

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

**DISTINCT INFRASTRUCTURE GROUP INC., DISTINCT INFRASTRUCTURE
GROUP WEST INC., DISTINCTTECH INC., IVAC SERVICES INC., IVAC SERVICES
WEST INC., and CROWN UTILITIES LTD.**

Respondents

RESPONDING FACTUM OF THE APPLICANT

December 11, 2019

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PART I - OVERVIEW

1. The moving parties, Chris Aron Wood and Mega Diesel Holdings Ltd. (together, the “**Moving Parties**”), seek an Order that the stay of proceedings (the “**Stay**”) granted pursuant to the Order of the Superior Court of Justice (Commercial List) dated March 11, 2019 (the “**Receivership Order**”) be lifted to allow the Moving Parties to continue the appeal of the decision of Master Schlosser dated March 11, 2019 (the “**Schlosser Decision**”) granted by the Court of Queen’s Bench of Alberta in Edmonton (the “**Alberta Court**”).¹
2. Royal Bank of Canada (the “**Bank**”), the Applicant in the within proceedings, submits that the Moving Parties’ request to lift the Stay should not be granted. The Moving Parties

¹ Application of Distinct Infrastructure Group Inc. and iVac Service West Inc., Court File No. 1703-19321 in the Alberta Court (the “**Alberta Court Application**”).

suggest that the issue for determination, specifically, whether the proceeds of sale of certain equipment owned by Distinct Infrastructure Group Inc. (“**Distinct**”) and iVac Services West Inc. (“**iVac**”) was properly paid to the Bank rather than the Moving Parties, is a priority dispute. However, there is no issue of priority to be determined as the Bank’s senior secured interest against the subject vehicles was not waived by the Bank and the interest of the Moving Parties is clearly subordinate to the Bank’s interest.

PART II - FACTS

3. Pursuant to the Receivership Order, Deloitte Restructuring Inc. was appointed as Receiver of the assets, undertakings and properties of Distinct and certain of its subsidiaries (collectively, “**DIG**”), including iVac.
4. Pursuant to a credit facility agreement most recently dated March 23, 2017 (as amended, the “**Credit Agreement**”), the Bank made credit facilities available to Distinct. As at the close of business on February 21, 2019, Distinct was indebted to the Bank in the amounts of \$53,373,111.88 and USD\$8,099.16, together with accruing interest, costs and fees, including legal fees and disbursements incurred by the Bank.²
5. Pursuant to the Credit Agreement, iVac guaranteed the obligations owing by Distinct to the Bank pursuant to an unlimited guarantee dated March 23, 2017.³ Further, pursuant to the Credit Agreement and as security for its obligations to the Bank, each of Distinct and iVac granted to the Bank a security interest over all of their real and personal property pursuant to a General Security Agreement dated March 23, 2017 (the “**Distinct GSA**” and “**iVac GSA**”, respectively”).⁴

² Affidavit of Gary Ivany sworn February 28, 2019 (the “**Ivany Affidavit**”) in connection with the Bank’s application to appoint the Receiver, returnable on March 11, 2019, at para. 20, Motion Record of the Applicant dated February 28, 2019, Tab 2.

³ Ivany Affidavit, at para. 25.

⁴ Ivany Affidavit, at para. 22.

6. The Bank registered its security against Distinct (an entity incorporated in the Province of Ontario), including with respect to the Distinct GSA, under the *Personal Property Security Act* (Ontario)⁵ on September 23, 2016 against all classes of collateral except “consumer goods”,⁶ and under the *Personal Property Security Act* (Alberta)⁷ (the “**Alberta PPSA**”) on September 23, 2016.⁸
7. The Bank registered its security interest against iVac (an entity incorporated in the Province of Alberta), including with respect to the iVac GSA, under the Alberta PPSA on September 23, 2016.⁹
8. The actions and conduct of DIG leading to the Bank’s application to appoint the Receiver, including the significant misstatements of DIG’s borrowing base calculations, work in progress amounts and accounts receivable in its reporting to the Bank, are set out in detail in the Ivany Affidavit. The Bank will suffer a significant shortfall in the obligations owing to the Bank by DIG.¹⁰
9. As stated in the Affidavit of Chris Aron Wood sworn October 15, 2019 in connection with the motion of the Moving Parties’, the Moving Parties obtained consent judgments against Distinct and iVac as follows: (i) on July 31, 2017 in the amount of \$422,398.81, plus costs;¹¹ and (ii) on September 13, 2018 in the amount of \$149,922, plus costs.¹² The Moving Parties’ filed Writs of Enforcement with the Clerk of the Alberta Court on

⁵ *Personal Property Security Act*, R.S.O. 1990, c P. 10.

