEL by JDL.

The New Machines and Special Term Machines and Individual Debts are referred to in Schedules A_1 and A_2 and summarized and identified with an asterisk in Schedule B.

JDL claims to have a PMSI in the New Machines and Special Term Machines for the Individual Debts. It also claims a PMSI in the portion of the Deere Parts for which it has not been paid.

JDL asserts that based on the Debenture and Other Security Agreements, it has a security interest (general security interest) in the Deere Parts, the Paid for Goods (as described at pages 14-18 of Schedule A_1) and in the New Machines and Special Term Machines as security for the Total Debt.

8. Documentation

For the purposes of this Final Determination, the Trustee has been provided with, reviewed, considered and relied upon the following:

(a) Proof of Claim dated April 17, 2002 filed by JDL herein and attachments thereto;

(b) John Deere Industrial Dealer Agreement, March 8, 1995, between the Claimant and Hickman;

(c) John Deere Security Agreement - Inventory, January 16, 1993, between the Claimant and Hickman;

(d) $500,000 Debenture, March 11, 1985, issued by Hickman to the Claimant (the "Debenture");

(e) Pledge Agreement, March 11, 1985, whereby Hickman pledged the Debenture to the Claimant;

(f) Letter Priority Agreement, July 5, 1985, to the Claimant from CIBC concerning priority of their respective security from HEL;

(g) Timberjack Dealer Selling Agreement, June 26, 2000, between Timberjack Corporation and Hickman;

(h) John Deere Skid Steer Loader Agreement, May 1, 1998, between JDL and HEL;

(i) Relating to the items listed in Schedule B:

  (i) Invoice dated October 10, 2001 for the 644H Loader in the amount of $193,603.90 indicating a shipping date of October 10, 2001;
  (ii) 3 Invoices, each dated September 5, 2001, each for a Diesel 6x4 Workstation Gator in the amount of $12,511.50 indicating a shipping date of September 5, 2001;
  (iii) An Invoice for two 72" front blades dated August 20, 2001 for the total amount of $2,896.50 and indicating a shipping date of August 20, 2001;
  (iv) An Invoice for two 48" Pin Pallet Forks dated December 13, 2000 for the total amount of $1,562.56 and indicating a shipping date of December 13, 2000;
  (v) 2 Invoices, each dated December 13, 2000, each for a 250 JD Skid Steer in the amount of $23,872.28 indicating a shipping date of December 13, 2000;
  (vi) An Invoice dated November 13, 2001 for a JD644H4WD Loader, Serial #DW644HX581986 indicating a shipping date of November 13, 2001;
  (vii) An Invoice dated September 27, 2001 for a 16" Cold Planer, Serial #KVCP16X300103, indicating a shipping date of September 27, 2001;

(viii) An Invoice dated October 11, 2001 for 2 48" Pin Pallet Forks (no serial number) indicating a shipping date of October 11, 2001.

(j) Purchase Money Security Interest Notices, all dated December 14, 1999, addressed to:

(i) General Motors Acceptance Corporation of Canada Limited;
(ii) CIBC Equipment Finance Limited;
(iii) CIBC;
(iv) ABN Amro Leasing, a Division of ABM Amro Bank Canada;
(v) Bombardier Capital Leasing.

(k) PPR registration report dated March 21, 2002;

(l) Reports prepared in respect of the Assets for the Trustee by or on behalf of the Receiver;

(m) A Reply dated October 16, 2002 of John Deere Limited ("JDL") to the Information Request of the Trustee dated October 2, 2002;

9. The Claim

A. The Debt:

(a) Claimed

(i) JDL claims the Total Debt owed to it by HEL as of March 13, 2002 is the sum of $3,591,153.71 of which $105,690.75 is legal fees incurred to that date.

Particulars of the Debt other than legal fees are set out in Schedule A_1 and A_2.

(ii) JDL claims to be owed the Individual Debts set out in Column 2 of Schedule B for the items marked by an asterisk in Schedule B.

(Note: In its Reply dated October 16, 2002, JDL has shown a revised amount due. The Trustee in this Determination has only dealt with the claim as set out and proved in the Proof of Claim filed by JDL.)

(b) Allowed or Disallowed

(i) The Total Debt, other than legal fees, is allowed by the Trustee based on the Proof of Claim and Schedules A_1 and A_2.

With respect to a portion of the Claim ($105,690.75) which consists of legal fees, PWC has not been provided with the accounts of counsel to JDL and cannot therefore verify that the accounts have been paid.

Legal fees that qualify as reasonable and incurred for the purposes set out in section 8 of the Security Agreement - Inventory or section 6 of the Debenture are secured under the terms of those documents. The courts of the Province reserve the right to tax and allow as reasonable legal fees payable by parties pursuant to the *Rules of the Supreme Court*, 1986.

The Security Agreement- Inventory

s.8 "If the Dealer's default under this Agreement occurs or continues

(a) all indebtedness owing by the Dealer to the Company shall become due and payable forthwith without notice to the Dealer and the Company may collect the same together with reasonable expenses of collection including, without limitation, court costs, legal fees on a solicitor and client basis, and all other legal expenses.

The Debenture, section 6, which provides in part:

"In the event the Company fails to abide by or fulfill the requirements of this paragraph, John Deere may, but it is not required to, take such steps as it considers advisable to remedy the situation and preserve or protect the charged property. Any moneys paid by John Deere in taking such steps together with all costs and expenses of John Deere shall be added to the indebtedness and liabilities secured hereunder and shall bear interest at the rate provided for in this Debenture and default in payment thereof shall constitute default hereunder."

(ii) The Individual Debts are allowed based on the Proof of Claim, Schedules A_1 and A_2 and the Invoices reviewed by the Trustee.

B. The Security Interests

(a) Asserted

JDL claims to have a security interest in the Assets which are or were in the Receiver's possession which include the Deere Parts, the Paid for Goods, and the items listed in Schedule B that were or are in the Receiver's possession based on the Debenture and the Other Security Agreements.

JDL also claims to have a security interest in any of the assets identified as Paid for Goods in Schedule A_1 or in Schedule B which were not in the Receiver's possession based on the Other Security Agreements.

JDL asserts that all of the Assets in which a security interest is claimed and which are the subject of this determination are or were:

(a) in the nature of Inventory;

(b) originally supplied or financed goods and are not proceeds.

JDL says that there may be other assets which are or were in the possession of the Receiver which are in the nature of proceeds to which JDL claims a security interest. Any such assets which may constitute proceeds have not been identified and are not the subject of this Final Determination.

JDL claims to have a security interest in:

(a) each of the Individual Items listed in Schedule B which were or are in the Receiver's possession for the Individual Debts;

(b) Parts for which JDL has not been paid in full for the amount owed in respect of such parts;

(c) all of the Assets as security for the Total Debt.

JDL asserts that the security interest in respect of the Items listed in Schedule B and any unpaid Parts is in the nature of a PMSI for amounts unpaid in respect of those items.

JDL asserts it has a "general" security interest in all of the Assets for the Total Debt.

(b) Security Interests Allowed or Disallowed

Determinations

1. The Trustee has determined that:

(a) the Assets in which a security interest is claimed are:

(i) in the nature of Inventory; and

(ii) with the exception of the Deere Parts not included in Parts were supplied and/or financed by JDL.

The reasons for the Trustee's determinations are set out following:

(i) Assets in the Nature of Inventory

The actual use to which goods are put by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. Goods that are held by a person for sale or lease or that have been leased by that person as lessor are inventory. It is the Trustee's understanding that all of the Assets were acquired as inventory; it has no specific knowledge of conversion of any of the Assets to Equipment.

(ii) Assets were Supplied and/or Financed by JDL

(a) Items listed in Schedule B - Items #1, 3, 4, 5, 6, 7, 8, 9, 10, and 11 are specifically identified in the Industrial Dealer Statement, Schedule A_1 (under the heading "Non-Consigned Inventory New Machines") and in the Lawn and Ground Care Statement, Schedule A_2. These items are identified as supplied but unpaid for. JDL has provided the Trustee with copies of invoices to evidence the supply of all of the items listed in Schedule B.

(b) The Paid for Goods - The Industrial Dealer Agreement, Schedule A_1 at pages 14-18 lists all of the Paid for Goods. The listing includes various other particulars concerning their supply by JDL. The Trustee accepts the foregoing as satisfactory evidence of the supply of the Paid for Goods by JDL.

(c) Parts - HEL maintained a computerized record of parts. HEL's records indicated there were a total of $2,409,682 of "John Deere" Parts at cost in Inventory. With the assistance of Parts personnel of Ontrac Equipment Limited, some physical inspection and inquiries, the Receiver is reasonably satisfied that of the $2,409,682 of parts categorized as "John Deere" Parts, it is reasonable in the circumstances to accept, for purposes of this Determination, that $2,046,224 of those parts were supplied by JDL. The amount accepted is the total classified as John Deere Parts less $2,667.19 of parts coded as JD parts in error, $37,190.04 of used parts, and $323,601 of Timberjack Parts. (The book value of Timberjack Parts was $403,601. JDL says it supplied $153,262.39 of Timberjack Parts between September of 2000 and February of 2002. The Trustee considers it reasonable to accept that $80,000 of the Timberjack Parts present on the Date of Bankruptcy had been supplied by JDL.)

(b) JDL has a security interest:

(i) in the Individual Items listed in Schedule B marked with an asterisk, for the Individual Debt set out in Column 2 of Schedule B;

(ii) in all of the Assets as security for the Total Debt.

The reasons for the Trustee's determination are set out following:

The JDL Industrial Dealer Agreement of March 8, 1995 provides in paragraph 13:

> "13. Title to ownership and the right to possession of all Sold Goods shipped by the Company (JDL) to the Dealer are and shall remain vested in the Company until full payment of the indebtedness thereof is and any other indebtedness now or hereafter owed by the Dealer to the Company shall have been made to the Company and each item of Sold Goods shall remain as security for such indebtedness even if its own purchase price is paid."

The JDL Skid Steer Loader Agreement provides in paragraph 3(b):

> "3(b) Title to, ownership and the right to possession of Goods shall remain vested in the Company until payment of the indebtedness thereof is and all other indebtedness now or hereafter owing by the Debtor to the Company shall have been paid to the Company.

The JDL Security Agreement - Inventory provides:

> "s.3 As security for the payment of the indebtedness, the Dealer hereby grants to the Company:
>
> (a) a security interest in any unpaid for item of collateral and the Company hereby reserves title to any such collateral provided by it;
>
> (b) a security interest in each paid for item of collateral and the Dealer conveys title to any such collateral..."

(Collateral as defined in the Security Agreement - Inventory includes all goods supplied or financed by John Deere Limited.)

The Debenture provides JDL with a security interest in replacement, repair or service parts components, assemblies and small attachments and items of John Deere Merchandise or other items similar to John Deere Merchandise which are or may in the future be offered for sale by John Deere. (The security interest created by the Debenture is limited to $500,000 plus interest, as provided in the Debenture, from the date of default. It is the Trustee's opinion the security interest created by the Debenture is in goods supplied by JDL only.)

The Trustee is satisfied:

(i) based on the statements attached as Schedules A_1 and A_2, and Invoices provided, that the items listed in Schedule B were supplied by JDL and that the items identified by asterisk are not paid for (the items not marked by an asterisk may be paid for);

(ii) based on JDL's Proof of Claim and the invoices provided, the Trustee is satisfied that JDL was owed, at the Date of Bankruptcy, the Individual Debts set out in Column 2 of Schedule B. Based on the agreements as referenced above, JDL has a security interest in the Individual items identified by an asterisk for the Individual Debts.

While the Trustee is satisfied that JDL has not been paid for all Parts supplied by it to HEL, JDL has not satisfied the burden of establishing which Parts it has not been paid for so as to establish a specific security interest in specific parts for the unpaid balance of the purchase price for those specific parts.

Based on the statements attached as Schedules A_1 and A_2; the invoices provided and reviewed; the inquiries made by the Receiver; information provided by Ontrac that JDL supplied the Parts, all of the items listed in Schedule B and all of the Paid for Goods listed at pages 14-16 of Schedule A_1 to HEL; and, based on the provisions of the Security Agreements referred to in the foregoing, the Trustee is satisfied and has determined that JDL has a security interest in all of the items supplied by it, whether paid for or not as security for the Total Debt. (Note: The security interest created under the Debenture is limited to $500,000 plus interest; the security interest created in the other security agreements is unlimited.)

10. The Application of the PPSA

By section 4 of the PPSA, the PPSA applies to every transaction that in substance creates a security interest without regard to form and without regard to who has title to the collateral and includes a chattel mortgage, conditional sale, fixed charge, floating charge, pledge, trust indenture, trust receipt, an assignment, a consignment, lease, trust or transfer of chattel paper where they secure payment or performance of an obligation.

By section 74(2) of the PPSA, the PPSA applies to every security agreement entered into before the commencement of the Act that was not validly terminated in accordance with prior law before the commencement of the Act.

The security interests created by the Security Agreements falls within the ambit of the PPSA.

11. Enforceability of Security Agreements

A security agreement is enforceable against a third party where the debtor has signed a security agreement that contains an appropriate description of the collateral as provided by section 11 of the PPSA.

By section 74(3) of the PPSA, section 11 does not apply to security agreements entered into and not validly terminated before the commencement of the PPSA. The validity of security interests contained in such agreements is governed by the prior law.

HEL has signed the John Deere Industrial Dealer Agreement, John Deere Security Agreement - Inventory, the Debenture, the Pledge Agreement, the Timberjack Dealer Selling Agreement, and the John Deere Skid Steer Loader Agreement.

The descriptions contained in the Other Security Agreements are sufficient to provide an enforceable security agreement for purposes of section 11 of the PPSA.

The *Registration of Deeds Act*, R.S.N. 1990, c.R-10, provides in section 10 that an "instrument" made after March 27, 1862 and not proved and registered shall be judged fraudulent and void both at law and in equity against a subsequent purchaser or mortgagee for valuable consideration who first registers his or her instrument, or against a Trustee of an insolvent estate, or an assignee or trustee under a conveyance for the benefit of creditors.

The Debenture is an instrument defined in the *Registration of Deeds Act* as it existed prior to the commencement of the PPSA.

Under section 24(1) of the *Registration of Deeds Act*, a document submitted for registration is considered to be registered when it is delivered to the registry provided it:

(a) is executed by all persons from whom an interest passes (here, HEL);
(b) has attached to it the proper proof; and
(c) is accompanied by the proper fee.

The Debenture has been executed by HEL, proved in accordance with the *Registration of Deeds Act*, and endorsed by the Registrar of Deeds as to registration.

Based on the *Registration of Deeds Act*, the Debenture was not void or fraudulent as against third parties but was enforceable according to its terms.

12. Effectiveness of the Security Agreement

According to section 10 of the PPSA, a security interest is effective according to its terms. The Trustee is satisfied that the terms of the Security Agreements relied on by JDL to establish security interests in the Assets are effective to establish the security interests allowed by the Trustee.

13. Attachment

A Security Interest in collateral (the Assets) contained in a Security Agreement attaches when value is given and the debtor (HEL) has rights in the collateral.

The Trustee is satisfied based on examination of Schedules A_1 and A_2, and on the materials, inquiries and inspections referred to at page 10, paragraph (ii)(c) that the collateral in which JDL claims to have a security interest has been supplied by JDL and that supply constitutes the provision of value by JDL to HEL with respect to HEL's rights in the collateral, all of the Assets were in HEL's possession at the Date of Bankruptcy.

14. Perfection

A security interest is perfected when it has attached and all steps required for its perfection under the PPSA have occurred (PPSA, s.20).

The Trustee has determined that the Security Interests claimed by JDL have been perfected as:

(a) The Trustee has determined that the security interests claimed have attached, and

(b) JDL has made the following registrations under the provisions of the PPSA which constitute all steps required to perfect the security interests contained in the Security Agreements under the provisions of the PPSA:

(i) Registration Number 5595 at the PPR dated December 14, 1999 with an expiry date of Infinity contains the following information:

> General Collateral: A security interest is taken in all present and after-acquired goods, supplied by the secured party to the debtor or supplied to the debtor by others and financed by the secured party, whether held as inventory o r otherwise, all present and after-acquired chattel paper, accounts and the debtor's earnings account and reserve account described in any of the debtor's finance and leasing agreements in effect from time to time, all goods, documents of title, chattel paper, securities, instruments, money and intangibles held in or representing the same, together with all attachments, accessories, accessions, replacements, substitutions, additions and improvements thereto and all proceeds of the foregoing in any form, including goods, documents of title, chattel paper, securities, instruments, money and intangibles derived directly or indirectly from any dealing with the collateral, and a right to an insurance payment or any other payment that indemnifies or compensates for loss or damages to the collateral or the proceeds of the collateral.
>
> Debtor: Hickman Equipment (1985) Limited
> Secured Party John Deere Limited

(ii) PPSA Registration number 5595 was amended on January 28, 2002 by filing an Amendment that bears PPSA Amendment Registration Number 1570455 and adds the following to the General Description Collateral:

The following is added to the current general collateral:
Without limiting the generality of the foregoing, a security interest is taken in all goods supplied to the debtor by the secured party or supplied by others and financed by the secured party and in all consigned goods whether John Deere merchandise or otherwise and whether contained in inventory of the debtor or otherwise, including without limitation all complete machines, all replacement, repair or service parts, all components, assemblies and small attachments and any other items of the John Deere merchandise product line and any other good of a make or kind offered for sale by the secured party, and all proceeds therefrom in any form whatsoever.

(iii) PPSA Registration number 328815 at the PPR dated June 6, 2000 with an expiry date of Infinity contains the following description:

General Collateral:
Collateral described in fixed and floating charge debenture dated March 11, 1985 including inventory, replacement, repair, service parts, components, assemblies and small attachments and proceeds therefrom.

Pre-PPSA registration information continued by this Registration:

Number/Date	County or Venue/Act
R87F2215	n/a
1985-03-11	*Registration of Deeds Act*

Debtor: Hickman Equipment (1985) Limited
Secured Party John Deere Limited

(iv) PPSA Registration filing 328815 was amended on January 28, 2002 by filing an Amendment that bears PPSA Amendment Registration Number 1570464 and adds the following to the General Description Collateral:

Without limiting the generality of the foregoing, a security interest is taken in the following property now owned or hereafter acquired by the debtor wherever located: All goods supplied to the debtor by the secured party, whether John Deere Merchandise or otherwise, ,and forming part of the debtor's inventory from time to time, and all replacement, repair or service parts, all components, assemblies and small attachments and any other items of John Deere Merchandise, and all proceeds therefrom in any form whatsoever.

15. Effective Date of Perfection

It is the Trustee's determination that the effective date of perfection of the security interests claimed by JDL for purposes of s.36 of the PPSA are as follows;

(a) a security interest limited to $500,000 plus interest as contained in the Debenture - March 11, 1985;

(b) security interests as contained in the Other Security Agreements relied on by JDL - December 14, 1999.

Basis of Determination

(a) The Debenture

The PPSA provides in s.75(1) that a prior security interest, which on commencement of the PPSA, is covered by an unexpired registration under prior registration law, is considered to have been registered under this Act as of the time of registration under the prior registration law.

The registered and perfected status of a prior security interest is continued if it is registered under the PPSA within 2 years of the commencement of the PPSA.

The Regulations, section 26, sets out the information required in a financing statement to continue a prior registration.