⁶ Ivany Affidavit, at para. 53.

⁷ *Personal Property Security Act*, R.S.A. 2000, C. P-7 (“**Alberta PPSA**”).

⁸ Ivany Affidavit at para. 56.

⁹ Ivany Affidavit at para. 82.

¹⁰ Third Report of Deloitte Restructuring Inc. dated December 6, 2019 (the “**Third Report**”) at para. 13.

¹¹ Affidavit of Chris Aron Wood sworn October 15, 2019 at para. 4, Motion Record of the Moving Parties dated November 5, 2019, Tab 2 (“**Wood Affidavit**”).

¹² Wood Affidavit at para. 8.

September 1, 2017 and October 10, 2018 (together, the “**Writs of Enforcement**”) in connection with the above mentioned judgements.¹³

10. The Writs of Enforcement were subsequently registered against Distinct and iVac under the Alberta PPSA on September 1, 2017 and October 10, 2018, against 17 serial number goods owned by Distinct and/or iVac.¹⁴
11. On or about December 2018, Distinct informed the Bank that it and iVac wished to place certain of their equipment for sale with Ritchie Bros. Auctioneers (Canada) Ltd. (“**Ritchie Bros.**”) in Edmonton, Alberta (the “**Auction**”), which required the Bank’s consent as it would constitute a sale out of the ordinary course of business pursuant to the terms of the Credit Agreement. The Bank was prepared to provide its consent on the condition that the net proceeds from the Auction be applied in reduction of the obligations owing by Distinct to the Bank. The Bank and Distinct agreed that the net proceeds from the sale of the Auction would be deposited into accounts maintained by DIG with the Bank, which would initially reduce the indebtedness owing to the Bank under the revolving facility and then be applied by the Bank in permanent reduction of the term loan.¹⁵
12. The Auction included the sale of four vehicles owned by either Distinct and/or iVac, in which the Writs of Enforcement had been registered against (collectively, the “**Subject Vehicles**”).¹⁶ The Subject Vehicles constitute collateral subject to the Distinct GSA and iVac GSA, including all proceeds therefrom.¹⁷ The Bank’s PPSA registrations in respect of the Distinct GSA and the iVac GSA were registered prior in time to the Writs of Enforcement in respect of the unsecured consent judgments.

¹³ Wood Affidavit at paras. 6 and 9.

¹⁴ Wood Affidavit at paras. 7, 10 and 11.

¹⁵ Affidavit of Gary Ivany sworn March 1, 2019, attached as Exhibit “A” to the Affidavit of Roxana Manea sworn December 5, 2019 (the “**March Ivany Affidavit**”) at paras. 7-9.

¹⁶ Wood Affidavit at para. 19.

¹⁷ March Ivany Affidavit, at para. 6.

13. In connection with the agreed payment arrangement between the Bank and Distinct, Ritchie Bros, requested that the Bank sign a secured creditor confirmation letter (the “**Security Interest Form**”), on Ritchie Bros.’ standard form, indicating that the Bank has a valid security interest in the equipment sold in the Auction, but that Ritchie Bros. will not pay the sale proceeds to the Bank directly.
14. Therefore, the Bank selected the following option on the Security Interest Form: “We have no interest in the Equipment nor the proceeds from the sale thereof, or, alternatively, we have a valid interest in the Equipment but do not wish to receive the proceeds from the sale thereof” [Emphasis added].¹⁸
15. The option selected by the Bank in the Security Interest Form was disjunctive and the Bank intended at all times for the second part of the statement to apply – namely that the Bank has a valid interest in the Subject Vehicles, but did not want to directly receive the sale proceeds thereof (as such proceeds were to be paid to DIG’s accounts with the Bank and then applied to permanently reduce the indebtedness owing to the Bank), reflecting the agreed upon payment arrangement between the Bank and its borrower, Distinct.¹⁹
16. The Security Interest Form did not contain any release of the Bank’s security interest in the proceeds of sale of the equipment.²⁰ The Security Interest Form did not purport to subordinate in any respect, whether explicitly or implicitly, the Bank’s security interest in the proceeds of sale of the equipment.
17. On January 23, 2019, Mega Diesel Excavating Ltd. (which subsequently became iVac as a result of amalgamation) and Distinct commenced the Alberta Court Application against the Moving Parties requiring the Moving Parties to discharge the Writs of Enforcement registered against the Subject Vehicles sold in the Auction and seeking an order directing Ritchie Bros. to distribute the sale proceeds in relation to such vehicles to the Bank.

¹⁸ A copy of the Security Interest Form is attached as Exhibit “G” to the March Ivany Affidavit.

¹⁹ March Ivany Affidavit at paras. 12-13.

²⁰ Ivany Affidavit at para. 47.

18. The Moving Parties attended the motion to object and request that the sale proceeds be distributed to them, rather than the Bank. The Moving Parties objected on the basis that, as a result of the Security Interest Form, the Bank had waived its security interest in the Subject Vehicles and the proceeds of sale of the Subject Vehicles should be paid to the Moving Parties instead of the Bank.
19. Since the Bank was not a party to the Application and was not in attendance, Master Smart adjourned the Application in order to provide the Bank an opportunity to respond to the Application.²¹
20. On March 11, 2019, the same date the Receivership Order was granted by the Ontario Court, on the return of Distinct's application, the Schlosser Decision was granted. The decision ordered the Moving Parties to discharge the Writs of Enforcement and directed Ritchie Bros. to pay the monies from the sale of the Subject Vehicles, which was in the amount of \$589,447.25, to the Bank to be applied to the Bank's secured indebtedness.²²
21. Accordingly, shortly after the date of the Schlosser Decision and the date of the Receivership Order, Ritchie Bros. paid the proceeds of sale of the Subject Vehicles to the Bank.
22. On March 13, 2019, the Moving Parties filed a Notice of Appeal of the Schlosser Decision to be heard before a judge in the Alberta Court (the "**Moving Parties' Appeal**"),²³ despite the fact that the Stay had already come into effect pursuant to the Receivership Order.²⁴ The Receiver advised the Moving Parties that such Notice of Appeal was stayed as a result of the Receivership Order and that the funds had already been paid by Ritchie Bros. to the Bank.

²¹ Ivany Affidavit at paras. 48-49.

²² Wood Affidavit at para. 29.

²³ *Alberta Rules of Court*, Reg. 124/2010, s. 6.14(1).

²⁴ Wood Affidavit at para. 30.

23. The Moving Parties commenced an appeal on the basis that the Bank had waived its security interest pursuant to the Security Interest Form. The Bank did not waive its security interest, nor did it subordinate its security interest and there is no merit to the Moving Parties' Appeal. To permit the appeal to continue would cause the Bank to unnecessarily incur additional costs and fees for the Bank (and the Receiver, which costs are being funded by the Bank), which is already expected to experience a significant shortfall in the indebtedness owing to it by DIG. Given that such Moving Parties' Appeal is without merit, the Bank requests that this Court dismiss the motion by the Moving Parties' to lift the stay of proceedings.

PART III - THE LAW AND ANALYSIS

A. This Court should not lift the Stay

24. The issue before the Court is whether the Stay should be lifted to permit the Moving Parties' to continue their appeal in the Alberta Court. The Stay should not be lifted as the Moving Parties do not meet the test to lift a stay of proceedings within receivership proceedings.

There is no merit to the Moving Parties' Appeal

25. In considering whether to lift a stay of proceedings, the Court may consider the merits of the proposed action where it is relevant to the issue of whether there are sound reasons for lifting the stay.²⁵ As the Court in *Ma* noted, "if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay".²⁶
26. It is apparent that the Moving Parties have little prospect of success in their appeal of the Schlosser Decision.

²⁵ *Ma, Re*, 2001 CarswellOnt 1019 at para. 3 [*"Ma"*], Book of Authorities of the Applicant ("**BOA**"), Tab 1.