The Debenture was covered by an unexpired registration under prior registration law and the registrant has filed a financing statement as required by section 26 of the Regulations within the time limited by the PPSA.

The Trustee has determined that the registration under the prior law has been properly transitioned so as to preserve the original registration date as the date of perfection for purposes of section 36.

(b) Other Security Interests

A Financing Statement having been filed on December 14, 1999 in respect of the other security interests, the effective date for Perfection of the other Security Interests claimed by JDL for purposes of s.36 of the PPSA is December 14, 1999.

16. PMSI

The definition of PMSI is contained in section 2(hh) of the PPSA to mean:

(i) a security interest taken in collateral to the extent that it secures all or part of the purchase price of the collateral;

(ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights;

(iii) the interest of a lessor of goods under a lease for a term of more than one year, and

(iv) the interest of a consignor who delivers goods to a consignee under a commercial consignment,

but does not include a transaction of sale by and lease back to the seller, and for the purpose of this definition, "purchase price" and "value" include interest, credit costs and other charges payable for the purchase or loan credit;"

The Trustee is satisfied that JDL's security interest in the items listed in Schedule B, marked with an asterisk, for which it has not been paid conforms to the definition of a PMSI as contained in s.2(hh) of the PPSA.

Basis for Determination

The Trustee is satisfied, based on the statements contained in Schedules A_1 and A_2, that JDL sold the items listed in Schedule B identified by an asterisk to HEL and the items have not been paid for.

The Security Interests described in the JDL Industrial Dealer Agreement, Skid Steer Loader Agreement, and the Security Interest - Inventory all include a Security Interest in Goods supplied (sold to HEL by JDL) until they are paid for. The Trustee is satisfied the security interest claimed on the items listed in Schedule B is to secure the purchase price of the collateral.

17. Proceeds

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

While no claim to proceeds is dealt with herein, JDL says that there may be other assets which are or were in the possession of the Receiver which are in the nature of proceeds to which JDL would assert it has a security interest.

The Trustee has not made any determination as to JDL's entitlement to proceeds; however, the Trustee has outlined below the statutory requirements that must be met by a secured party in order to assert a claim to proceeds from the disposition of collateral as against other secured creditors.

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration

or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.

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

If proceeds do not fall into one of these categories, s.29(4) of the PPSA requires registration with respect to the proceeds collateral within 15 days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.

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

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

18. Additional Comments on Priorities

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

PMSI Notices dated December 14, 1999 state:

> John Deere Limited ("Secured Party") has registered a Financing Statement under the *Personal Property Security Act* bearing registration number 5595 and hereby notifies you that it has acquired or expects to acquire a Purchase Money Security Interest in inventory of the Debtor which is supplied from time to time by the Secured Party to the Debtor including:
>
> > All present and after-acquired goods, supplied by the Secured Party to the Debtor or supplied to the Debtor by others and financed by the

> Secured Party, whether held as inventory or otherwise, all present and after-acquired chattel paper, accounts and the Debtor's contingent earnings account and reserve account described in any of the Debtor's finance and leasing agreements in effect from time to time, all goods, documents of title, chattel paper, securities, instruments, money and intangibles held in or representing the same, together with all attachments, accessories, accessions, replacements, substitutions, additions and improvements thereto and all proceeds of the foregoing in any form, including goods, documents of title, chattel paper, securities, instruments, money and intangibles derived directly or indirectly from any dealing with the collateral and a right to an insurance payment or any other payment that indemnifies or compensates for loss or damage to the collateral or the proceeds of the collateral."

The Trustee has been provided with the Statutory Declaration of Ernest G. Reid, Q.C., a partner of Stewart McKelvey Stirling Scales, sworn October 16, 2002, in which he makes oath and says that pursuant to the provisions of s.35(2) of the PPSA, notices were sent by registered mail on December 14, 1999 to General Motors Acceptance Corporation of Canada, CIBC Equipment Finance Limited, Canadian Imperial Bank of Commerce, ABM AMRO Leasing, a Division of ABM AMRO Bank Canada, and Bombardier Capital Leasing Limited.

19. Auction Results

Auction and sale results for the Assets in which JDL claims a Security Interest are set out in Schedule D.

(Note: To date, the Parts have not been realized on and there are no proceeds.)

22 MAY 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 1
MT. PEARL, NF Schedule A1
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

TAL AMOUNT DUE NOW: **** 3,799,345.22
TABLE BY 15 APR 2002

SUMMARY STATEMENT

STATEMENT OF ACCOUNT	CURRENT DUE	CONSIGNED & FUTURE DUE
MISCELLANEOUS INVOICE CHARGES		
RENTAL MACHINE PAYMENTS		
TRANSFER INVOICE CHARGES		
FLOOR PLANS		
PIP CREDITS + WARRANTY CREDITS	10,044.60 CR	
TOTAL SENTRY INSURANCE CHARGES		
FINANCIAL INFORMATION		
J.D.I.S. CHARGES	1,506.48	
RENTAL MACHINE INTEREST		
OTHER INTEREST CHARGES		
RETAIL FINANCE ACTIVITY		
MISCELLANEOUS DEBIT/CREDIT MEMOS	276.43	
CARRY OVER DEPOSITS		
GOODS & SERVICES TAX (GST, PST & HST)	3,885.68 CR	
SETTLEMENT ADJUSTMENTS		
PARTS STATEMENT		
PARTS	5,859.10	5,732.39
PARTS FREIGHT/PALLETS		
PRODUCT IMPROVEMENT KITS		
RTS DEBIT MEMOS	221.05	
PARTS CREDIT MEMOS	17,990.62 CR	
CONSIGNED INVENTORY		
NEW MACHINES		2,026,038.85
RENTAL MACHINES		1,785,297.98
FREIGHT		
DUTY		
NON-CONSIGNED INVENTORY		
NEW MACHINES	193,603.90	
RENTAL MACHINES		
FLOOR PLANS		
REPOSSESSIONS / LEASE RETURNS		
ATTACHMENTS		
MISCELLANEOUS	43,807.34	4,414.74
JOHN DEERE CREDIT ADMINISTERED		
SHORTAGES	3,585,991.82	
SETTLEMENTS PENDING		
RETAIL NOTES PENDING		
JD CREDIT CARDS PENDING		
UNAPPLIED CREDITS		428,896.58 CR
TOTAL AMOUNT DUE	3,799,345.22	3,392,587.38

TOTAL STATEMENT BALANCE (CURRENT + FUTURE + CONSIGNED) 7,191,932.60

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 2
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

MANAGEMENT INFORMATION

FUTURE FINAL DUE AMOUNTS

	DUE DATE	AMOUNT
(DOES NOT INCLUDE FUTURE CARRY OVER DEPOSITS. SEE FLOOR PLAN INVENTORY FOR MACHINES WHICH MAY QUALIFY FOR AN EXTENDED DUE DATE)	1 MAY 2002	8,740.59
	1 JUN 2002	1,147.91
	1 JUL 2002	258.63
	1 AUG 2002	
	1 SEP 2002	
	1 OCT 2002	
	ON OR AFTER 1 NOV 2002	

CURRENT INFORMATION

PREMATURITY INTEREST BEARING AMOUNT	
PAST DUE INTEREST BEARING AMOUNT	
RENTAL MACHINES ON RENT	
RENTAL MACHINES OFF RENT	
COMPLETE GOODS PURCHASES YEAR TO DATE	1,785,297.98
CARRY OVER DEPOSIT BALANCE	4,508,972.15
PARTS PURCHASES YEAR TO DATE	508,724.35
PARTS STOCK ORDERS YEAR TO DATE	395,802.62
PAID FOR MACHINES	8,738,331.80

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 3
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

STATEMENT BALANCE

PRIOR MONTH'S STATEMENT BALANCE	7,221,722.79

STATEMENT OF ACCOUNT TRANSACTIONS	AMOUNT BILLED FOR MONTH (TOTAL CREDITS + TOTAL DEBITS)
CONSIGNED INVOICES	
RENTAL MACHINE PAYMENTS	
NON-CONSIGNED INVOICES	
CONSIGNED TRANSFERS	
NON-CONSIGNED TRANSFERS	
FLOOR PLANS	
PAYMENTS TO DEALER BY JOHN DEERE	
PIF WARRANTY CREDITS	
WARRANTY CREDITS	2,459.45 CR
VOUCHERS	7,585.15 CR
DEALER GROUP TRUST	
ULTRAGARD COMMISSIONS	
PROPERTY/CASUALTY INSURANCE	
FLOATER INSURANCE	
FINANCIAL INFORMATION	
F.D.I.S. CHARGES	
INTEREST CHARGES	1,506.48
RETAIL FINANCE ACTIVITY	
MISCELLANEOUS DEBIT/CREDIT MEMOS	
CARRY OVER DEPOSITS	707.10
GOODS & SERVICES TAX (GST, PST & HST)	
BONUSES ISSUED	3,885.68 CR
	430.67 CR
DEALER PAYMENTS TO JOHN DEERE	

PARTS STATEMENT TRANSACTIONS

PARTS PURCHASES	
PARTS FREIGHT/PALLETS	126.75
PRODUCT IMPROVEMENT KITS	
PARTS DEBIT MEMOS	
PARTS CREDIT MEMOS	221.05
	17,990.62 CR
ENDING STATEMENT BALANCE	7,191,932.60

CURRENT DUE SUMMARY

	AMOUNT
CURRENT DUE STATEMENT OF ACCOUNT	12,147.37 CR
CURRENT DUE PARTS STATEMENT	11,910.47 CR
CURRENT DUE NON-CONSIGNED INVENTORY	3,823,403.06
TOTAL AMOUNT DUE NOW (PAYABLE BY 15 APR 2002) ****	3,799,345.22

12 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 4
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

STATEMENT OF ACCOUNT

REFERENCE NUMBER	BILL DATE	DESCRIPTION		CURRENT DUE	CONSIGNED & FUTURE DUE
		PIP WARRANTY CREDITS:			
005828	12MAR	SHOP #00004951401		1,224.85 CR	
005829	12MAR	SHOP #00004958001		1,234.60 CR	
		SUBTOTAL:	2,459.45 CR		
		WARRANTY CREDITS:			
005698	07MAR	SHOP #00004735401		3,810.85 CR	
006132	20MAR	SHOP #00004795801		2,847.96 CR	
006133	20MAR	SHOP #00004981301		926.34 CR	
		SUBTOTAL:	7,585.15 CR		
		JDIS CHARGES:			
JDS03	21MAR	JDIS CHARGE		1,506.48	
		SUBTOTAL:	1,506.48		
		DEBIT/CREDIT MEMOS:			
DML03	14MAR	DIRECT MAIL CHARGES		707.10	
BRCO03	19MAR	DURA-TRAX DIRECT			
		SUBTOTAL:	707.10		
		GOODS & SERVICES TAX:			
GSTAX	22MAR	GST/HST CREDITS		4,269.88 CR	
GSTAX	22MAR	GST/HST DEBITS		384.20	
		SUBTOTAL:	3,885.68 CR		
		BONUSES ISSUED:			
053756	21MAR	SURCHARGE ADJ		136.43 CR	
053996	21MAR	SURCHARGE ADJ		123.69 CR	
054008	21MAR	SURCHARGE ADJ		170.55 CR	
		SUBTOTAL:	430.67 CR		
TOTAL STATEMENT OF ACCOUNT				CURRENT DUE 12,147.37 CR	CONSIGNED & FUTURE DUE

22 MAR 2002

HICKMAN EQUIPMENT(1985) LTD
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

PAGE 5

SERV 6026

PARTS STATEMENT

REFERENCE NUMBER	BILL DATE	FREIGHT/PALLETS CURRENT DUE	PARTS CURRENT DUE	PARTS FUTURE DUE	AMOUNT SUBJECT TO GST/PST/HST
PARTS BILLED IN CURRENT MONTH:					
PRODUCT IMPROVEMENT KITS BILLED IN CURRENT MONTH:					
PARTS DEBIT MEMOS BILLED IN CURRENT MONTH:					
FRTT03	04MAR	10.00			10.00
PARTS CREDIT MEMOS CREDITED IN CURRENT MONTH:					
041825	11MAR	2,744.91	20,735.53 CR		17,990.62 CR

22 MAR 2002

HICKMAN EQUIPMENT(1985) LTD
MT. PEARL, NF

JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014 SERV 6016

REFERENCE NUMBER	BILL DATE	FREIGHT/PALLETS CURRENT DUE	PARTS CURRENT DUE	PARTS FUTURE DUE	AMOUNT SUBJECT TO GST/PST/HST
PARTS BILLED IN CURRENT MONTH:					
624675	27FEB		126.75		126.75
PRODUCT IMPROVEMENT KITS BILLED IN CURRENT MONTH:					
PARTS DEBIT MEMOS BILLED IN CURRENT MONTH:					
FRTT03	04MAR	93.36			93.36
PARTS CREDIT MEMOS CREDITED IN CURRENT MONTH:					

22 MAR 2002

HICKMAN EQUIPMENT(1985) LTD
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

REFERENCE NUMBER	BILL DATE	FREIGHT/PALLETS CURRENT DUE	PARTS CURRENT DUE	PARTS FUTURE DUE	AMOUNT SUBJECT TO GST/PST/HST
PARTS BILLED IN CURRENT MONTH:					
PRODUCT IMPROVEMENT KITS BILLED IN CURRENT MONTH:					
PARTS DEBIT MEMOS BILLED IN CURRENT MONTH:					
FRTT03	04MAR	117.69			117.69
PARTS CREDIT MEMOS CREDITED IN CURRENT MONTH:					

PARTS TRANSACTIONS BILLED IN CURRENT MONTH

TOTAL PARTS BILLED:	126.75	(PARTS CURRENT DUE + FUTURE DUE)
TOTAL FRT/PALLETS:		(PARTS FRT. + PRODUCT IMP. FREIGHT)
TOTAL PIP KITS:		(CURRENT DUE + FUTURE DUE)
PARTS DEBIT MEMOS:	221.05	(CURRENT DUE + FUTURE DUE)
PARTS CREDIT MEMOS:	17,990.62 CR	(CURRENT DUE + FUTURE DUE)
PARTS DISCOUNTS:		(FOR ACCOUNT # 6026)
		(FOR ACCOUNT # 6016)
		(FOR ACCOUNT # 6014)
TOTAL PARTS DISCOUNTS:		(FOR INFORMATION ONLY)
GST/PST/HST PARTS DEBITS:	347.80	(FOR INFORMATION ONLY)
GST/PST/HST PARTS CREDITS:	17,990.62 CR	(FOR INFORMATION ONLY)

PARTS WITH INSTALLMENT PAYMENTS (INCLUDES ALL FUTURE DUE AMOUNTS BILLED IN CURRENT MONTH)

INVOICE NUMBER	ORIGINAL TOTAL	CURRENT DUE	FUTURE DUE	COMMENT
STOCK ORDER PARTS INSTALLMENTS:				
605771 29JAN	4,476.47	1,492.15	1,492.17	3/MAR 02
605790 29JAN	11,562.72	3,854.24	3,854.24	3/MAR 02
607745 31JAN	1,157.90	385.96	385.98	3/MAR 02

22 MAR 2002

HICKMAN EQUIPMENT(1985) LTD
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

VOICE NUMBER	ORIGINAL TOTAL	CURRENT DUE	FUTURE DUE	COMMENT
SUBTOTAL:	17,197.09	5,732.35	5,732.39	
TOTAL INSTALLMENT PAYMENTS	17,197.09	5,732.35	5,732.39	

TOTAL PARTS STATEMENT	CURRENT DUE	FUTURE DUE	AMOUNT SUBJECT TO GST/PST/HST
	11,910.47 CR	5,732.39	17,642.82 CR

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 9
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

CONSIGNED INVENTORY STATEMENT

NEW MACHINES:

REFERENCE HOURS	DATE MACHINE CODE	MACHINE DESCRIPTION - SERIAL NUMBER	DUE DATE	QTY	CONSIGNED AMOUNT	REFERENCE AMOUNT
N05254301	OCT01	370 EXCAVATOR	FEB03	1	291,325.30	291,325.30
	T 13510	- FF0370X081333	COD:		DUTY:	
ORDER BONUS:			EXCHG ADJ:	24.50%	FRT:	
STATUS: DEALER WAREHOUSED INVENTORY						
N05277601	SEP01	50 COMPACT EXCAVATOR	FEB03	1	58,796.64	58,796.64
	T 42200	- FF050ZX240522	COD:		DUTY:	
ORDER BONUS:			EXCHG ADJ:	24.50%	FRT:	
N05256201	JUL01	27 COMPACT EXCAVATOR	FEB03	1	35,527.72	35,527.72
	T 44300	- FF027ZX220685	COD:		DUTY:	
ORDER BONUS:			EXCHG ADJ:	24.50%	FRT:	
N05311601	SEP01	310G BKH LDR TURBO M	FEB03	1	71,390.15	71,390.15
	T 17543	- T0310GX901681	COD:		DUTY:	
ORDER BONUS:			EXCHG ADJ:	24.50%	FRT:	
T00933201	JUL01	310SG TURBO BKHOE LD	FEB03	1	74,984.62	74,984.62
HRS: 0354	T 17622	- T0310SG900135	COD:		DUTY:	
ORDER BONUS:			EXCHG ADJ:	24.50%	FRT:	
STATUS: ON DEMO						
T05312901	OCT01	310SG TURBO BKHOE LD	FEB03	1	80,942.55	80,942.55
HRS: 0007	T 17622	- T0310SG902188	COD:		DUTY:	
ORDER BONUS:			EXCHG ADJ:	24.50%	FRT:	
T00935001	JUL01	410G TURBO BKH LDR M	FEB03	1	92,163.50	92,163.50
HRS: 0025	T 17722	- T0410GX900366	COD:		DUTY:	
ORDER BONUS:			EXCHG ADJ:	24.50%	FRT:	
T05260001	AUG01	850C CRAWLER DOZER	FEB03	1	224,427.75	224,427.75
	T 78500	- T0850CX900871	COD:		DUTY:	
ORDER BONUS: (4,003.50)			EXCHG ADJ:	24.50%	FRT:	
STATUS: PRICE PROTECTED						

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 10
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

REFERENCE / HRS	DATE / MACHINE DESCRIPTION / MACHINE CODE - SERIAL NUMBER	DUE DATE	QTY	CONSIGNED AMOUNT	REFERENCE AMOUNT
N05259101	AUG01 544H 4WD LOADER T 64401 - DW544HX581149	FEB03	1	129,686.90	129,686.90
ORDER BONUS:		COD:		DUTY:	
		EXCHG ADJ:	24.50%	FRT:	
N05259201	AUG01 544H 4WD LOADER T 64401 - DW544HX581151	FEB03	1	129,686.90	129,686.90
ORDER BONUS:		COD:		DUTY:	
		EXCHG ADJ:	24.50%	FRT:	
N05258401	AUG01 TC44H FOUR WHEEL DRI T 68800 - DWTC44H581146	FEB03	1	117,576.90	117,576.90
ORDER BONUS:		COD:		DUTY:	
		EXCHG ADJ:	24.50%	FRT:	
N05259601	AUG01 644H 4WD LOADER T 64601 - DW644HX581142	FEB03	1	192,942.18	192,942.18
HRS: 0150		COD:		DUTY:	
ORDER BONUS:		EXCHG ADJ:	24.50%	FRT:	
STATUS: ON DEMO					
N05259801	JUL01 744H LOADER T 64700 - DW744HX580995	FEB03	1	249,047.54	249,047.54
ORDER BONUS: (8,083.60)		COD:		DUTY:	
STATUS: PRICE PROTECTED		EXCHG ADJ:	24.50%	FRT:	
N05259901	AUG01 744H LOADER T 64700 - DW744HX581084	FEB03	1	277,540.20	277,540.20
ORDER BONUS: (8,083.60)		COD:		DUTY:	
STATUS: PRICE PROTECTED		EXCHG ADJ:	24.50%	FRT:	

TOTAL CONSIGNED NEW MACHINES	DUTY	FREIGHT	REFERENCE AMOUNT
			2,026,038.85
TOTAL CONSIGNED NEW MACHINE MEMO ITEMS		COD BALANCE	CONSIGNED AMOUNT
			2,026,038.85

22 MAR 2002

HICKMAN EQUIPMENT(1985) LTD
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

RENTAL MACHINES:

REFERENCE / HOURS	DATE / MACHINE CODE - SERIAL NUMBER	MACHINE DESCRIPTION	DUE DATE	QTY	CONSIGNED AMOUNT	REFERENCE AMOUNT
T00933301 HRS: 0186 ORDER BONUS: STATUS: OFF RENT	JUL01 T 17622 - T0310SG900188	310SG TURBO BKHOE LD	FEB03 COD: EXCHG ADJ: 20.00%	1	70,647.95 DUTY: FRT:	70,647.95
T00935801 HRS: 0413 ORDER BONUS: STATUS: OFF RENT	JUL01 T 97710 - DW770CH580828	770CH MOTOR GRADER	FEB03 COD: EXCHG ADJ: 23.25%	1	212,336.00 DUTY: FRT:	212,336.00
N05257401 HRS: 0439 ORDER BONUS: STATUS: OFF RENT	JUL01 T 59100 - FF0200X501911	200LC EXCAVATOR	FEB03 COD: EXCHG ADJ: 20.00%	1	151,576.07 DUTY: FRT:	151,576.07
N05250101 HRS: 0958 ORDER BONUS: STATUS: OFF RENT	JUN01 T 59100 - FF0200X502015	200LC EXCAVATOR	FEB03 COD: EXCHG ADJ: 20.00%	1	133,927.52 DUTY: FRT:	133,927.52
N05250301 HRS: 0869 ORDER BONUS: STATUS: OFF RENT	JUN01 T 59100 - FF0200X502018	200LC EXCAVATOR	JUL02 COD: EXCHG ADJ: 20.00%	1	136,959.80 DUTY: FRT:	136,959.80
T00934601 HRS: 0560 ORDER BONUS: STATUS: OFF RENT	JUL01 T 59100 - FF0200X502048	200LC EXCAVATOR	FEB03 COD: EXCHG ADJ: 20.00%	1	147,488.47 DUTY: FRT:	147,488.47
N05277701 HRS: 0589 ORDER BONUS: STATUS: OFF RENT	JUL01 T 59100 - FF0200X502053	200LC EXCAVATOR	FEB03 COD: EXCHG ADJ: 20.00%	1	146,499.55 DUTY: FRT:	146,499.55
N05257301 HRS: 0437 ORDER BONUS: STATUS: OFF RENT	JUL01 T 59100 - FF0200X502067	200LC EXCAVATOR	FEB03 COD: EXCHG ADJ: 20.00%	1	151,678.27 DUTY: FRT:	151,678.27

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 12
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

REFERENCE / HRS	DATE / MACHINE CODE - SERIAL NUMBER	DESCRIPTION	DUE DATE	QTY	CONSIGNED AMOUNT	REFERENCE AMOUNT
T00934401 HRS: 1222 ORDER BONUS: STATUS: OFF RENT	JUL01 T 59200 - FF0450X090642	450LC EXCAVATOR	MAY02 COD: EXCHG ADJ:	1 20.00%	291,466.69 DUTY: FRT:	291,466.69
T00934001 HRS: 0562 ORDER BONUS: STATUS: OFF RENT	JUL01 T 59200 - FF0450X090649	450LC EXCAVATOR	FEB03 COD: EXCHG ADJ:	1 23.25%	342,717.66 DUTY: FRT:	342,717.66

TOTAL RENTAL MACHINES	DUTY	FREIGHT	REFERENCE AMOUNT
			1,785,297.98

TOTAL RENTAL MACHINE MEMO ITEMS	COD BALANCE	CONSIGNED AMOUNT
		1,785,297.98

TOTAL CONSIGNED INVENTORY	TOTAL COD BALANCE	TOTAL DUTY	TOTAL FREIGHT	TOTAL REFERENCE AMOUNT
				3,811,336.83

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 13
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

NON-CONSIGNED INVENTORY

NEW MACHINES:

REFERENCE HOURS	DATE MACHINE CODE	MACHINE DESCRIPTION - SERIAL NUMBER	DUE DATE	QTY	ORIGINAL AMOUNT	AMOUNT OWED
N05335501	OCT01 T 64601	644H 4WD LOADER - DW644HX581726	DEC01	1	193,603.90	193,603.90
STATUS: GST/HST MERCHANDISE ONLY			/ CURRENT DUE		DUTY:	

TOTAL NEW MACHINE INVENTORY	CURRENT DUE	FUTURE DUE
	193,603.90	

MISCELLANEOUS:

REFERENCE	BILL DATE	ORIGINAL AMOUNT	TERMS	CURRENT DUE	FUTURE DUE
0201	AUG01		OWATONNA TOOLS 1/JAN02	11,127.98	
0202	SEP01		OWATONNA TOOLS 1/FEB02	11,702.96	
0203	OCT01		OWATONNA TOOLS 1/MAR02	11,069.12	
0204	NOV01		OWATONNA TOOLS 1/APR02	9,907.28	
0205	DEC01		OWATONNA TOOLS 1/MAY02		3,008.20
0206	JAN02		OWATONNA TOOLS 1/JUN02		1,147.91
0207	FEB02		OWATONNA TOOLS 1/JUL02		258.63

TOTAL MISCELLANEOUS	CURRENT DUE	FUTURE DUE
	43,807.34	4,414.74

SHORTAGES:

REFERENCE	BILL DATE	DESCRIPTION	DUE DATE	QTY	CURRENT DUE	FUTURE DUE
JAN02 01	DEC01	MISC ITEMS - DUE NOW	JAN02	1	907,998.84	
00278271	JAN02	NSF SHORTAGE S.N.: 0000000581986	JAN02	1	226,197.99	
99999971	JAN02	DEPRECIATION PER AUD S.N.: 0000000000000	JAN02	1	165,203.57	
FEB02 01	JAN02	MISC ITEMS - DUE NOW	FEB02	1	271,279.89	
58114271	FEB02	DEPRECIATION PER AUD S.N.: 0000000581142	FEB02	1	6,422.72	
90278471	FEB02	TARGET DISALLOWED S.N.: 0000000581121	FEB02	1	8,888.81	

TOTAL SHORTAGES	CURRENT DUE	FUTURE DUE
	3,585,991.82	

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 14
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

UNAPPLIED CREDITS:

REFERENCE	DATE	DESCRIPTION	CREDIT AMOUNT
P00275401	DEC01	HICKMAN EQUIP 0000000895252	96,695.49 CR
P00275501	DEC01	PAYOFF SUBURBAN CONS 0000000826831	5,673.72 CR
P00275502	DEC01	PAYOFF SUBURBAN CONS 0000000826831	851.06 CR
P00275801	DEC01	DAREL REXON 0000000761207	12,462.89 CR
390275971	DEC01	P/A DISCOUNT 0000000000179	38,123.00 CR
300277391	JAN02	UNAPPLIED CREDIT OVER	512.68 CR
300278391	JAN02	UNAPPLIED CREDIT OVER	20,000.00 CR
300002371	JAN02	CM CTA SPARE TIME 0000000000347	6,015.99 CR
300278491	JAN02	UNAPPLIED CREDIT OVER	3,341.92 CR
300040471	JAN02	SURPLUS DMF FUNDS 0000000000404	73,367.29 CR
DMARC2 01	FEB02	CURRENT DUE CREDIT	171,852.54 CR
TAL UNAPPLIED CREDITS			428,896.58 CR

PAID FOR GOODS:

REFERENCE	DATE	MACHINE DESCRIPTION MACHINE CODE - SERIAL NUMBER	QTY	AMOUNT
104548701	JUN99	330LC EXCAVATOR T 12510 - FF0330X080456	1	263,325.30
TATUS: PREVIOUS RENTAL - OFF RENT				
104527901	JUN99	330LC EXCAVATOR T 12510 - FF0330X080518	1	263,325.30
TATUS: PREVIOUS RENTAL - OFF RENT				
00909501	JUL00	330LC EXCAVATOR T 12510 - FF0330X080747	1	263,325.44
TATUS: PREVIOUS RENTAL - OFF RENT				
04547801	JUN99	370 EXCAVATOR T 13510 - FF0370X080344	1	291,325.30
TATUS: PREVIOUS RENTAL - OFF RENT				

2 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 15
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

FERENCE	DATE MACHINE DESCRIPTION MACHINE CODE - SERIAL NUMBER	QTY	AMOUNT
105271201	AUG01 1050C CRAWLER DOZER T 29100 - LU1050C005288	1	421,300.50
105261101	JUN01 350C A*EFN*LATED DUM T 59500 - BE350CT200325 STATUS: PREVIOUS RENTAL - OFF RENT / FINANCED BY DCS	1	358,977.60
105261201	JUN01 350C A*EFN*LATED DUM T 59500 - BE350CT200326 STATUS: ON DEMO - PREVIOUS RENTAL / FINANCED BY DCS	1	358,977.60
100942601	DEC01 660G GRAPPLE WC03300 - TJ1110B001027	1	210,207.00
100942701	DEC01 608BH HARVESTER WC04200 - WC608BX005005	1	370,995.00
100942901	DEC01 1410 FORWARDER WJ00100 - TJ1410X000305	1	324,307.00
104852301	SEP00 120 EXCAVATOR T 12000 - P00120X031958 STATUS: ON DEMO - PREVIOUS RENTAL	1	116,046.00
104994301	NOV00 160LC EXCAVATOR T 12600 - P00160X041555 STATUS: PREVIOUS RENTAL - OFF RENT	1	134,583.40
105143301	APR01 160LC EXCAVATOR T 12600 - P00160X041653 STATUS: ON DEMO - PREVIOUS RENTAL	1	134,583.40
05143401	APR01 160LC EXCAVATOR T 12600 - P00160X041654 STATUS: PREVIOUS RENTAL - OFF RENT	1	134,583.40
05166901	JUN01 160LC EXCAVATOR T 12600 - P00160X041741 STATUS: PREVIOUS RENTAL - OFF RENT	1	126,710.27
05253901	JUL01 160LC EXCAVATOR T 12600 - P00160X041792	1	134,583.40
05254001	JUL01 160LC EXCAVATOR T 12600 - P00160X041793	1	134,583.40
04997901	JAN01 310SG TURBO BKHOE LD T 17622 - T0310SG894504 STATUS: ON DEMO	1	82,603.95

22 MAR 2002

HICKMAN EQUIPMENT(1985) LTD
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

FERENCE	DATE MACHINE DESCRIPTION MACHINE CODE - SERIAL NUMBER	QTY	AMOUNT
NO5132901	MAR01 310SG TURBO BKHOE LD T 17622 - T0310SG896594	1	82,701.45
STATUS: PREVIOUS RENTAL - OFF RENT			
NO5132801	MAR01 310SG TURBO BKHOE LD T 17622 - T0310SG896618	1	80,829.45
NO5145301	MAR01 310SG TURBO BKHOE LD T 17622 - T0310SG897094	1	82,384.25
STATUS: PREVIOUS RENTAL - OFF RENT			
T00885401	AUG99 450H CRAWLER DOZER T 19011 - T0450HX874682	1	70,360.32
STATUS: PREVIOUS RENTAL - OFF RENT			
104860501	JUN00 450H CRAWLER LGP 74H T 19030 - T0450HX889199	1	95,209.50
104605001	SEP99 750C CRAWLER DOZ%%	1	190,671.75
TATUS: PREVIOUS RENTAL - OFF RENT	T 77500 - T0750CX879743		
104706801	JAN00 750C CRAWLER DOZER T 77500 - T0750CX882592	1	169,452.00
1235301	JUN98 850C CRAWLER DOZER T 78500 - T0850CX848745	1	152,040.70
TATUS: PREVIOUS RENTAL - OFF RENT			
04877901	JUN00 850C CRAWLER DOZER T 78500 - T0850CX888907	1	245,370.00
TATUS: ON DEMO - PREVIOUS RENTAL			
05260101	AUG01 850C CRAWLER DOZER T 78500 - T0850CX900908	1	224,427.75
TATUS: PRICE PROTECTED			
05079001	JAN01 624H 4WD LOADER T 64500 - DW624HX579048	1	153,461.70
TATUS: ON DEMO - PREVIOUS RENTAL			
04607501	OCT99 644H 4WD LOADER T 64601 - DW644HX574161	1	195,989.50
TATUS: PREVIOUS RENTAL - OFF RENT			
05149201	APR01 644H 4WD LOADER T 64601 - DW644HX580105	1	198,814.70
TATUS: PREVIOUS RENTAL - OFF RENT			

2 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 17
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

FERENCE	DATE MACHINE DESCRIPTION MACHINE CODE - SERIAL NUMBER	QTY	AMOUNT
05148901	MAR01 TC62H 4WD LOADER T 69020 - DWTC62H579785	1	164,635.10
TATUS: ON	DEMO		
05149001	APR01 TC62H 4WD LOADER T 69020 - DWTC62H579824	1	164,635.10
TATUS:	PREVIOUS RENTAL - OFF RENT		
00911601	AUG00 744H LOADER T 64700 - DW744HX576952	1	269,021.20
TATUS:	PREVIOUS RENTAL - OFF RENT		
04233301	AUG98 200LC EXCAVATOR T 59100 - FF0200X500457	1	162,191.38
TATUS: ON	DEMO - PREVIOUS RENTAL		
04606901	OCT99 200LC EXCAVATOR T 59100 - FF0200X500917	1	166,567.10
TATUS:	PREVIOUS RENTAL - OFF RENT		
04837201	JUN00 200LC EXCAVATOR T 59100 - FF0200X501362	1	166,567.10
TATUS:	PREVIOUS RENTAL - OFF RENT		
04857701	JUL00 200LC EXCAVATOR T 59100 - FF0200X501479	1	166,567.10
TATUS:	PREVIOUS RENTAL - OFF RENT		
00911301	AUG00 200LC EXCAVATOR T 59100 - FF0200X501500	1	166,567.30
TATUS:	PREVIOUS RENTAL - OFF RENT		
05166601	APR01 200LC EXCAVATOR T 59100 - FF0200X501803	1	166,567.10
TATUS: ON	RENT		
05177301	APR01 200LC EXCAVATOR T 59100 - FF0200X501969	1	166,567.10
TATUS:	PREVIOUS RENTAL - OFF RENT		
05256801	JUN01 200LC EXCAVATOR T 59100 - FF0200X502017	1	133,212.04
TATUS: ON	DEMO - PREVIOUS RENTAL		
05114201	FEB01 450LC EXCAVATOR T 59200 - FF0450X090600	1	382,311.30
TATUS: ON	DEMO - PREVIOUS RENTAL		
05195301	APR01 450LC EXCAVATOR T 59200 - FF0450X090627	1	382,311.30
TATUS: ON	DEMO - PREVIOUS RENTAL		

12 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 18
MT. PEARL, NF
JOHN DEERE LIMITED - INDUSTRIAL STATEMENT
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

FERENCE	DATE MACHINE DESCRIPTION MACHINE CODE - SERIAL NUMBER	QTY	AMOUNT
008C1501	FEB99 P/BEAM T 000BK	1	14,555.25
TOTAL PAID FOR GOODS (MEMO ITEMS)			TOTAL 8,738,331.80
TOTAL NON-CONSIGNED INVENTORY STATEMENT		CURRENT DUE 3,823,403.06	FUTURE DUE 424,481.84 CR

22 MAR 2002 HICKMAN EQUIPMENT(1985) LTD PAGE 19
MT. PEARL, NF
JOHN DEERE LIMITED - DEBIT/CREDIT MEMO NO. GSTAX03
DIVISION # 4, TERRITORY # 2, DEALER ACCOUNT # 6014

DESCRIPTION / EXPLANATION	GST/HST CURRENT DUE	FUTURE DUE
*** GOODS & SERVICES TAX 7% ON GST, 15% ON HST ***		
PIP WARRANTY CREDITS	10,044.60 CR	
DEBIT # DML03	707.10	
DEBIT # JDS03	1,506.48	
BONUS #053756	136.43 CR	
BONUS #053996	123.69 CR	
BONUS #054008	170.55 CR	
PARTS STATEMENT DEBITS (NF)	347.80	
PARTS STATEMENT CREDITS (NF)	17,990.62 CR	
DEBITS SUBJECT TO GST/HST	2,561.38	
CREDITS SUBJECT TO GST/HST	28,465.89 CR	
TOTAL GST TAX @ 7% ON DEBITS		
TAL HST TAX @ 15% ON DEBITS	384.20	
TOTAL GST TAX @ 7% ON CREDITS		
TOTAL HST TAX @ 15% ON CREDITS	4,269.88 CR	
UBTOTAL: GOODS & SERVICES TAX (GST,HST)	3,885.68 CR	

26 MAR 2002 HICKMAN EQUIPMENT (1985) LTD Schedule A_2 PAGE 1
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

OTAL AMOUNT DUE NOW: PAYABLE BY 12 APR 2002	****	69,153.16

SUMMARY STATEMENT

STATEMENT OF ACCOUNT	CURRENT DUE	FUTURE DUE
MISCELLANEOUS INVOICE CHARGES		
TRANSFER INVOICE CHARGES		
FLOOR PLANS		
PIP CREDITS + WARRANTY CREDITS		
TOTAL SENTRY INSURANCE CHARGES		
FINANCIAL INFORMATION		
I.D.I.S. CHARGES		
INTEREST CHARGES		
RETAIL FINANCE ACTIVITY		
MISCELLANEOUS DEBIT/CREDIT MEMOS		
GOODS & SERVICES TAX (GST, PST & HST)		
SETTLEMENT ADJUSTMENTS		
PARTS STATEMENT		
PARTS		
PARTS FREIGHT/PALLETS		
PRODUCT IMPROVEMENT KITS		
PARTS DEBIT MEMOS		
PARTS CREDIT MEMOS		
INVENTORY STATEMENT		
NEW MACHINES	1,562.56	40,431.00
SPECIAL TERMS NEW MACHINES	47,744.56	
RENTAL MACHINES		
COMPLETE GOODS W/INSTALLMENTS		
ATTACHMENTS W/INSTALLMENTS	482.93	993.00
FLOOR PLANS		
REPOSSESSIONS		
SETTLEMENTS PENDING		
MISCELLANEOUS	348.12	107.60
JOHN DEERE CREDIT ADMINISTERED		
MORTAGES	19,014.99	
RETAIL NOTES PENDING		
CREDIT CARDS PENDING		
APPLIED CREDITS		5,817.57 CR
	CURRENT DUE	FUTURE DUE
TAL AMOUNT DUE	69,153.16	35,714.03
TAL STATEMENT BALANCE (CURRENT DUE + FUTURE DUE)		104,867.19