²⁶ *Ibid.*

27. The Moving Parties' acknowledge that their registrations under the Alberta PPSA were subsequent in time to that of the Bank's registrations,²⁷ and therefore, are legally subordinated to the Bank. The Moving Parties base their entire dispute on the Security Interest Form completed by the Bank. There is no merit to this argument for the following reasons:
- (a) the Bank did not waive its security interest against the Subject Vehicles, rather, the Bank advised Ritchie Bros. that the proceeds of sale were not to be paid to the Bank pursuant to the arrangements agreed to between DIG and the Bank. Instead, the sale proceeds were to be paid to DIG, which would then be applied to reduce the obligations owing by DIG to the Bank;
 - (b) the Bank's security over Distinct and iVac include the proceeds of sale of the Subject Vehicles as collateral;
 - (c) the Bank was not even aware of any interest asserted by the Moving Parties at the time the Bank completed the Security Interest Form;²⁸
 - (d) the Security Interest Form is not addressed to the Moving Parties, it was not delivered by the Bank to the Moving Parties nor was there any consideration for any such purported result, nor are the Moving Parties entitled to obtain any rights or benefits pursuant to the Security Interest Form to which they are not privy; and
 - (e) the Bank did not explicitly nor implicitly subordinate its security interest to the Moving Parties, and therefore, the Moving Parties cannot rely on the Security Interest Form to claim priority.²⁹
28. Further, the issue has already been determined by the Alberta Court. Master Schlosser determined that "the facts here [do not] support a wavier on the part of RBC to give up its

²⁷ Wood Affidavit at paras. 7, 9 and 14.

²⁸ Ivany March Affidavit at para. 13.

²⁹ Without explicitly or implicitly subordinating a security interest to a third party, that third party cannot rely on the subordination (See *C.I.F. Furniture Ltd., Re*, 2011 ONCA 34, at paras. 43-44 of Appendix "A", as adopted by para. 5, BOA Tab 2).

claims to the proceeds of sale of this machinery”.³⁰ Further, Master Schlosser determined that “the representation that was made to Ritchie Bros., if sufficient to have done that, is not something the writ holder is entitled to rely on”.³¹

29. As a result, the Court should consider the lack of merit of the Moving Parties’ Appeal in its consideration of whether to lift the Stay. Given that there is little prospect of success of such appeal, and the issues have already been determined by the Alberta Court to have no merit, the Court should deny the Moving Parties’ motion to lift the Stay.

Lifting the stay will materially prejudice the Bank

30. In determining whether to lift a stay of proceedings imposed by a receivership order, the Court should consider the totality of the circumstances and the relative prejudice to both sides.³² The Court may also find guidance in the jurisprudence which has developed around requests to lift stays imposed by the *Bankruptcy and Insolvency Act*.³³
31. The Bank would suffer material prejudice if the stay is lifted. Given the substantial shortfall that the Bank will suffer in the obligations owing by DIG to the Bank (which already exceeds \$53 million),³⁴ any additional costs to defend its senior secured position in the Notice of Appeal would cause the Bank to incur additional unnecessary fees and expenses. The Bank would not be reimbursed for such costs, as any cost award that might ultimately be ordered in its favour would not fully compensate the Bank for its losses.
32. The Moving Parties are attempting to obtain a priority arising from unsecured consent judgments that they are not otherwise legally entitled to. Any further attempts to “jump

³⁰ Transcript of the Alberta Court Application, March 11, 2019, attached as Exhibit Q to the Wood Affidavit, at lines 30-31.

³¹ *Ibid* at lines 33-34.

³² *Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community*, 012 ONSC 7319 [“*Peoples*”] at para. 5, BOA Tab 3.

³³ R.S.C. 1985, c. B-3. *Ibid*.

³⁴ Third Report at para. 13.

over” the senior secured lender will be at additional cost and expense of the Bank. Further, the Moving Parties are seeking to do this without considering any other potential secured parties. If the stay were lifted, and in light of the receivership proceedings, the Moving Parties, Bank and the Receiver would be required to notify and serve all secured parties that have subsequent registered interests to determine whether any other party might assert a right to the funds in priority to the Moving Parties. This could lead to exponential costs for the Bank.

33. The Moving Parties will suffer little prejudice if the stay is not lifted. Given that the issue in dispute has already been determined by the Alberta Court, the status quo will be preserved.
34. Further, the Moving Parties failed to file a stay of execution once the Schlosser Decision was granted and accordingly, the funds had already been paid by Ritchie Bros. to the Bank pursuant to the Schlosser Decision and have since been comingled.

PART IV - RELIEF REQUESTED

35. For all of the foregoing reasons, the Applicant requests that the Court dismiss the motion to lift the Stay brought by the Moving Parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2019.

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SCHEDULE “A”**Authorities**

TAB NO.	CASELAW
1	<i>Ma, Re</i> , 2001 CarswellOnt 1019
2	<i>C.I.F. Furniture Ltd., Re</i> , 2011 ONCA 34
3	<i>Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community</i> , 012 ONSC 7319

SCHEDULE “B”

Relevant Statutes

Alberta Rules of Court, Reg. 124/2010, s. 6.14(1).

Appeal from master's judgement or order

6.14(1) If a master makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.

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