24 MAR 2002 HICKMAN EQUIPMENT (1985) LTD PAGE 2
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

MANAGEMENT INFORMATION

FUTURE FINAL DUE AMOUNTS

(INCLUDES SHIPPING PERIOD INSTALLMENTS)

DUE DATE	AMOUNT
1 MAY 2002	355.85
1 JUN 2002	248.25
1 JUL 2002	248.25
1 AUG 2002	248.25
1 SEP 2002	
1 OCT 2002	
ON OR AFTER 1 NOV 2002	2,896.50

CURRENT INFORMATION

PREMATURITY INTEREST BEARING AMOUNT	
PAST DUE INTEREST BEARING AMOUNT	
COMPLETE GOODS PURCHASES YEAR TO DATE	
PARTS PURCHASES YEAR TO DATE	
PARTS STOCK ORDERS YEAR TO DATE	
PAID FOR MACHINES	5,281.28

RETAIL SALES BONUS PROGRAM

QUARTER	QUALIFYING UNIT SALES	BONUS UNITS	QUALIFYING SALES $	POTENTIAL BONUS EARNED $
1	0	0	0.00	0.00
2	0	0	0.00	0.00
3	0	0	0.00	0.00
4	0	0	0.00	0.00
CURRENT BONUS PERCENT:	.00			

24 MAR 2002 HICKMAN EQUIPMENT (1985) LTD PAGE 3
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

STATEMENT BALANCE

PRIOR MONTH'S STATEMENT BALANCE	104,867.19
STATEMENT OF ACCOUNT TRANSACTIONS	AMOUNT BILLED FOR MONTH (TOTAL CREDITS + TOTAL DEBITS)
COMPLETE GOODS AND ATTACHMENT INVOICES	
TRANSFER INVOICES	
FLOOR PLANS	
PAYMENTS TO DEALER BY JOHN DEERE	
PIP WARRANTY CREDITS	
WARRANTY CREDITS	
VOUCHERS	
DEALER GROUP TRUST	
ULTRAGARD COMMISSIONS	
PROPERTY/CASUALTY INSURANCE	
FLOATER INSURANCE	
FINANCIAL INFORMATION	
J.D.I.S. CHARGES	
INTEREST CHARGES	
RETAIL FINANCE ACTIVITY	
MISCELLANEOUS DEBIT/CREDIT MEMOS	
GOODS & SERVICES TAX (GST, PST & HST)	
BONUSES ISSUED	
DEALER PAYMENTS TO JOHN DEERE	
PARTS STATEMENT TRANSACTIONS	
PARTS PURCHASES	
PARTS FREIGHT/PALLETS	
PRODUCT IMPROVEMENT KITS	
PARTS DEBIT MEMOS	
PARTS CREDIT MEMOS	
ENDING STATEMENT BALANCE	104,867.19

CURRENT DUE SUMMARY

CURRENT DUE STATEMENT OF ACCOUNT		AMOUNT
CURRENT DUE PARTS STATEMENT		
CURRENT DUE INVENTORY STATEMENT		69,153.16
TOTAL AMOUNT DUE NOW (PAYABLE BY 12 APR 2002)	****	69,153.16

24 MAR 2002 HICKMAN EQUIPMENT (1985) LTD PAGE 4
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

STATEMENT OF ACCOUNT

REFERENCE NUMBER	BILL DATE	DESCRIPTION	CURRENT DUE	FUTURE DUE

TOTAL STATEMENT OF ACCOUNT	CURRENT DUE	FUTURE DUE

24 MAR 2002 HICKMAN EQUIPMENT (1985) LTD PAGE 5
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

PARTS STATEMENT

REFERENCE NUMBER	BILL DATE	FREIGHT/PALLETS CURRENT DUE	PARTS CURRENT DUE	PARTS FUTURE DUE	AMOUNT SUBJECT TO GST/PST/HST
PARTS BILLED IN CURRENT MONTH:					
PRODUCT IMPROVEMENT KITS BILLED IN CURRENT MONTH:					
PARTS DEBIT MEMOS BILLED IN CURRENT MONTH:					
PARTS CREDIT MEMOS CREDITED IN CURRENT MONTH:					

PARTS TRANSACTIONS BILLED IN CURRENT MONTH

TOTAL PARTS BILLED:	(PARTS CURRENT DUE + FUTURE DUE)
TOTAL FRT/PALLETS:	(PARTS FRT. + PRODUCT IMP. FREIGHT)
TAL PIP KITS:	(CURRENT DUE + FUTURE DUE)
ARTS DEBIT MEMOS:	(CURRENT DUE + FUTURE DUE)
ARTS CREDIT MEMOS:	(CURRENT DUE + FUTURE DUE)
ARTS DISCOUNTS:	(FOR INFORMATION ONLY)
ST/PST/HST PARTS DEBITS:	(FOR INFORMATION ONLY)
ST/PST/HST PARTS CREDITS:	(FOR INFORMATION ONLY)

PARTS WITH INSTALLMENT PAYMENTS (INCLUDES ALL FUTURE DUE AMOUNTS BILLED IN CURRENT MONTH)

NVOICE NUMBER	ORIGINAL TOTAL	CURRENT DUE	FUTURE DUE	COMMENT
TAL INSTALLMENT YMENTS				

24 MAR 2002 HICKMAN EQUIPMENT (1985) LTD PAGE 6
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

TOTAL PARTS STATEMENT	CURRENT DUE	FUTURE DUE	AMOUNT SUBJECT TO GST/PST/HST

24 MAR 2002 HICKMAN EQUIPMENT (1985) LTD PAGE 7
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

INVENTORY STATEMENT

NEW MACHINES:

REFERENCE / HOURS	DATE / MACHINE CODE - SERIAL NUMBER	MACHINE DESCRIPTION	DUE DATE	QTY	ORIGINAL AMOUNT	AMOUNT OWED
N25144601	SEP01	DIESEL 6X4 WORKSITE	OCT02	1	12,511.50	12,511.50
HRS: 0007	W 19750 - W0W6X4D002027				DUTY:	
STATUS: GST/HST MERCHANDISE ONLY		/ ON DEMO				
N25144501	SEP01	DIESEL 6X4 WORKSITE	OCT02	1	12,511.50	12,511.50
HRS: 0007	W 19750 - W0W6X4D002028				DUTY:	
STATUS: GST/HST MERCHANDISE ONLY						
N25144701	SEP01	DIESEL 6X4 WORKSITE	OCT02	1	12,511.50	12,511.50
HRS: 0008	W 19750 - W0W6X4D002069				DUTY:	
STATUS: GST/HST MERCHANDISE ONLY						
N25145101	AUG01	FR BLADE BM18522	01-1	1	1,448.25	1,448.25
	EO99999				DUTY:	
STATUS: GST/HST MERCHANDISE ONLY						
25145102	AUG01	FR BLADE BM18522	01-1	1	1,448.25	1,448.25
	EO99999				DUTY:	
STATUS: GST/HST MERCHANDISE ONLY						
19124501	DEC00	PIN PALLET FORK 48"	JAN02	1	781.28	781.28
	KV02523				DUTY:	
TATUS: GST/HST MERCHANDISE ONLY		/ CURRENT DUE				
19124502	DEC00	PIN PALLET FORK 48"	JAN02	1	781.28	781.28
	KV02523				DUTY:	
TATUS: GST/HST MERCHANDISE ONLY		/ CURRENT DUE				

TOTAL NEW MACHINE INVENTORY	CURRENT DUE	FUTURE DUE
	1,562.56	40,431.00

24 MAR 2002

HICKMAN EQUIPMENT (1985) LTD
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

SPECIAL TERMS NEW MACHINES:

REFERENCE HOURS	DATE MACHINE CODE	MACHINE DESCRIPTION - SERIAL NUMBER	DUE DATE	QTY	ORIGINAL AMOUNT	AMOUNT OWED
N19050801 HRS: 0365	DEC00	250 JOHN DEERE SKID KV00700 - KV0250A253464	JAN02	1	23,872.28	23,872.28
STATUS: GST/HST MERCHANDISE ONLY		/ CURRENT DUE			DUTY:	
N19050601	DEC00	250 JOHN DEERE SKID KV00700 - KV0250A253465	JAN02	1	23,872.28	23,872.28
STATUS: GST/HST MERCHANDISE ONLY		/ CURRENT DUE			DUTY:	

TOTAL SPECIAL TERMS NEW MACHINES	CURRENT DUE	FUTURE DUE
	47,744.56	

INFORMATIONAL NOTES:

- *** NOTATION INDICATES INTEREST BEARING.

ATTACHMENTS WITH INSTALLMENT TERMS:

REFERENCE	BILL DATE	ORIGINAL AMOUNT	TERMS	CURRENT DUE	FUTURE DUE
I 0204N	AUG01		CP ATTACH UNDE 1/APR02	482.93	
I 0205N	AUG01		CP ATTACH UNDE 1/MAY02		248.25
I 0206N	AUG01		CP ATTACH UNDE 1/JUN02		248.25
I 0207N	AUG01		CP ATTACH UNDE 1/JUL02		248.25
I 0208N	AUG01		CP ATTACH UNDE 1/AUG02		248.25

TOTAL ATTACHMENTS WITH INSTALLMENTS	CURRENT DUE	FUTURE DUE
	482.93	993.00

MISCELLANEOUS:

EFERENCE	BILL DATE	ORIGINAL AMOUNT	TERMS	CURRENT DUE	FUTURE DUE
0202	AUG01		OWATONNA TOOLS 1/FEB02	132.92	
0203	NOV01		OWATONNA TOOLS 1/MAR02	107.60	
0204	NOV01		OWATONNA TOOLS 1/APR02	107.60	
0205	NOV01		OWATONNA TOOLS 1/MAY02		107.60

TAL MISCELLANEOUS	CURRENT DUE	FUTURE DUE
	348.12	107.60

24 MAR 2002

HICKMAN EQUIPMENT (1985) LTD
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

SHORTAGES:

REFERENCE	BILL DATE	DESCRIPTION	DUE DATE	QTY	CURRENT DUE	FUTURE DUE
S25630671	JAN02	CASH DUE-16" PLANER S.N.: 0000000300103	JAN02	1	14,063.80	
S25630771	JAN02	CASH DUE-48" PALLET S.N.: 000000000FORK	JAN02	1	809.40	
S25630772	JAN02	CASH DUE-48" PALLET S.N.: 000000000FORK	JAN02	1	809.40	
DFEB02 01	JAN02	MISC ITEMS - DUE NOW	FEB02	1	3,332.39	
TOTAL SHORTAGES					CURRENT DUE 19,014.99	FUTURE DUE

UNAPPLIED CREDITS:

REFERENCE	DATE	DESCRIPTION	CREDIT AMOUNT
)MAR02 01	FEB02	CURRENT DUE CREDIT	5,817.57 CR
'OTAL UNAPPLIED CREDITS			5,817.57 CR

PAID FOR GOODS:

EFERENCE	DATE	MACHINE DESCRIPTION MACHINE CODE - SERIAL NUMBER	QTY	AMOUNT
25728101	OCT01	DLX PKG BW00485 WL99999	1	1,500.00
25728102	OCT01	DLX PKG BW00485 WL99999	1	1,500.00
25728103	OCT01	DLX PKG BW00485 WL99999	1	1,500.00
7829601	SEP00	PIN PALLET FORK 48" KV02523	1	781.28
TAL PAID FOR GOODS (MEMO ITEMS)				TOTAL 5,281.28
TAL INVENTORY STATEMENT			CURRENT DUE 69,153.16	FUTURE DUE 35,714.03

24 MAR 2002 HICKMAN EQUIPMENT (1985) LTD PAGE 10
MT. PEARL, NF
JOHN DEERE LIMITED - LAWN & GROUNDS CARE STATEMENT
DIVISION # 6, TERRITORY # 1, DEALER ACCOUNT # 3702

SHIPPING PERIOD INFORMATION:

SHIPPING PERIOD 01-1

TOTAL PURCHASES DURING PERIOD	7,396.50		
TOTAL SETTLEMENTS	4,500.00	INTEREST START & DUE DATES	
CURRENT INVENTORY BALANCE	2,896.50	PREMATURITY	FINAL DUE
INVENTORY INTEREST/DUE DATE	307.73	AUG 02	AUG 03
INVENTORY INTEREST/DUE DATE	2,588.77		AUG 03

Schedule B

Equipment Description including Serial Number

			Final Amount Due to JDL as set out in JDL's Reply Col.1	Amount Allowed by the Trustee on Date of Bankruptcy Col.2	Auction / Sale Amounts Col.3
1	644H 4WD Loader	DW644HX581726 *	$239,584.83	$193,603.90	$182,500.00
2	644H 4WD Loader	DW644HX581986	$240,636.17	--	--
3	6X4 Worksite Gator	W0W6X4D002027 *	$12,954.03	$12,511.50	$12,000.00
4	6X4 Worksite Gator	W0W6X4D002028 *	$12,954.03	$12,511.50	$12,000.00
5	6X4 Worksite Gator	W0W6X4D002069 *	$12,954.03	$12,511.50	$12,000.00
6	Front Blade	BM18522 6183 (N25145101)*	$1,549.94	$1,448.25	not identified
7	Front Blade	BM18522 6185 (N25145102)*	$1,549.94	$1,448.25	not identified
8	Pin Pallet Fork 48"	KV02523 (N19124501) *	$781.28	$781.28	not identified
9	Pin Pallet Fork 48"	KV02523 (N19124502) *	$781.28	$781.28	not identified
10	250 Skid Steer	KV0250A253464 *	$26,524.76	$23,872.28	$23,000.00
11	250 Skid Steer	KV0250A253465 *	$26,524.76	$23,872.28	$24,000.00
12	16" Cold Planer	KVCP16X300103	$14,616.79	--	--
13	Pin Pallet Fork 48"	N25630701 (invoice number)	$809.40	--	--
14	Pin Pallet Fork 48"	N25630702 (invoice number)	$809.40	--	--

Schedule C

Parts are the portion of the parts identified on the computer system maintained by HEL prior to Bankruptcy as John Deere Parts and/or Timberjack Parts which the Trustee is reasonably satisfied were supplied by JDL.

The book value of the Parts are calculated as follows:

Total	John Deere Parts and/or Timberjack Parts identified on the computer system	$2,409,682.00
	Less Timberjack Parts	($403,601.00)
	Less Parts incorrectly coded	($2,667.00)
	Less Used Parts	($37,190.00)
	Plus Timberjack Parts existing in Inventory which the Trustee considers it reasonable to accept as having been supplied by JDL	$80,000.00
	Parts Total	$2,046,244.00

Schedule D

Auction / Sale Results
in respect of Paid For Goods

STOCK #	MODEL	SERIAL #	NET AMOUNT
C000261	John Deere 750C Dozer	T0750CX882592	125,000.
C000401	John Deere 450H Dozer	T0450HX874682	60,000.
C000893	John Deere 744H Loader	DW744HX576952	192,500.
C000931	John Deere 120 Excavator	P00120X031958	107,000.
C001032	John Deere 200LC Excavator	FF0200X500457	115,000.
C001035	John Deere 160LC Excavator	P00160X041555	110,000.
C001054	John Deere 200LC Excavator	FF0200X501362	135,000.
C001058	John Deere 450H Dozer	T0450HX889199	127,500.
C001059	John Deere 850C Dozer	T0850CX888907	160,000.
C001105	John Deere 624H Loader	DW624HX579048	152,500.
C001111	Timberjack 1410 Forwarder	17DD0305	306,000.
C001220	John Deere 450LC Excavator	FF0450X090600	240,000.
C001236	John Deere 310SG Backhoe	T0310SG896618	76,000.
C001237	John Deere 310SG Backhoe	T0310SG896594	75,000.
C001241	John Deere 310SG Backhoe	T0310SG897094	76,000.
C001273	John Deere TC62H Loader	DWTC62H579785	155,000.
C001274	John Deere TC62H Loader	DWTC62H579824	142,500.
C001327	John Deere 160LC Excavator	P00160X041653	115,000.
C001328	John Deere 160LC Excavator	P00160X041654	110,000.
C001329	John Deere 200LC Excavator	FF0200X501803	140,000.
C001334	John Deere 450LC Excavator	FF0450X090627	240,000.
C001336	John Deere 644H Loader	DW644HX580105	160,000.
C001365	John Deere 350C Articulated Dump Truck	BE350CT200325	225,000.
C001366	John Deere 350C Articulated Dump Truck	BE350CT200326	230,000.
C001517	John Deere 6x4 Gator	W0W6X4D002028	12,000.
C001518	John Deere 6x4 Gator	W0W6X4D002027	12,000.
C001531	Timberjack 608B Harvester	WC608BX005005	300,000.
N1361	John Deere 850C Dozer	T0850CX848745	100,000.
N1854	John Deere 330LC Excavator	FF0330X080456	170,000.

STOCK #	MODEL	SERIAL #	NET AMOUNT
N1858	John Deere 330LC Excavator	FF0330X080518	170,000.
N-C001377	John Deere 160LC Excavator	P00160X041741	120,000.
N-C001453	John Deere 160LC Excavator	P00160X041792	132,500.
N-C001454	John Deere 160LC Excavator	P00160X041793	132,500.
N-C001479	John Deere 850C Dozer	T0850CX900908	222,500.
N-C001486	John Deere 1050C Dozer	LU1050C005288	330,000.
C000892	John Deere 200LC Excavator	FF0200X501500	91,834.
C000172	John Deere 644H Loader	DW644HX574161	114,791.
C001343	John Deere 200LC Excavator	FF0200X501969	131,100.
N-C001379	John Deere 200LC Excavator	FF0200X502017	131,100.
C001057	John Deere 330LC Excavator	FF0330X080747	199,500.

Note:

1. Paid for Goods include the following 2 “Wells Fargo” items removed from sale by the Court, which items are in the possession of the Receiver and have now been sold:

	Serial #	Net Amount
John Deere 200LC Excavator	FF0200X500917	103,000.
John Deere 370 Excavator	FF0370X080344	147,250.

2. The following items, which are listed at pages 14-18 of the Industrial Dealer Statement as “Paid for Goods” were not and are not in the Receiver’s possession:

Reference #	Model	Serial #
N04857701	200LC Excavator	FF0200X501479
N04997901	310SG Turbo Backhoe	T0310SG894504
T00942601	660G Grapple	TJ1110B001027
T00801501	P/Beam	--

SCHEDULE "A"
FINAL DETERMINATION

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

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

1. Introduction

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

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

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

2. Summary Final Determination

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

3. Defined Terms

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

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

4. The Assets

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

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

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in

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

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

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

The Proof of Claim dated 11 March 2002 and the documents attached thereto (more particularly described below) indicate a total claim in the amount of **$1,927.942.17**. This is exclusively a secured claim. This claim breaks down, on a lease by lease basis, as follows:

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

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

8. Documentation

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

i. PPR Search conducted in the name of the debtor on March 21, 2002.

ii. Proof of Claim dated April 16, 2002.

iii. Untitled Schedule setting out what appears to be costs with respect to various pieces of equipment (equipment identified by s/n).

iv. Unidentified computer printout with respect to invoice no. 046877, dated December 14, 1999, with respect to the 450 LC Excavator, s/n FF0450X090455.

v. The leases are related to documents as follows:
   a. **Lease # 67279** (assets # 1-5 above)
      - Copy of lease. HEL is the Lessee and supplier.
      - Correspondence dated June 6, 2000 from John Deere Credit addressing priorities.

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

b. **Lease #62375** (assets #6-7 above)
   - Copy of lease. HEL is the Lessee and supplier.
   - Correspondence dated January 11, 2000 between Cyberlease and John Deere Credit addressing priorities.
   - Invoice dated January 25, 2000 to MTC for the 2 Excavators.
   - Invoice dated December 6, 2000 to Wilson Contracting Ltd. for Excavator (P00160X041169). Trade in was a used Rottne Harvester (R40506).
   - Cyberlease invoice to MTC in the amount of $25,410.95, stamped "Paid".
   - Copy of wire transfer receipt dated January 13, 2000 from MTC to HEL in the amount of $718,148.53.

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

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

(vi) Correspondence from Cyberlease to MTC dated January 13, 2000 submitting a lease transaction for funding.

(vii) Cyberlease Corporation invoice dated May 30, 2000 to MTC in the amount of $32,116.05.

(viii) Complete Goods invoice to HEL for a 200LC Excavator, s/n FF0200X500968.

9. The Classification of the Assets

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

10. Application of the PPSA

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

11. PRE-PPSA/ Transitioning Issues

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

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

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

Is there attachment?

(i) Value given?

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

(ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2]. HEL held possession of the assets. Furthermore, HEL held the assets under 4 lease agreements and s. 13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when she obtains possession of them under the lease.

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

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

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

Is there a perfection step?

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

YES.

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

Description: Equipment.

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

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

[2] Ibid. at 84.

And any proceeds therefrom

b. <u>Lease No. 62375</u>(for assets # 6-7 above)

YES.

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

Description: Equipment.

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

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

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

And any proceeds therefrom

c. <u>Lease No. 63485</u>(for assets # 8-9 above)

YES.

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

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

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

And any proceeds therefrom

d. <u>Lease No. 78235</u>(for asset # 10 above)

YES.

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

"*200 LC Excavator serial #FF0200X501664*".

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

and any proceeds therefom

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

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

[3] Ibid. at p.140.

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

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

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as MTC may be entitled to claim a super-priority status (ref: s. 35(2)). MTC has not provided evidentiary support for such an entitlement.

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

[4] Ibid. at 140.

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

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

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

15. Auction Results

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

JD 653G Feller Buncher (s/n T0653GX880032) $180,000.00.

[5] R. Cuming & R. Wood, (Toronto: Carswell, 1998) at 416.

SCHEDULE A
FINAL DETERMINATION

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

Secured Party: **NATIONAL LEASING GROUP INC. ("NLGI")**

1. Introduction

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

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

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

2. Summary Final Determination

As NLGI's claim is allowed as a valid secured claim in all of the Assets, the Trustee claims no interest in the assets that are the subject of the claim.

3. Defined Terms:

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

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

4. Assets

NLGI's claim relates primarily to office equipment, including computer systems, software, servers, adapters, batteries, printers, scanners, etc. However, NLGI also claims an interest in three pieces of heavy equipment. At the time of bankruptcy all three pieces of heavy equipment had been sold to third parties. However, the proceeds from the sale of Asset #2 were held in trust by the Monitor and subsequently are now held in trust by the Trustee.

1) 160LC Excavator (P00160X041613)

2) 310SG Backhoe Loader (T0310SG894504)

3) 310SG Backhoe Loader (T0310SG895013)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

Except where a specific claim to proceeds has been made and material provided in support of that claim, the Trustee expresses no opinion with respect to claims to proceeds or claims

involving tracing. An outline of the proceeds claims processes and issues are set out in s.13.

7. Overview of Claim

NLGI claims that it holds a secured PMSI in the office equipment listed in the various Lease Agreements entered into by HEL and NLGI and with respect to the heavy equipment, NLGI claims it holds a first charge priority position in the collateral and any proceeds therefrom.

The Proof of Claim, dated 17 April 2002, indicates a total claim of $557,740.82 comprised of an Unsecured Claim in the amount of $0.00 and a Secured Claim in the amount of $557,740.82. The total claim results from 14 separate lease agreements:

1) Lease #2069724 – Balance outstanding of $6,147.90 + buyout of $10.00

2) Lease #2094295 – Balance outstanding of $11,553.90 + buyout of $1,586.34

3) Lease #2073988 – Balance outstanding of $13,363.00 + buyout of $10.00

4) Lease#2075799 – Balance outstanding of $14,938.50 + buyout of $10.00

5) Lease#2077894 – Balance outstanding of $7,615.30 + buyout of $10.00

6) Lease#2079924 – Balance outstanding of $12,308.10 + buyout of $10.00

7) Lease#2120456 – Balance outstanding of $4,512.20 + buyout of $398.60

8) Lease#2075797 – Balance outstanding of $2,640.00 + buyout of $10.00

9) Lease#2096477 – Balance outstanding of $32,248.00 + buyout of $4,319.10

10) Lease#2089410 – Balance outstanding of $5,830.40 + buyout of $10.00

11) Lease#2129759 – Balance outstanding of $22,245.60 + buyout of $1,908.90

12) Lease#2140104 – Balance outstanding of $29,257.34 + buyout of $2,174.30

13) Lease#2108928 – Balance outstanding of $374,831.54 + buyout of $1.00

14) Lease#2106175 – Balance outstanding of $9,074.70 + buyout of $909.00

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.

ii. Proof of Claim (Form 33) dated 17 April 2002.

iii. Various invoices from HEL:
- From HEL to J. Eales Equipment Rentals Ltd., dated January 16, 2002, for the sale of a John Deere 310SG Backhoe (T0310SG894504).
- From HEL to Triple A Excavating, dated October 31, 2001, for the sale of a 160LC Excavator (P00160X041613). Trade-in was a used JD 310D Backhoe (T0310DG793724).
- From HEL to Hurley Construction Ltd., dated February 22, 2001, for the sale of a 310SG Backhoe (T0310SG895013). Trade-in was a used JD 310SE Backhoe (T0310SE832756).

iv. Correspondence from Paul Burgess, solicitor for NLGI, dated 29 October 2002

v. **Master Lease Agreement (No. 48001254)**
- Lease Agreement, dated February 20, 2001, between NLGI as Lessor and HEL as Lessee. This agreement covers the three pieces of heavy equipment; 2 - 310SG Backhoe Loaders (s/n T0310SG894504 & T0310SG894013) and a 160LC Excavator (P00160X041613). The lease was for a 48-month term commencing March 1, 2001 and with a $1.00 residual. Attached to the Agreement is a Delivery and Acceptance Certificate dated February 20, 2001 signed by HEL.
- Waiver letters:
  - From John Deere Limited dated February 26, 2001
  - From CIBC Equipment Finance Limited dated February 27, 2001
  - From CIBC dated February 21, 2001
  - From MTC Leasing Inc. dated March 8, 2001
  - From GMAC dated February 27, 2001
  - From Mellon Leasing/Mellon Bank dated February 27, 2001
  - From Cyberlease Corporation dated February 27, 2001
  - From ABN/AMRO dated February 26, 2001
- Invoice from HEL to NLGI, dated 21 February 2001, for the purchase of the three heavy equipment Assets by NLGI.
- Payment requisition from NLGI to John Deere Ltd. (Canada), dated 7 March 2001, for $353,494.49. (This amount equals the total amount less HST for the three items noted in the HEL Invoice above.)
- Cheque from NLGI to John Deere Ltd. (Canada), dated 7 March 2001, for $353,494.49.

vi. **Lease No. 2140104**

- Lease Agreement, dated December 3, 2001, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 40 months with an option to purchase after 36 months for $2174.30. The Lease covers the following office equipment:
    - 2 printers (4520 DN1 IBM Infoprint 1000 20 DUPLX/ET
    - 2 Chip (IPDS) Chip for IP1000 20
    - 2 Memory Upgrades (32MB Memory Upgrade for IP1000 20)
    - 5 Cisco 350 Series Adapters
    - 2 Cisco 350 Series Access Point
    - 1 Cisco 350 Series PCI Desktop Adapter
    - 2 3 year IBM Onsite Warranties
    - 1 Cisco 350 PCM Wireless Client Adapter
    - 1 HP Switch
    - 1 NA Active Virus Defense Suite
    - 7 Exabyte cart 35/70
    - 75 Symantec Nav Corp ED DT/SVR
    - 1 Symante Norton Anti-Virus CD
    - 1 Arcserve NT 2000 WorkGroup
    - 1 Veritas Backup
    - 1 Veritas Backup
    - 1 Veritas Backup
- Invoice from PFW Systems Corporation dated 9 November 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from PFW Systems Corporation dated 21 November 2001, showing the purchase of various items by NLGI for shipment to HEL
- Cheque from NLGI to PFW Systems Corporation dated 3 December 2001 for $15,735.45.
- Invoice from X-Wave, dated 16 November 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from X-Wave, dated 3 October 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from X-Wave, dated 30 October 2001, showing the purchase of various items by NLGI for shipment to HEL
- Cheque from NLGI to X-Wave dated 3 December 2001for $9,269.00.

vii. **Lease No. 2129759**

- Lease Agreement, dated September 20, 2001, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 33 months for $1,908.90. The Lease covers the following office equipment:
    - 1 HP Laserjet 2200 DTN
    - 1 HP Deskjet
    - 3 Thinkpad X21 PII with accessories.
- Invoice from MicroAge Computer Centres, dated 20 August 2001 showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 20 August 2001 showing

the purchase of various items by NLGI for shipment to HEL.

- Invoice from MicroAge Computer Centres, dated 5 September 2001 showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 16 August 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 20 August 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 10 September 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 16 August 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 16 August 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Correspondence from Lillian Davis dated 24 October 2002 to NLGI confirming payment to MicroAge Computer on 19 September 2001 for $21,952.35.

viii. **Lease No. 2120456**

- Lease Agreement, dated July 1, 2001, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 33 months for $398.60. The Lease covers the following office equipment:
  - 1 Hewlett Packard Laserjet 455 ON Color
  - 1 64 MB for HP
- Invoice from MicroAge Computer Centres, dated 13 June 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Cheque from NLGI to MicroAge Computer Centres, dated 29 June 2001, for $4,583.90.

ix. **Lease No. 2106175**

- Lease Agreement, dated March 1, 2001, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 39 months with an option to purchase after 36 months for $909.00. The Lease covers the following office equipment:
  - 1 server installed in configuration
  - 1 75 Microsoft exchange CAL 5.5 Bus
  - 1 Microsoft exchange server 5.5 Bus
  - 1 Microsoft kit
- Invoice from X-Wave, dated 15 February 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from X-Wave, dated 15 February 2001, showing the purchase of various items by NLGI for shipment to HEL.
- Cheque from NLGI to X-Wave, dated 1 March June 2001, for $10,453.50.

x. **Lease No. 2096477**

- Lease Agreement, dated November 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to

purchase after 33 months for $4,319.10. The Lease covers the following office equipment:

- 1 IBM SVR5100 P3667 128MB 256KB
- 1 IBM Tape Drive 20/40 GB SCSI DLT INT
- 1 IBM ENET SVR Adapter 10/100
- 1 IBM P/S Netfinity Hotswap Kit
- 2 IBM HD SCSI 18.2GB Hotswap
- 1 IBM HD SCSI 18.2 GB Hotswap
- 1 Kingston MEM 128MB DIMM Netfinity
- 1 Kingston MEM 256 MB DIMM Netfinity
- 1 APC Smart UPS 1000 XL NET
- 1 IBM Cable SVR RAID-3L Ultra 2 SCSI Adapter
- 1 KDS Monitor 15" CLR
- 1 IBM TP 600X PIII 500MHZ
- 1 IBM 64MG SO-DIMM SDRAM MEM
- 1 Realprot Ethernet 10/100
- 2 IBM 56W Ultraslim AC Adapter
- 1 Thinkpad A20P P111/750 12
- 1 IBM 128MB 100MHZ
- 1 IBM Thinkpad Prot Replica
- 1 IBM Thinkpad 72W AC ADAPT
- 1 Realprot Ethernet 10/100
- HP Laserjet 4050 1200X120
- 1 HP Duplex Printing Option
- 1 HP Jetdirect 600N Multipr
- 9 NEC 17" Monitors
- 6 IBM PC P111 500 MHZ
- 5 IBM Etherlink 10/100 PCI
- 1 IBM Power Supply 250W NF5600
- 1 IBM 10/100 Network Card
- 1 HP Procurve Switch 224M 10BT
- 6 64MB Ram Upgrade
- 1 ARC Software PKG
- 1 IBM Internal CD-Rewriter
- 1 IBM Battery
- 1 IBM 56W Ultraslim AC Adaport
- 1 IBM 64MB 100MHZ Non-ECC D
- 1 IBM 126 MB Non-Parity
- Accessories and Support

- Invoice from X-Wave, dated 27 October 2000, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from X-Wave, dated 16 October 2000, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from X-Wave, dated 16 October 2000, showing the purchase of various items by NLGI for shipment to HEL.

- Invoice from X-Wave, dated 16 October 2000, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from X-Wave, dated 19 October 2000, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from X-Wave, dated 24 October 2000, showing the purchase of various items by NLGI for shipment to HEL.
- Cheque from NLGI to X-Wave Solutions, dated 31 October 2000, for $14,377.30.
- Invoice from MicroAge Computer Centres, dated 29 August 2000, showing the purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 10 October 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 21 September 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 8 October 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 12 October 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 11 August 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 13 October 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 21 September 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 25 September 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 25 September 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 28 September 2000, showing the purchase of various items by NLGI for shipment to HEL
- Cheque from NLGI to MicroAge Computer Centres, dated 31 October 2000, for $35,292.35.

xi. **Lease No. 2094295**

- Lease Agreement, dated October 1, 2000 between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 33 months for $1,586.34. The Lease covers the following office equipment:
    - 3 IBM Infoprint 21 Printers
    - 3 service packs
- Invoice from PFW Systems Corporation, dated 22 September 2000, showing purchase of various items by NLGI to HEL
- Invoice from PFW Systems Corporation, dated 26 September 2000, showing purchase of various items by NLGI to HEL
- Cheque from NLGI to PFW Systems Corporation, dated 5 October 2000, for $15,921.75.

- Invoice from Reprograhics Ltd., dated 26 September 2000, showing purchase of various items by NLGI for shipment to HEL
- An internal document of NLGI dated 5 October 2000, requisitioning cheque for payment to Reporgraphics Ltd.
- Cheque from NLGI to Reporgrahics Ltd., dated 5 October 2000, $1,782.50.

xii. **Lease No. 2089410**

- Lease Agreement, dated September 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 33 months for $10.00. The Lease covers the following office equipment:
    - 2 IBM Thinkpads 390E PII
- Invoice from MicroAge Computer Centres, dated 31 July 2000, showing purchase of various items by NLGI for shipment to HEL.
- Cheque from NLGI to MicroAge Computer Centres, dated 18 August 2000, for $9,057.40.

xiii. **Lease No. 2079924**

- Lease Agreement, dated June 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 36 months for $10.00. The Lease covers the following office equipment:
    - 1 Pentium 111 500 Mhz, computer
    - 1 Data Protection Adapter
    - 1 VGA Color Monitor
    - 2 Printers
    - 1 Receipt Printer
    - 1 Diagnostic Modem
    - 1 UPS
    - Accessories
- Foreign Exchange Agreement dated 15 May 2000 and executed by HEL
- Invoice from Computer Support Services Inc., dated 17 April 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from Solutions by Computer, dated 17 April 2000, showing the purchase of various items by NLGI for shipment to HEL
- Correspondence from Sylvia Harnett-Dove, NLGI to John King, HEL dated 25 June 2000
- E-mail correspondence from Sylvia Harnett-Dove, NLGI dated 10 May 2000
- Cash Flow Statement
- Cheque from NLGI to Computer Support, dated 18 May 2000, for $14,712.68 (US)
- Authorization slip signed by National Leasing authorizing transfer of $22,201.43 (Can.) to $14,712.68 (US).

xiv. **Lease No. 2077894**

- Lease Agreement, dated May 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 36 months for $10.00. The Lease covers the following office equipment:
    - 2 Ricoh Photocopiers
    - 2 Ricoh Faxes
    - 2 Cabinets
    - 2 Computer Systems & Accessories
- Invoice from Reporgrahics Ltd., dated 23 March 2000, showing purchase of various items by NLGI for shipment to HEL
- Internal document of NLGI requisitioning payment to Repographics Ltd., dated 25 April 2000.
- Cheque from NLGI to Reporgrahics Ltd., dated 25 April 2000, for $10,557.00
- Invoice from MicroAge Computer Centres, dated 13 April 2000, showing the purchase of various items by NLGI for shipment to HEL
- Internal document of NLGI, dated 24 April 2000, requisitioning payment to MicroAge.
- Cheque from NLGI to MicroAge Computer Centres, dated 25 April 2000, for $6,254.85.

xv. **Lease No. 2075799**

- Lease Agreement, dated May 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 36 months for $10.00. The Lease covers the following office equipment:
    - 2 IBM PC300GL PIII 64/13/5G
    - 2 DT 1726D 17” Monitor
    - 2 64MB EDD 133 MHZ
    - 2 IBM 64 MB 100MHZ NP SDRAM
    - 1 IBM 64 MB 100MHZ Non-Ecc D
    - 1 DT 1726 17” Monitor
    - 1 Burglar Alarm System
    - 1 Cellular Backup
    - 1 Cisco 1605 Dual Ethernet Router
    - 2 HP Procurve 10/100 24 Port Hub
    - 1 HP Netserver 10/100 TX PCI Network Card
    - 1 Kingston 64 MB Upgrade for IBM 300 GL
    - 1 32 MB Upgrade for IBM 300GL
    - 1 Kingston 32MB Module F/IBM PC
    - 1 Kingston 32MB Module F/IBM TP 760 ETC
    - 4 3COM Fast Etherlink 10/100BTX PCI Adapt.
    - 4 3COM Megahertz 10/100 PC Network Card
    - HP Procurve 10/100 24 Port Hub
    - 1 32 MB Upgrade for IBM 300GL
    - 1 3COM Fast Elinkxl PCMCIA 10/100 No DOC
    - 38 Total Virus Defence Suite (26-50)
- Invoice from MicroAge Computer Centres, dated 8 March 2000, showing purchase of various items by NLGI for shipment to HEL.

- Invoice from MicroAge Computer Centres, dated 13 March 2000, showing purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 15 March 2000, showing purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 29 March 2000, showing purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 22 March 2000, showing purchase of various items by NLGI for shipment to HEL.
- Invoice from MicroAge Computer Centres, dated 22 March 2000, showing purchase of various items by NLGI for shipment to HEL.
- Internal document of NLGI, dated 17 April 2000, requisitioning payment to MicroAge.
- Cheque from NLGI to MicroAge Computer Centres, dated 17 April 2000, for $6,499.80.
- Invoice from X-Wave Solutions, dated 31 March 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from X-Wave Solutions, dated 31 December 1999, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from X-Wave Solutions, dated 6 January 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from X-Wave Solutions, dated 25 February 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from X-Wave Solutions, dated 27 January 2000, showing the purchase of various items by NLGI for shipment to HEL
- Internal document of NLGI, dated 17 April 2000, requisitioning payment to X-Wave Solutions
- Cheque from NLGI to X-Wave Solutions, dated 17 April 2000, for $20,053.70
- Invoice from MIT Information Technology Inc., dated 5 April 2000, showing the purchase of various items by NLGI for shipment to HEL
- Internal document of NLGI, dated 17 April 2000, requisitioning payment to MIT Information Technology
- Cheque from NLGI to MIT Information Technology, dated 17 April 2000, for $2,407.87
- Invoice from Techni-Services Limited, dated 3 April 2000, showing purchase of various items by NLGI for shipment to Show Tech Audio
- Invoice from Techni-Services Limited, dated 3 April 2000, showing purchase of various items by NLGI for shipment to Show Tech Audio
- Internal document of NLGI, dated 17 April 2000, requisitioning payment to Techni-Services Limited.
- Cheque from NLGI to Techni-Services Limited, dated 17 April 2000, for $1,827.52.

xvi. **Lease No. 2075797**

- Lease Agreement, dated June 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 36 months for $10.00. The Lease covers the following office equipment:

    - 1 telephone system and accessories.
- Invoice from NewTel Communications, dated 24 April 2000 addressed to National Leasing Group.
- Internal document of NLGI, dated 29 May 2000, requisitioning payment to NewTel Communications.
- Cheque from NLGI to NewTel Communications, dated 30 May 2000, for $4,610.47.

xvii. **Lease No. 2073988**

- Lease Agreement, dated April 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 36 months for $10.00. The Lease covers the following office equipment:
    - 133860 PC – 300PL PII 400 64/6.4GB
    - 134335 IBM 64 MB 100MHZ NP SDRAM
    - 358126 Daytek 17" Monitor
    - SER 800 Install of Ram
    - 132252 IBM Thinkpad 390X CEL 400
    - 132109 IBM PC300PL PIII 500MHZ 6
    - 514503 Office 2000 Prowin 9XNT 0
    - 755259 Realport Ethernet Cardbus
    - CEC016 64 MB RAM Upgrade
    - 447895 Kingston 32 MB RAM
    - 511092 Windows 98 Second Edition
    - 358126 Daytek 17" Monitor
- Correspondence from Sylvia Harnett-Dove, NLGI to HEL dated 17 March 2000
- Invoice from MicroAge Computer Centres, dated 23 February 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 24 February 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 11 February 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 14 February 2000, showing the purchase of various items by NLGI for shipment to HEL
- Invoice from MicroAge Computer Centres, dated 18 February 2000, showing the purchase of various items by NLGI for shipment to HEL
- Internal document of NLGI, dated 8 March 2000, requisitioning payment to MicroAge.
- Cheque from NLGI to MicroAge Computer Centres, dated 8 March 2000, for $29,513.60

xviii. **Lease No. 2069724**

- Lease Agreement, dated February 1, 2000, between HEL as Lessee and NLGI as Lessor. The Lease is for a term of 36 months with an option to purchase after 36 months for $10.00. The Lease covers the following office equipment:

    - 2 IBM TP 600X Notebook Computers with accessories
- Invoice from MicroAge Computer Centres, dated 1 February 2000, showing the purchase of various items by NLGI for shipment to HEL
- Internal document of NLGI, dated 2 February 2000, requisitioning payment to MicroAge Computer Centres
- Cheque from NLGI to MicroAge Computer Centres, dated 2 February 2000, for $17,285.65

9. Classification of the Assets

The actual subjective use to which the assets are put by the debtor dictates whether the assets will be classified as inventory, equipment or consumer goods. It is the opinion of the Trustee that the 3 pieces of heavy equipment were held by HEL for sale or lease and as such, form part of the inventory of HEL (s.2(x) of the PPSA). The remainder of the Assets to the best of the Trustee's knowledge was used by HEL in their office and therefore constitute equipment of HEL (s.2(p) of the PPSA).

10. Application of the PPSA

As indicated by the above-noted documentation the secured transactions between NLGI and HEL were in the form of inventory and equipment leases. The lease which secured the 3 pieces of heavy equipment (as listed above), was for a term of more than one year and was a financing lease as opposed to a true lease; s.4 of the PPSA confirms that such a secured transaction is governed by the PPSA. With respect to the other Lease Agreements, all were for a term of greater than one year and therefore are subject to the PPSA

11. PRE-PPSA/ Transitioning Issues

Not applicable in this instance as all transactions took place in 2000 and 2001 and therefore were subsequent to the coming into force of the PPSA in the Province.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the

purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

YES The Trustee has been provided with evidence of value passing from NLGI to HEL with respect to these transactions.

(ii) Rights in the collateral?

YES HEL held possession of the assets and any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13.[2] Furthermore, s. 13 (3) confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when s/he obtains possession of them under the lease.

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

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

YES The evidentiary requirements of s. 11, required for attachment, are established by the 14 leases. Specifically, in accordance with s.11(1)(b), all 14 leases are in writing, have been signed by HEL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?

Master Lease Agreement (No. 48001254)

YES

[1] C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.
[2] Ibid. at p.84.

Registration number 809277 contains the following information:

- **General Description of Collateral:** "All backhoe loaders, excavator of every nature or kind described in Lease Schedule number 2108928 dated February 20, 2001, which Lease Schedule is attached to and forms part of Master Lease Agreement number 48001254 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral: "**2001 310SG Backhole Loader (s/n T0310SG894504); 2001 310SG Backhole Loader (s/n T0310SG895013); 2001 160LC Excavator (s/n P00160X041613)"

Registration number 809244 contains the following information:

- **General Description of Collateral:** "All goods and equipment of every nature or kind leased pursuant to Master Lease Agreement number 48001254 dated February 20, 2001 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions, including all after acquired goods and equipment and any Lease Schedules attached to and forming part of Master Lease Agreement number 48001254."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, these registrations qualify as a perfection step with respect to NLGI's security interest in the 3 pieces of heavy equipment in Lease Schedule #2108928. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2140104

YES

Registration number 1544225 contains the following information:

- **General Description of Collateral:** "All computer systems, software, adapters, servers, upgrades of every nature or kind described in Lease Number 2140104 dated December 3, 2001 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2140104. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in

accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2129759

YES

Registration number 1239412 contains the following information:

- **General Description of Collateral:** "All computer systems, software, CD-RW, printers, battery and scanners of every nature or kind described in Lease number 2129759 dated September 20, 2001 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.219759. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2120456

YES

Registration number 1067133 contains the following information:

- **General Description of Collateral:** "All printers of every nature or kind described in Lease number 2120456 dated June 29, 2001 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2120456. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2106175

YES

Registration number 825232 contains the following information:

- **General Description of Collateral:** "All computer software of every nature or kind described in Lease number 2106175 dated March 1, 2001 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2106175. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2096477

YES

Registration number 627521 contains the following information:

- **General Description of Collateral:** "All portable and desktop computer systems, tape drives, adapters, hotswaps, kits, RAM, monitors, printers, CD-RW, power supplies, switches, software, batteries, port replicators of every nature or kind described in Lease number 2096477 dated Oct 31, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2096477. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2094295

YES

Registration number 583005 contains the following information:

- **General Description of Collateral:** "All printing equipment of every nature or kind described in Lease number 2094295 dated October 31, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2094295. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2089410

YES

Registration number 493304 contains the following information:

- **General Description of Collateral:** "All portable computer systems, software of every nature or kind described in Lease number 2089410 dated August 18, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2089410. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2079924

YES

Registration number 292037 contains the following information:

- **General Description of Collateral:** "All computer systems, software, monitors, and printers of every nature or kind described in Lease number 2079924 dated May 17, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2079924. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2077894

YES

Registration number 242305 contains the following information:

- **General Description of Collateral:** "All photocopiers, fax machines, office furniture, computer systems, software, monitors, upgrades of every nature or kind described in Lease number 2077894 dated April 25, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2077894. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2075799

YES

Registration number 226886 contains the following information:

- **General Description of Collateral:** "All computer systems, software, upgrades, monitors, burglar alarm systems, computer networking equipment, backup systems of every nature or kind described in Lease number 2075799 dated April 17, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No. 2075799. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2075797

YES

Registration number 318550 contains the following information:

- **General Description of Collateral:** "All telephone equipment of every nature or kind described in Lease number 2075797 dated May 30, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No.2075797. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2073988

YES

Registration number 147215 contains the following information:

- **General Description of Collateral:** "All computer systems, monitors, portable computer systems and software of every nature or kind described in Lease number 2073988 dated March 8, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No. 2073988. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

Lease No. 2069724

YES

Registration number 85847 contains the following information:

- **General Description of Collateral:** "All computer systems of every nature or kind described in Lease number 2069724 dated February 2, 2000 between the Secured Party, as Lessor and the Debtor as Lessee, as amended from time to time, together with all attachments, accessories and substitutions."
- **Serial Numbered Collateral:** Blank

By operation of s.26 of the PPSA, this registration qualifies as a perfection step with respect to NLGI's security interest in the assets listed in Lease No. 2069724. What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(d) of the Regulations, items of equipment must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral description in the above-noted financing statement does satisfy these requirements.

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

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

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

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

[3] Ibid. at p.140.
[4] Ibid.

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier may be entitled to claim a super-priority status (ref: s. 35(2)). As NLGI is unable to provide evidentiary support for such an entitlement, its security interest in the 3 pieces of heavy equipment is subject to the residual priority rules of the PPSA.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of an inventory financier's interest is typically the date of registration of its financing statement in the PPR:

Lease	**Registration Date**	**Registration No.**
Master Lease Agreement (# 48001254)	20 February 2001	809277
Lease # 2140104	4 December 2001	1436360
Lease # 2129759	21 September 2001	1239412
Lease # 2120456	3 July 2001	1067133
Lease # 2106175	2 March 2001	825232
Lease # 2096477	1 November 2000	627521
Lease # 2094295	6 October 2000	583005
Lease # 2089410	21 August 2000	493304
Lease # 2079924	19 May 2000	292037
Lease # 2077894	26 April 2000	242305
Lease # 2075799	18 April 2000	226886
Lease # 2075797	1 June 2000	318550
Lease # 2073988	9 March 2000	147215

Lease # 2069724	3 February 2000	85847

- There are instances whereby an equipment financier may be entitled to claim a super-priority (ref. s.35(1)). NLGI has provided the Trustee with evidentiary support for such an entitlement with respect to the office equipment provided to HEL.

15. Auction Results

The three heavy equipment Assets were sold prior to HEL's bankruptcy and therefore were not included in the goods sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. However, as noted above, the proceeds from the sale of Asset #2, being **$70,200.00**, are being held in trust.

SCHEDULE A
FINAL DETERMINATION

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

Secured Party: **ORIX CREDIT ALLIANCE OF CANADA ("ORIX")**

1. Introduction.

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

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

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

2. Summary Final Determination

The claim is allowed as a valid, secured claim to the asset. The Trustee claims no interest in the asset that is the subject of the claim.

3. Defined Terms

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

"CSA"	-	*Conditional Sales Act*, R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"PMSI"	-	Purchase Money Security Interest
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	Serial Number

4. Asset

1998 John Deere 450LC Excavator (FF0450X090166) (the “Excavator”)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6 Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

The Trustee has not been provided with a Proof of Claim on behalf of Orix. The particulars of their claim, such as the amount owed, are unknown. However, based on the documents included in the file to date (as more particularly described below) it would appear that Orix is owed $33,406.89. This is with respect to their financing of the Excavator.

Orix appears to be claiming a perfected security interest in the Excavator.

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

8. Documentation

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

i. PPR search conducted in the name of HEL on March 21, 2002.

ii. Correspondence from John F. Belton of Orix dated February 09, 1999 to Jake Urquhart of Urquhart MacDonald requesting a verification of equipment for HEL.

iii. Security Agreement dated July 13, 1998 between HEL and Orix. Attached to this is:

- Schedule "A", identifying the Excavator.
- Authorization for business pre-authorization debit plan dated July 13, 1998 and signed by HEL.
- Delivery/Installation Certificate, Waiver and Agreement confirming delivery on July 13, 1998 and signed by HEL.

iv. Computer printout with respect to the Excavator, invoice number 040309 dated February 25, 1998 to customer United Rentals of Canada Inc. and also invoice #238 dated August 9, 1999.

v. Invoice for the Excavator dated February 22, 2002 for $33,406.89.

vi. Copy of cheque #60000494 dated July 16, 1998 in the amount of $444,508.19 from ORIX to HEL.

9. Classification of the Asset

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

10. Application of the PPSA

From the documentation provided, it appears that the Excavator was the subject of a security agreement between Orix and HEL. However, we are unable to determine on what basis financing was provided. By operation of s. 4(1) however, it is the opinion of the Trustee that this transaction is governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13,2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest related and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-ppsa registration for purposes of priority. There are a number of conditions however. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant in this instance since the date of the Security Agreement is 1998, prior to the coming into force of the PPSA. While the security agreement was registered in the Old Registry on March 8, 1999 (reg#719838) there was no registration in the PPR until February 2002, which is well beyond the transition period. Further, the financing statement registered does not meet the requirements of s.26 of the Regulations. As such, it is the opinion of the Trustee that while the security has been properly registered in the PPR, the relevant date, for purposes of perfection, must be the date of registration in the PPR and no time prior.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

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

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?
(i) Value given?

As indicated in the List of Documents above, we have been provided with a copy of a cheque payable to HEL in the amount of $444,508.19. It is the opinion of the Trustee that this is sufficient evidence of value for the purposes of attachment.

(ii) Rights in the collateral?

Yes Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2]. The Excavator was rented to United Rentals at the time of attachment, but HEL did not sell it to them until August 9, 1999 (Invoice #238) for a purchase price of $446,000.00. As such, it is the opinion of the Trustee that HEL had rights in the Excavator.

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

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

Yes. The evidentiary requirements of s. 11, required for attachment, are established by the security agreement described above.

Is there a perfection step?
Yes.
Registration # 1583290 dated Feb.4/02 contains the following information:

- *1998 John Deere base Hydraulic Excavator model 450LC serial number FF0450X090166 c/w cab with air and heater, 900mm track shoes, standard boom, and vandal protection… together with all accessories, attachments and accessories, and proceeds in any form including goods, documents of title, chattel paper, securities, instruments, money or intangibles.*

What constitutes an appropriate description of collateral, comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the

[2] Ibid. at 84.

Trustee that the collateral description in Orix's financing statement satisfies these requirements.

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

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

[3] Ibid. at p.140.
[4] Ibid. at 140.

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as Orix may be entitled to claim a super-priority status (ref: s. 35(2)). Orix has not provided evidentiary support for such an entitlement.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of Orix's interest in the Excavator is the date of registration of its financing statement in the PPR – **February 4, 2002.**

15. Auction Results

The Excavator was not sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. According to the records of the Receiver, this excavator was not in the inventory of HEL but was sold to United Rentals of Canada Inc. on August 9, 1999 for a purchase price of $446,000.00.

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **ROYAL BANK OF CANADA ("RBC")**

1. Introduction

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

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

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

2. Summary Final Determination

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

3. Defined Terms:

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

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

4. The Assets:

22 pieces of heavy equipment. 9 pieces remained in the inventory of HEL and were sold at the Trustee's auction (as indicated by "*"). 13 pieces were sold to third parties.

1.	JD 200LC Excavator	FF0200X501676
2.	JD 450LC Excavator**	FF0450X090600
3.	JD 120LC Excavator	P00120X032071
4.	JD 27 Excavator	FF027ZX220458
5.	JD 644H Loader	DW644HX579488
6.	JD 850C Dozer	T0850CX896776
7.	JD 310G Backhoe	T0310GX897091
8.	JD 310SG Backhoe *	T0310SG897094
9.	JD 310SG Backhoe	T0310SG897121
10.	JD 310SG Backhoe	T0310SG897104
11.	JD 310SG Backhoe*	T0310SG896594
12.	JD 310SG Backhoe *	T0310SG896618
13.	JD 160LC Excavator*	P00160X041654
14.	JD 450LC Excavator	FF0450X090629
15.	JD 750 Excavator	FF0750X970041
16.	JD 644H Loader *	DW644HX580105
17.	JD 644H Loader	DW644HX580090
18.	JD 644H Loader	DW644HX579886
19.	JD 160LC Excavator*	P00160X041653
20.	JD 200LC Excavator*	FF0200X501803
21.	JD 330LC Excavator	FF0330X081150
22.	JD TC62H Loader*	DWTC62H579824

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

[*] The 9 pieces indicated by "*" are those which remained in the HEL inventory.

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

RBC claims that it holds a perfected security interest in the 22 assets listed above arising from four (4) Lease Agreements entered into in 2001. RBC takes the position that it has satisfied all the requirements to attach and perfect a security interest, including registration of the security interests in the PPR.

The Proof of Claim dated 16 April 2002 and the documents attached thereto (more particularly described below) indicate a total claim of **$6,085,216.20** comprised, in part, of a Secured Claim in the amount of $3,797,162.62.

- Lease No. 10972-82354 (securing 2 assets, #1-2 in the list above). Balance outstanding of **$792,553.99.**

- Lease No. 10972-82355 (securing 2 assets #3-4 in the list above). Balance outstanding of **$212,493.42.**

- Lease No. 10972-82364 (securing 8 assets #5-12 in the list above). Balance outstanding of **$1,326,043.23.**

- Lease No. 10972-82378 (securing 10 assets #13-22 in the list above). Balance outstanding of **$3,754,125.56.**

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

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.

ii. Proof of Claim dated 17 April 2002.

iii. Document Entitled "Schedule (Amended March 5, 2002) of Heavy Equipment Leases".

iv. Detailed document packages for each of the 4 leases as follows:

a. **Lease No. 82354** (assets # 1-2 above)

- Copy of Lease
- Internal Memo from RBC
- Invoice from HEL to RBC dated March 12, 2001 with respect to the 2 Excavators
- Bill of Sale dated March 14, 2001 for the 2 Excavators
- Copy of PPSA search results
- Correspondence dated March 16/01 setting out the competing interests between RBC and John Deere Limited
- Disbursement Request & Transfer Statement

b. **Lease No. 82355:** (assets # 3-4 above)

- Copy of Lease
- Internal Memo from RBC
  Invoice with respect to the 2 Excavators
- Bill of Sale dated March 14/01 for the 2 Excavators
- Registration Statement re PPSA
- PPSA search results
- Correspondence dated March 16/01 setting out the competing interests between RBC and John Deere Limited
- Disbursement Request & Transfer Statement

c. **Lease No. 82364:** (assets # 5-12 above)

- Copy of Lease
- Internal Memo from RBC
- Invoice from HEL to RBC for the 8 pieces of equipment
- Bill of Sale dated April 2, 2001 for the 8 pieces of equipment
- Copy of PPSA registration
- Correspondence dated April 3/01 setting out the competing interests between CIBC and RBC

- Correspondence dated April 3/01 setting out the competing interests between RBC and John Deere Limited
- Disbursement Request & Transfer Statement

d. <u>Lease No. 82378</u>: (assets # 13-22 above)

- Copy of Lease
- Internal Memo from RBC
- Invoice from HEL to RBC dated May 1/01 for the 10 pieces of equipment
- Bill of Sale dated May 2/01 for the 10 pieces of equipment
- PPSA registration and search results
- Correspondence dated May 2/01 setting out the competing interests between RBC and CIBC
- Correspondence dated May 10/01 setting out the competing interests between RBC and John Deere Limited
- Disbursement Request & Transfer Statement

v. Invoices

- July 16/01 to J. Eales Equipment Rentals Ltd for the JD 27 Compact Excavator FF027ZX220458.
- Feb 22/01 to the Town of Gander for the sale of a JD 120LC Excavator P00120X032071. Trade-in was a used Caterpillar 206 Excavator s/n 3GC00025 March 1/01 to H. Wareham & Sons for the sale of a used CAT 206 Excavator s/n 3GC00025.
- March 1/01 to Modern Holdings Limited for the sale of a JD 330LC Excavator s/n FF0330X080941, a JD 850C Dozer s/n T0850CX896776 and a used CAT D350 C truck s/n 35NB6911. Trade-ins were a CAT 330 Excavator s/n 8SK00848, a CAT D8N Dozer s/n STJ02858, a Terex Truck, a used Ingersoll Rand ECN 350 air track s/n R10031, a used Ingersoll Rand SP825 Compressor, s/n 172821.
- April 5/01 to Ritchie Brothers for a used CAT 330 Excavator s/n 8SK00848.
- Aug.31/01 to United Rentals for a 310G backhoe, s/n T0310GX897091.
- May 24/01 to McNamara Construction for a 300LC Excavator, s/n FF0330X081131, a 450LC Excavator, s/n FF0450X090629, a 550LC Excavator s/n FF0550X950060, a 750 Excavator s/n FF0750X970041, a Crawler Dozer s/n T0850CX898748 and a crawler Dozer, s/n LU1050C005072.
- Nov.28/01 to Neuwest Rentals Limited for the sale of JD 270LC Excavator, s/n FF0270X070880; 330LC Excavator, s/n FF0330X081150; 330LC Excavator s/n FF0330X081129; 330LC Excavator s/n FF0330X081149; 330LC Excavator s/n FF0330X081243; 270LC Excavator s/n

FF0270X070962; 330LC Excavator s/n FF0330X081248; 330 LC Excavator s/n FF0330X081278.

- Sept.29/01 to J-1 Contracting Ltd. for JD 1050C Crawler Dozer, s/n LU1050C005230; 450LC Excavator, s/n FF0450X090645; 770CH Motor Grader, s/n DW770CH580709; 644H Loader, s/n DW644HX580090; 2- 270 2 Speed Skidsteers s/n 256273 and 256299.
- May 16/01 to Fairview Investments Ltd. for a JD 644H 4 WD Loader, s/n DW644HX579886. Trade-in was a JD 644G Loader, s/n DW644GB542037.
- May 15/01 to Capital Ready Mix for a 644H Wheel Loader, s/n DW644HX579488.
- March 1/01 to Modern Holdings Ltd. for a 330LC Excavator, s/n FF0330X080941, and 850C Dozer, s/n T0850CX896776 and a truck s/n 35NB6911. Trade-ins were a used CAT 330 Excavator, s/n 8FK00848, a CAT D8N Dozer, s/n 5TJ02858, a Terex Truck, an Ingersoll Rand 350 Air Track, s/n R10031 and an Ingersoll Rand XP825 Compressor, s/n 172821.
- Dec.11/01 to Ace Paving Limited for a JD 310 SG Backhoe s/n T0310SG897121.
- Nov.26/01 to W & D Enterprise for a JD 310SG Backhoe, s/n T0310SG897104.
- May 31/01 to Marine Contractors Inc. for a JD 200-LC Excavator, s/n FF0200X501636, a JD 200-LC Excavator, s/n FF0200X501668 and a JD 200-LC Excavator s/n FF0200X501676. Trade-ins were a CAT 320B Excavator, s/n 06CR04706, a CAT 320B Excavator, s/n 06CR05244 and a CAT 320B Excavator, s/n 06CR05245.

9. Classification of the Assets

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

10. Application of the PPSA

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

11. PRE-PPSA/ Transitioning Issues

Not applicable in this instance as all transactions took place in 2001 and therefore were subsequent to the coming into force of the PPSA in the Province.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[†]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

YES. For each of the 4 leases, we have been provided with copies of Bills of Sale, Disbursement Requests and Transfer Statements which confirm payment by RBC to HEL for the assets. From here, the assets were leased back to HEL with HEL being in possession of the assets. It is the opinion of the Trustee that this is sufficient evidence of value for the purposes of attachment.

(ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[‡]. Furthermore,

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

[‡] Ibid. at p.84

HEL held the assets under 4 lease agreements and s. 13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when s/he obtains possession of them under the lease.

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

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

Is there a perfection step?

a. Lease No. 82354 (for assets # 1-2 above)
YES.
Registration number 844423 dated March 14/01 (amended by **Registration number 850099** dated March 19/01) contains the following information

- **General Description of Collateral**: *"2 excavators."* This was amended to add the following description *"Add General Collateral Description: One John Deere 450 LC Excavator s/n FF0450X090600, One John Deere 200 LC Excavator s/n FF0200X501676"*

b. Lease No. 82355: (for assets # 3-4 above)
YES
Registration number 844449 dated March 14/01 (amended by **Registration number 850107** dated March 19/01) contains the following information

- **General Description of Collateral**: *"2 excavators"* This was amended on to add the following description *"General Collateral Description: One John Deere 27 Excavator s/n FF027X220458, One John Deere 120 Excavator s/n P00120X032071"*

c. Lease No. 82364: (for assets # 5-12 above)
YES
Registration number 876631 dated April 2/01 contains the following information

- **General Description of Collateral**: *"Heavy Duty John Deere Equipment"*

d. Lease No. 82378: (for assets # 13-22 above)

YES
Registration number 936203 dated May 3/01 contains the following information
General Description of Collateral: *"John Deere Loaders & Excavators"*

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

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

[§] Ibid. at 140.

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

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within 15 days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.[**]

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

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

As indicated in the list of documents, the Trustee has been provided with a number of invoices indicating the disposition of some of the Assets. RBC has not made any specific claims with respect to proceeds/tracing.

14. Additional Comments on Priorities

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

- The documents indicate that in all 4 leases the assets secured were first sold to RBC by HEL and then leased back to HEL. Bills of sale have been provided for all 4 leases. Although such sale and lease-back arrangements appear to entitle RBC to claim a PMSI, subsection 2(hh) of the PPSA specifically excludes "a transaction of sale by and lease back to the seller" from being a PMSI.

- If these leases were not sale/leaseback type transactions, there are instances whereby an inventory financier such as RBC may be entitled to claim a super-priority status (ref: s. 35(2)). RBC has not provided evidentiary support for such an entitlement.

- As established by s. 36 of the PPSA, the relevant dates for the determination of the priority of RBC's security interests are as follows:

    - Lease # 82354: **March 14/01** (date of PPR registration # 84423)

[**] Ibid. at 140.

- Lease # 82355: **March 14/01**(date of PPR registration # 84449)

- Lease # 82364:**April 2/01**(date of PPR registration # 876631)

- Lease # 82378: **April 2/01**(date of PPR registration # 876631).
  Note that although a financing statement was registered with respect to this lease, describing a security interest in "John Deere Loaders and Excavators", the previous financing statement, describing a security interest in "Heavy Duty John Deere equipment" is broad enough to capture both lease #82364 and 82378. (Ref. s. 44(5) and (6)).

15. Auction Results

9 of the assets were sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. Net amounts obtained (bid amount less LVG buyer's premium) were as follows:

- JD 310SG Backhoe (T0310SG896618) - $76,000.00
- JD 450LC Excavator (FF0450X090600) - $240,000.00
- JD 310SG Backhoe (T0310SG896594) - $75,000.00
- JD 310SG Backhoe (T0310SG897094) - $76,000.00
- JD 160LC Excavator (P00160X041653) - $115,000.00
- JD TC62H Loader (DWTC62H579824) - $142,500.00
- JD 160LC Excavator (P00160X041654) – $110,000.00
- JD 200LC Excavator (FF0200X501803) - $140,000.00
- JD 644H Loader (DW644HX580105) - $160,000.00

Total: $1,134,500.00

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **T D ASSET FINANCE ("TD")**

1. Introduction

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

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

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

2. Summary Final Determination

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

3. Defined Terms

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

"BSA"	-	*Bills of Sale Act,* R.S.N.L. 1990, c. B-3 (rep.)
"CSA"	-	*Conditional Sales Act*, R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"LEMS"	-	Labrador Equipment and Mining Supplies Ltd.
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PMSI"	-	Purchase Money Security Interest
"PPSA" or "Act"	-	*Personal Property Security Act*, S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)

"s/n" - Serial Number

4. The Assets

29 pieces of heavy equipment. TD Claims that 25 of the 29 were sold out of trust. The 4 that were remaining in inventory are indicated by "*"

1. 310E Backhoe Loader	(T0310EX842140)
2. 310E Backhoe Loader	(T0310SE843585)
3. 230LC Excavator	(FF0270X060131)
4. 270LC Excavator	(FF0270X070216)
5. 310E Backhoe Loader	(T0310EX880931)
6. 160LC Excavator	(P00160X041072)
7. 644HLoader	(DW644HX574112)
8. 644H Loader	(DW644HX574161)*
9. 44H 4WD Loader	(DW744HX574668)
10. 450LC Base Excavator	(FF0450X090461)
11. 200LC Excavator	(FF0200X500967)
12. 6100 Forwarder	(993353)
13. Model 1410, 8 wheel forwarder	(17DD0279)
14. 160LC Excavator	(P00160X041475)
15. 160LC Excavator	(P00160X041476)
16. 160LC Excavator	(P00160X041477)
17. 450LC Base Excavator	(FF0450X090545)
18. 310SE Backhoe Loader	(T0310SE891140)
19. 200LC Excavator	(FF0200X501521)
20. 270LC Excavator	(FF0270X070714)
21. 200LC Excavator	(FF0200X501500)*
22. 744H Loader	(DW744HX576952)*
23. 200LC Excavator	(FF0200X501562)
24. 35 Compact Excavator	(FF035ZX230362)
25. 120 Excavator	(P00120X031958)*
26. 310SE Backhoe Loader	(T0310SE891802)
27. 310SE Backhoe Loader	(T0310SE892030)
28. 270 JD Skidsteer	(KV0270A271178)
29. 260 JD Skidsteer	(KV0260A261565)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

TD claims that it holds a perfected security interest in the 29 assets listed above arising from 5 Lease Agreements. TD takes the position that it has satisfied all the requirements to attach and perfect a security interest, including registration of the security interests in the PPR.

The Proof of Claim dated 10 April 2002, and the documents attached thereto (more particularly described below) indicate a total claim of **$4,486,849.80.** This is exclusively a secured claim. This relates to 5 Leases as follows:

- Lease No. 2, dated April 23, 1998 (securing 4 assets, # 1-4 above). Balance outstanding of **125,462.77.**

- Lease No. 3, dated November 11, 1999 (securing 4 assets, #5-8 above). Balance outstanding of **$467,230.81.**

- Lease No. 4 dated January 14, 2000 (securing 3 assets, #9-11 above). Balance outstanding of **$787,560.31.**

- Lease No. 5 dated September 5, 2000 (securing 11 assets #12-22 above). Balance outstanding of **$2,466,754.78.**

- Lease No. 6 dated October 15, 2000 (securing 7 assets, #23-29 above). Balance outstanding of **$639,841.13.**

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

8. Documentation

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

i. PPR search conducted in the name of the debtor on March 21, 2002.

ii. Proof of Claim dated 10 April 2002.

iii. Correspondence dated 18 Sept./00 2000 from John Deere Limited addressing priorities with respect to certain pieces of equipment.

iv. Document entitled "Hickman Equipment (1985) Ltd – Equipment Listing Valuation" (referencing all 5 of the leases).

v. The 5 leases and supporting documentation:

a. **Lease # 2** between HEL as Supplier, HEL and LEMS as Lessees and co-Lessee and Cyber Lease Corporation as Lessor.

- Copy of lease
- Delivery and Acceptance Certificate dated April 21, 1998.
- Letter of Undertaking dated 21 April 1998.
- Letter of Acknowledgement dated April 23, 1998.
- Letter of Acknowledgement dated April 23, 1998.
- Bill of Sale dated April 23, 1998.
- Assignment of Lease or Security Agreement dated April 23, 1998.
- Invoice from HEL to Cyber Lease Corporation dated April 17,1998 for the four pieces of equipment.
- Letter of Direction for payment from Cyber Lease Corporation to T D Asset Finance Corp.
- Copy of a cheque in the amount of $31,624.46 from TD to Cyberlease.
- Copy of a wire transfer from TD to HEL dated April 29, 1998 in the amount of $682,161.32.
- Certificates of Incumbency dated April 21, 1998.
- Correspondence dated April 29, 1998 between T D Asset Finance and Royal Bank of Canada setting out their relative priorities with respect to the assets in Schedule "A" (Schedule "A" not attached).
- Correspondence between John Deere Limited and Cyber Lease dated 12 October 2000 setting out their relative priorities with respect to the four assets.

- Invoice dated April 6, 1998 to Whitby Construction Ltd. for the sale of the 270LC Excavator (FF0270X0 70216). Trade in was a used CAT El20B Excavator (70F01664).
- Invoice dated July 17, 1998 to Municipal Recyclers Ltd. for the sale of a John Deere 230LC Excavator (FF0270X0 60131). Trade in was a used CAT 225 Excavator (N1279).
- Internal computer print out for the sale of the 310SE Backhoe (T0310SE843585) to Concord Paving Limited.
- Invoice dated December 20, 1999 for the sale of the J D 310E Backhoe (T0310EX842140).

b. **Lease # 3** between HEL as Supplier, HEL and LEMS as Lessees and Cyber Lease Corporation as Lessor, dated November 11, 1999.

- Copy of lease
- Delivery and Acceptance Certificate dated 10 November 1999.
- Letter of Undertaking dated 10 November 1999.
- Certificate of Encumbancy dated 10 November 1999.
- Copy of a wire transfer dated November 16, 1999 from TD to HEL in the amount of $784,221.20.
- Copy of a cheque dated November 15, 1999 from TD to Cyber lease in the amount of $25,237.14.
- "Direction to Pay" dated November 11, 1999 from Cyber lease to TD authorizing transfer to HEL of $784,289.72.
- Assignment of Lease or Security Agreement dated 11 November 1999.
- Bill of Sale dated 11 November 1999.
- Copy of an Old Registry search indicating the registration of Lease #3.
- Invoice dated 11 November 1999 from HEL to Cyber Lease Corporation for the sale of the four assets.
- Notice of Assignment and Acknowledgement dated 10 November 1999.
- Correspondence dated January 20,2000 between John Deere Limited and T D Asset Finance setting out priorities with respect to the assets.
- Correspondence dated 12 October 2000 between Cyber Lease and John Deere Limited setting out priorities with respect to the assets.
- Invoice dated January 28, 2000 to Wilson Contracting Ltd. for the sale of the John Deere 160LC Excavator (P00160X041072).
  Invoice dated December 20, 1999 to J. Eales Equipment Rentals Ltd. for the sale of 5 pieces of equipment: 4- JD 310SE Backhoes (T0310SE878325; T0310SE830455; T0310EX880931; T0310EX878939) and 1 JD 200LC Excavator (FF0200X500458). Trade-ins were Used JCB 214 Backhoe (SLP214TCTE0441631),

Used Komatsu Excavator (36247), Bombardier BM50 Sidewalk Plow (901890020); Used Snow Blower (43201); JCB214 Backhoe (SLP214TCTE0441654); Used J D 310D Backhoe (T0310DG822527) and Used Case W20 Loader (9159029).

c. **Lease # 4** between HEL as Supplier, HEL and LEMS as Lessees and Cyber Lease Corporation as Lessor dated January 14, 2000.

- Copy of lease
- Delivery and Acceptance Certificate dated 14 January 2000.
- Invoice from HEL to Cyber Lease Corporation dated January 13, 2000.
- Letter of Undertaking dated 14 January 2000.
- Copy of a wire transfer dated January 17, 2000 from TD to HEL in the amount of $1,171.631.03.
- Direction to pay dated January 13, 2000 from Cyber lease to TD authorizing transfer to HEL in the amount of $1,171,631.03.
- Notice of Assignment dated 14 January 2000.
- Assignment of Lease or Security Agreement dated 14 January 2000.
- Bill of Sale dated January 2000.
- Correspondence dated January 20, 2000 between John Deere Limited and T D Asset Finance setting out relative priorities with respect to the three assets.
- Correspondence dated January 26, 2000 from John Deere Credit to Cyber Lease releasing its interest in the assets.
- Certificate of Encumbancy dated 14 January 2000.
- Correspondence between John Deere Limited and Cyber Lease dated 12 October 2000 setting out their priorities with respect to the three assets.
- Invoice dated December 24, 1999 to Premier Construction for the sale of a JD 744H 4WD Loader (DW744HX574668); a JD 644G 4WD Loader (DW644HX573019) and a JD 644H Wheel Loader (DW644HX574112)
  Invoice dated April 25, 2000 to Municipal Construction for the sale of 2 JD 450LC Excavators (FF0450X090460 and FF0450X090461), and a JD 850C Crawler Dozer (T0850CX879791)
- Invoice dated March 28, 2000 to New Venture Logging Ltd. for the sale of a JD 200LC Excavator (FF0200X500967).

d. **Lease # 5** dated September 5, 2000 between HEL as Supplier and Lessee and Cyber Lease Corporation as the Lessor.

- Copy of Lease
- Notice of Assignment and Acknowledgement dated 5 Sept./00.

- Pre-authorized Payment Authorization for payment directly into the Bank account.
- Delivery and Acceptance Certificate.
- Certificate of Encumbancy.
- Copy of a cheque from TD to HEL dated September 9, 2000 in the amount of $2,952,806.91.
- "Direction to pay" in the amount of $2,952,806.91 from Cyber lease to TD authorizing payment to HEL.
- Letter of Undertaking.
- Notice of Assignment and Acknowledgement.
- Assignment of Lease or Security Agreement dated 5 September 2000.
- Bill of Sale dated 5 September 2000.
- Correspondence between John Deere Credit Inc. and Cyber Lease dated 31 August 2000 wherein John Deere Credit confirms it has no interest in the 10 pieces of equipment.
- Delivery and Acceptance Certificate dated 5 September 2000.
- Letter of Undertaking dated 5 September 2000.
- Invoice dated August 31, 2000 from HEL and Cyber Lease Corporation for the sale of the 11 pieces of equipment.
- Correspondence dated 18 September 2000 from John Deere Limited to Cyber Lease setting out priorities with respect to the 9 pieces of equipment.
- Sales Contract dated November 24, 1998 to Elliott Brothers Limited for the sale of a J D 160 Excavator (P00160X040561) and a J D 160 LC Excavator (P00160X040477).
- Invoice dated December 22, 2000 to Burton's Cove Logging and Lumber Limited for a Timberjack 610 Forwarder (993353). Trade in was a Timberjack 230A Forwarder (CT7296).
- Invoice dated September 5, 2000 to Gillam Logging Limited for the sale of a Timberjack 1410 Forwarder (17DD0279). Trade in was a Timberjack 1010 Forwarder (106032).
- Invoice to Marine Contractors dated July 26, 2000 for the sale of four pieces of equipment: JD 544H Wheel Loader (DW544HX577412), JD 160 Excavator (P00160X041475), JD 270 Excavator (FF0270X070607), J D 330LC Excavator (FF0330X080850). Trade ins were JD 590D Excavator (FF590DX002664), JD 792 D Excavator (FF792DX010033), JD 892E Excavator (FF892EX011705)
- Invoice to United Rentals (Mt. Pearl) of Canada, Inc. dated Nov. 21, 2001 for the sale of a J D 160LC Excavator (P00160X041476).
- Invoice dated October 11, 2000 to Greening's Poultry Farm for the sale of a J D 310SE Backhoe (T0310SE891140). Trade in was a used CAT 416 Backhoe (5PC05592).

- Invoice to Newfound Construction Ltd. dated December 13, 2000 for a J D 200LC Excavator (FF0200X501521). Trade in was a Hitachi EX200 Excavator (14547157).
- Invoice dated September 8, 2000 to Arthur Fowlow Ltd. for the sale of a J D 270LC Excavator (FF0270X070714). Trade ins were a J D 792D Excavator (FF792DX010221) and a Timberjack 230 Forwarder (AA5196).

e. **Lease # 6** dated October 15, 2000 between HEL as Supplier and Lessee and Cyber Lease Corporation as Lessor.

- Copy of Lease
- Letter of Undertaking dated 15 October 2000.
- Delivery and Acceptance Certificate dated 15 October 2000.
- Copy of a cheque dated October 16, 2000 from TD to HEL in the amount of $21,802.66.
- Wire Transfer dated October 20, 2000 from TD to HEL in the amount of $726,812.22.
- Direction to pay dated October 13, 2000 from Cyber lease to TD authorizing transfer to HEL of $726,812.22.
- Invoice from HEL to Cyber Lease dated October 12, 2000 for the sale of the 7 pieces of equipment.
- Notice of Assignment and Acknowledgement dated 15 Oct. 2000.
- Assignment of Lease or Security Agreement dated 15 October 2000.
- Bill of Sale dated 15 October 2000.
- Correspondence dated October 12, 2000 from John Deere Credit releasing its interest in the 7 pieces of equipment.
- Invoice dated October 31, 2000 to Shi-Lo Enterprises Ltd. for the sale of a J D 35 Compact Excavator (FF035ZX230362) and a 250 Skidsteer (KV0250A252451). Trade in was a J D 550G Dozer (T0550GH832884).
- Invoice dated October 24, 2000 to Jim Butler Limited for the sale of a J D 310SE Backhoe (T0310SE892030). Trade in was a JCB 1400B Backhoe (14BT4069/348496/7).
- Invoice dated December 14, 2000 to James Alan Smith o/a Mountain Brook Landscaping for the sale of a J D 270 Skidsteer (KV0270A271178).
- Invoice to United Rentals (Goose Bay) of Canada dated June 21, 2001 for the sale of a J D 260 Skidsteer (KV0260A261565).

vi. Various invoices for pieces of equipment not included in the Leases (likely trade ins).

vii. Correspondence dated August 6, 2002 and October 25, 2002 from counsel for TD setting out its position re: sale/leaseback transactions.

9. Classification of the Assets

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

10. Application of the PPSA

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

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13,2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest relates and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-ppsa registration for purposes of priority. There are a number of conditions however. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for 2 of the 5 TD Leases: Lease # 2 dated April 23, 1998 and Lease # 3 dated November 11, 1999, the other 3 took place subsequent to the coming into force of the PPSA in the Province.

Lease #2

Through a search of the Old Registry, the Trustee has confirmed that Lease #2 was registered at the Old Registry on May 22, 1998 (Reg # 695690). Nevertheless, the financing statement registered with respect to this lease (registration #1572435 described below) was not registered until January 29, 2002 and was therefore beyond the deadline of December 13, 2001 for transitioning. As such, it is the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection

must be the date of registration in the PPR and not the date of registration in the Old Registry.

Lease #3

Through a search of the Old Registry, the Trustee has confirmed that Lease #2 was registered at the Old Registry on December 6, 1999 (Reg # 747996). Nevertheless, even if it were registered in the Old Registry, the financing statement registered with respect to this lease (registration #1572417 described below) was not registered until January 29, 2002 and was therefore beyond the deadline of December 13, 2001 for transitioning. As such, it is the opinion of the Trustee that while this security has been properly registered in the PPR, the relevant date for purposes of perfection must be the date of registration in the PPR and not the date of registration in the Old Registry.

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

Is there attachment?

(i) Value given?

Lease #2

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

YES. By an invoice dated April 17/98, HEL sold the 4 assets to Cyberlease for $637533.95. Then on April 23/98, HEL and LEMS leased the 4 assets back from Cyberlease. We have been provided with copies of cheques, wire transfers, directions for payment and invoices (as list above) to provide sufficient evidence of value for the purposes of attachment.

Lease #3

YES. By an invoice dated November 09/99, HEL sold the 4 assets to Cyberlease for $681,931.47. Then on November 11/99, HEL and LEMS leased the 4 assets back from Cyberlease. We have been provided with copies of cheques, wire transfers, directions for payment and invoices (as list above) to provide sufficient evidence of value for the purposes of attachment.

Lease #4

YES. By an invoice dated January 13/00, HEL sold the 3 assets to Cyberlease for $1,171,630.90. Then on January 14/00, HEL and LEMS leased the 3 assets back from Cyberlease. We have been provided with copies of cheques, wire transfers, directions for payment and invoices (as list above) to provide sufficient evidence of value for the purposes of attachment.

Lease #5

YES. By an invoice dated August 31, 2000, HEL sold the 11 assets to Cyberlease for $2,567,658.17. Then on September 5, 2000, HEL leased the 11 assets back from Cyberlease. We have been provided with copies of cheques, wire transfers, directions for payment and invoices (as list above) to provide sufficient evidence of value for the purposes of attachment.

Lease #6

YES. By an invoice dated October 12, 2000, HEL sold the 7 assets to Cyberlease for $632,010.63. Then on October 15, 2000, HEL leased the 7 assets back from Cyberlease. We have been provided with a Confirmation of Delivery of the assets to HEL by Cyberlease dated October 15, 2000. Also on October 15, 2000, the 7 assets were sold by Cyberlease to TD for $632,010.63 and the bill of sale provided confirms receipt of this amount. We have been provided with copies of cheques, wire transfers, directions for payment and invoices (as list above) to provide sufficient evidence of value for the purposes of attachment.

(ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2]. HEL held possession of the assets. Furthermore, s. 13 (3) of the Act confirms that a lessee under a lease for a term of more than one year has rights in the goods for purposes of attachment when s/he obtains possession of them under the lease.

[2] Ibid. at 84.

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

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

YES The evidentiary requirements of s. 11, required for attachment, are established by the 5 leases. Specifically, in accordance with s.11 (1) (b), the leases are in writing, they have been signed by HEL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?

a. Lease #90-0946046-002

Yes.

Registration #1572435 dated January 29, 2002 is an assignment of the proceeds of Lease #090-0946046-002 from Cyber Lease Corporation to T D Asset Finance Corp.

Registration #1572391 dated January 29, 2002 contains the following description:

1 310E Backhoe Loader Unit N1258 s/n T0310SE843585
1 270LC Excavator Unit N1275R s/n FF0270X070216
1 230LC Excavator Unit N1162R s/n FF0230X060131
1 310E Backhoe Loader Unit N1239 s/n T0310EX842140
As per lease agreement no. 090-0946046-002, as amended between Hickman Equipment (1985) Limited and Cyber Lease Corporation and all equipment subject thereto, including all additions, substitutions, and replacements and amounts owing thereunder.

Serial Numbered Collateral
Motor Vehicle – 310E Backhoe Loader - T0310EX842140
Motor Vehicle - 230LC Excavator - FF0230X060131
Motor Vehicle – 270LC Excavator - FF0270X070216
Motor Vehicle – 320E Backhoe Loader - T0310SE843585

b. Lease #90-0946-046-003

Yes.

Registration #1572426 dated January 29, 2002 is an assignment of proceeds of lease #090-0946046-003 from Cyber Lease Corporation to T D Asset Finance Corp.

Registration #1572417 dated January 29, 2002 contains the following description:

1 310E Backhoe Loader, Unit N1946 s/n T0310EX880931
1 160LC Excavator, Unit N1934 s/n P00160X041072
1 644H 4WD Loader, Unit N1950 s/n DW644HX 574161
1 644H 4WD Loader, Unit N1949 s/n DW644HX574112

As per lease agreement no. 090-0946046-003, as amended between Hickman Equipment (1985) Limited and Cyber Lease Corporation and all equipment subject thereto, including all additions, substitutions and replacements and amount owing thereunder.

Serial Numbered Collateral
Motor Vehicle – 644H 4WD Loader, s/n DW644HX574112
Motor Vehicle – 644H 4WD Loader, s/n DW644HX574161
Motor Vehicle – 160LC Excavator, s/n P00160X041072
Motor Vehicle – 310E Backhoe Loader, s/n T0310EX880931

c. Lease #90-0946046-004

Yes.

Registration #73805 dated January 26, 2000 contains the following description:
1 744H 4WD Loader, s/n DW744HX574666, ENG RG6125A010715
1 450LC Base Excavator, s/n FF0450X090461, ENG RG6101A509271
1 200LC Excavator, s/n FF0200X500967m ENG T06068
1 744H 4WD Loader, s/n DW744HX574668, ENG RG6125A010715
1 450LC Base Excavator, s/n FF0450X090461, ENG RG6101A509271
1 2000LC Excavator, s/n T06068
Also: all proceeds of lease #090-0946046-004 (also referred to as 90-0946046-4).

Serial Numbered Collateral
Motor Vehicle – 744H 4WD Loader, s/n DW744HX574668
Motor Vehicle – 450LC Base Excavator, s/n FF0450X090461
Motor Vehicle – 200LC Excavator, s/n FF0200X500967

Change of secured party pursuant to an assignment of lease or security agreement made between the secured parties, dated January 14, 2000.

Registration #58671 dated 18 January 2000 contains the following description:
1 744H 4WD Loader s/n DW744HX574668, ENG RG6125A010715
1 450 LC Base Excavator, s/n FF0450X090461, ENG RG6101A509271
1 200LC Excavator, s/n FF0200X500967, ENG T06068
as per Lease Agreement no. 090-0946-046-004, as amended between Hickman Equipment (1985) Limited/ Labrador Equipment & Mining Supplies Ltd. and T D Asset Finance Corp. and all equipment subject thereto including all additions, substitutions, and replacements and amounts owing thereunder.

d. Lease #90-0946046-5

Yes.

Registration #517565 dated September 1, 2000 contains the following description:

Proceeds of lease no. 90-0946046-5:
Motor Vehicle – 6100 Forwarder 16' deck w/Serco loader s/n 993353
Motor Vehicle – Model 1410, 8 wheel Forwarder, s/n 17DD0279
Motor Vehicle- 160LC Excavator, s/n P001060X041475
Motor Vehicle – 160LC Excavator, s/n P00160X041476
Motor Vehicle – 160LC Excavator, s/n P00160X041477
Motor Vehicle – 450LC Excavator, s/n FF0450X090545
Motor Vehicle – 310SE Backhoe Loader, s/n T0310SE891140
Motor Vehicle - 200LC Excavator, s/n FF0200X501521
Motor Vehicle – 270LC Excavator, s/n FF0270X070714
Motor Vehicle – 200LC Excavator, s/n FF0200X501500
Motor Vehicle – 744H Loader, s/n DW744HX576952

e. **Lease #90-0946046-6**

Yes.

Registration #598847 dated 17 October 2000 is an assignment of the proceeds of Lease No. 090-0946-046-006 from Cyber Lease Corporation to T D Asset Finance Corp.

Registration #596635 dated 16 October 2000 is the proceeds of Lease No. 90-0946-046-6.

Registration #598847 dated October 17, 2000 contains the following description:

1 200LC Excavator Unit C000873 s/n FF0200X501562
1 Base 35 Compact Excavator Unit C000867 s/n FF035ZX230362
1 120 Excavator Unit C000884 s/n P00120X031958
1 310SE Backhoe Loader Unit C00894 s/n T0310SE892030
1 270 JD Skidsteer Unit C000914 s/n KV0270A271178
1 260 JD SKidsteer Unit C000913 s/n KV0260A261565 as per lease agreement no. 90-0946-046-006, as amended between Hickman Equipment (1985) Limited and Cyber Lease Corporation and all equipment subject thereto, including all additions, substitutions and replacements and amount owing thereunder.

Serial Number Collateral
Motor Vehicle – 200LC Excavator s/n FF0200X501562
Motor Vehicle – Base 35 Compact Excavator s/n FF035ZX230362
Motor Vehicle – 120 Excavator s/n P00120X031958
Motor Vehicle – 310SE Backhoe Loader s/n T0310SE891802
Motor Vehicle – JD Skidseer s/n KV0270A271178
Motor Vehicle – 260 JD Skidsteer s/n KV0260A261565

Change of secured party pursuant to an assignment of lease or security agreement made between the secured parties, dated October 15, 2000.

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

13. Proceeds

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

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

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

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

[3] Ibid. at p.140.

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

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

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

14. Additional Comments on Priorities

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

- The documents indicate that in all 5 leases the assets secured were supplied by HEL and then leased back to HEL. Section 2(hh) of the PPSA specifically excludes "a transaction of sale by and lease back to the seller" from being a PMSI. Note that TD opposes this position and maintains that the leases are entitled to pmsi priority. TD takes the position that the leases were not in substance sale and leaseback agreements as the financing provided by Cyber Lease (later assigned to TD) was used to enhance HEL's asset pool by the acquisition of new collateral.

- If these leases were not sale/leaseback type transactions, there are instances whereby an inventory financier such as TD may be entitled to claim a super-priority status (ref: s. 35(2)). TD has not provided evidentiary support for such an entitlement.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of TD's interest in the assets are:
    - **Lease # 90-0946046-002**: January 29/2002
    - **Lease # 90-0946-046-003:** January 29/2002
    - **Lease # 90-0946-046-004:** January 18/2000.
    - **Lease # 90-0946-046-005:** September 1/2000
    - **Lease # 90-0946-046-006:** October 17/2000

[4] Ibid. at 140.

15. Auction Results

1. **744H Loader (DW744HX576952**) - sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium) was: **$192,500.00.**

2. 120 Excavator (P00120X031958) - sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium) was: **$107,000**

3. **200LC Excavator (FF0200X501500)** – Sold prior to the auction, but after May 14,2002. Net amount for Receivership was **$91, 834.00**

4. **644H Loader (DW644HX574161) -** Sold prior to the auction, but after May 14,2002. Net amount for Receivership was **$114,791.00**

Total: $399,125.00

SCHEDULE "A"
FINAL DETERMINATION

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

Secured Party: **TRAMAC EQUIPMENT LIMITED ("Tramac")**

1. Introduction

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

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

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

2. Summary Final Determination

The Claim is allowed as a valid secured claim to the asset. The Trustee claims no interest in the asset that is the subject of the claim.

3. Defined Terms

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

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

4. Asset

Hydraulic Drill Model CPA 225 (S/N 129379) (the “Drill”)

5. Assumptions

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

i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;

ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;

iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;

iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

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

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

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

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

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

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

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

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

7. Overview of Claim

Tramac is claiming to have a valid security interest over the Drill. Specifically, it is claiming to have pmsi super-priority, arising from a consignment agreement for the Drill entered into with HEL in May of 2001.

The Proof of Claim dated 9 April 2002 indicates an unsecured claim in the amount of $22,487.49 and a secured claim (Property) in the amount of **$149,750.00**.

Tramac has not made a claim on the basis of proceeds/tracing.

8. Documentation

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

- PPR search conducted in the name of the debtor on March 21, 2002.
- Interlocutory Application (Inter Partes) of Tramac dated 5 March 2002 seeking the return of the Drill. (This application was subsequently withdrawn by a Notice of Withdrawal dated 17 June 2002).
- A Proof of Claim (Property) and Affidavit (s.81(4) of the BIA) and a Proof of Claim (Form 33) dated 9 April 2002. Attached to it are the following documents:

    - Purchase Order (61503) dated March 26, 2001 from HEL to Tramac for the consignment of the Drill, to be installed on a 690E Excavator, no charge.

    - Purchase Order (61503) noting a rental rate of $12,000 per month and a rental start date of May 22, 2001.

    - Fax cover sheet from Tramac to Edward Head of HEL dated 30 April 2001 setting out the terms of consignment of the Drill.

    - Fax cover sheet from Tramac to Edward Head of HEL dated 15 May 2001 setting out the particulars of the consignment of the Drill.

    - An invoice dated October 22, 2001 from Tramac to HEL for the Drill at a price of $12,000.

    - The PPR Verification Statement (Registration #1560224).

    - Statement of Account dated February 11, 2002 from Tramac to HEL indicating a balance owing of $22,487.49.

9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. In this regard, it is our opinion that as a Drill was held by HEL for sale or lease. As such, it forms part of the inventory of HEL (s. 2(x) of the PPSA).

10. Application of the PPSA

The above noted documentation and the affidavit of Mr. Serge Pelletier of Tramac, filed in support of Tramac's interlocutory application outline the details of the supply of the Drill to HEL on a consignment basis. We have been provided with a purchase order dated 26 March 2001 for the acquisition, on a consignment basis, of the Drill by HEL from Tramac.

The terms of the consignment agreement are stated to be a rental rate of $12,000.00/month, starting 22 May 2001. The total cost of the Drill is set out in correspondence dated 30 April 2001 and 15 May 2001 from Tramac to HEL.
By operation of s. 2(h), the PPSA applies to commercial consignments such as this one.

11. PRE-PPSA/ Transitioning Issues

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

12. Perfection

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

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

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.[1]

2. The debtor must have rights in the collateral; and

3. There must be a security agreement that meets the requirements of s. 11.

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

<u>Is there attachment</u>?
(i) Value given?
Yes. The fact that the Drill was provided to HEL on a consignment basis is sufficient evidence of value given by Tramac.

(ii) Rights in the collateral?
Yes. Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13[2]. HEL held

[1] C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.
[2] Ibid. at 84.

possession of the drill on a consignment basis. Furthermore, s. 13(3) of the Act confirms that a consignee under a commercial consignment has rights in the goods when s/he obtains possession under the consignment.

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

(iii) Have the evidentiary requirements of s. 11 been met?
Yes. The evidentiary requirements of s. 11, required for attachment, are established by the documentation described above. Specifically, there is a purchase order that sets out the terms of the consignment arrangement that has been duly executed by Edward Head on behalf of HEL.

Is there a perfection step?
YES.
Registration # 1560224 dated January 21/02contains the following information

"*Hydraulic Drill, Model CPA 225, Serial Number 129379*".

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

13. Proceeds

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

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

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

must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.[3]

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

(a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;

(b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or

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

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within 15 days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.[4]

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

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

14. Additional Comments on Priorities

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

- There are instances whereby an inventory financier such as Tramac may be entitled to claim a super-priority status (ref: s. 35(2)). Tramac has not presented evidentiary support for such an entitlement.

[3] Ibid. at 140.
[4] Ibid. at 140.

- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of Tramac's interest in the drill is the date of registration of its financing statement in the PPR: **21 January 2002**.

15. Auction Results

The Drill was sold at the Receiver's auction on July 12, 2002, in Halifax, Nova Scotia. The Net amount obtained (bid amount less LVG buyer's premium) was **$62,000**.