

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

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

B E T W E E N:

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

**MOTION RECORD OF THE APPLICANTS,
MEGA DIESEL HOLDINGS LTD. AND CHRIS ARON WOOD
(Returnable December 17, 2019)**

November 5, 2019

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SAVIN & COLRAINE LLP**

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AND TO: iVAC SERVICES WEST INC.
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AND TO: CROWN UTILITIES LTD.
242 Hargrave Street, Suite 1700
Winnipeg, Manitoba
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Debtor

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SUPERIOR COURT OF JUSTICE
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IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

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TAB 1

Court File No. CV-19-00615270-00CL

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

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

B E T W E E N:

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

**NOTICE OF MOTION
(Returnable December 17, 2019)**

MEGA DIESEL HOLDINGS LTD. and CHRIS ARON WOOD (the “Moving Parties”), will make a Motion to a Judge presiding over the Commercial List on **Tuesday, December 17, 2019 at 10:00 am**, or as soon after that time as the Motion can be heard at the court house, located at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The Motion is to be heard

in writing under subrule 37.12.1(1) because it is (insert one of on consent, unopposed or made without notice);

in writing as an opposed motion under subrule 37.12.1(4);

orally.

THE MOTION IS FOR:

1. An Order, if necessary, abridging and validating the timing and method of service of this Notice of Motion and the Motion Record herein;
2. An Order granting leave and lifting the stay of proceedings (the “Stay”) imposed by Justice Hainey’s Order, dated March 11, 2019 (the “Receivership Order”), for the purpose of allowing the Moving Parties to pursue their appeal in the Court of Queen’s Bench of Alberta, Court File No. 1703-13921, from the Order of Master Schlosser, dated March 11, 2019 (the “Schlosser Order”) arising from an action involving Distinct Infrastructure Group Inc. and iVac Services West Inc. to determine the status of the Moving Parties’ Writs of Enforcement registered in the Alberta Personal Property Registry, and their entitlement to net proceeds of sale from disposition of assets covered by the writs (the “Priority Dispute Appeal”).
3. Costs on a substantial indemnity scale; and
4. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

1. Pursuant to the Application by Royal Bank of Canada (“RBC”), as secured creditor, and the terms of the Receivership Order, Deloitte Restructuring Inc. (the “Receiver”) was appointed receiver over the assets, undertakings, and properties of the Respondent-Debtors.
2. The Receivership Order was granted on the same day as the Schlosser Order.
3. As a result of the Receivership Order, the Alberta Priority Dispute Appeal has been stayed.

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4. The Moving Parties, through their lawyers, have requested that the Receiver consent to a lifting of the Stay, as permitted by the terms of the Receivership Order, so that they may pursue the Alberta Prior Dispute Appeal, but the Receiver has refused.
5. As a result of the Schlosser Order, the Moving Parties' Writs of Enforcement have been discharged and the net proceeds of sale from disposition of assets covered by such writs have been paid to RBC.
6. MD Holdings and Wood will suffer material prejudice should the Stay not be lifted to allow the Alberta Priority Dispute Appeal to proceed.
7. The Priority Dispute Appeal will be dealt with expeditiously as the appellants' materials have already been served and filed with the Court of Queen's Bench of Alberta.
8. There is merit to the Priority Dispute Appeal, and there are sound reasons for lifting the Stay as a result of representations made by RBC regarding the priority of its interest in the net proceeds of sale of the assets at issue.
9. Section 101 of the *Courts of Justice Act*, RSO 1990, c C43.
10. Rules 1.04, 2.01, 2.03, 3.02, 37, 39, and 57 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.
11. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The Affidavit of Chris Aron Wood, sworn October 15, 2019; and

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2. Such further and other material as counsel may advise and this Honourable Court may permit.

November 5, 2019

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SAVIN & COLRAINE LLP**
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Lawyers for Deloitte Restructuring Inc.,
in its capacity as Court-appointed Receiver of the Respondents

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-6-

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IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

ROYAL BANK OF CANADA
Applicant

-and-

DISTINCT INFRASTRUCTURE GROUP INC., et al
Respondents

Court File No. CV-19-00615270-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION
(Returnable December 17, 2019)

BIRENBAUM, STEINBERG, LANDAU,
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Lawyers for the Applicant,
Mega Diesel Holdings Ltd. and Chris Aron Wood

TAB 2

Court File No. CV-19-00615270-00CL

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

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and

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Respondents

AFFIDAVIT OF CHRIS ARON WOOD

(Sworn October 15th, 2019)

I, **CHRIS ARON WOOD**, of the City of Kelowna, in the Province of British Columbia,

MAKE OATH AND SAY AS FOLLOWS:

1. I am one of the moving parties on this motion and a director of the corporate moving party, Mega Diesel Holdings Ltd. (“MD Holdings”), and as such have knowledge of the matters to which I hereinafter depose. Where my evidence is based on information provided to me by others, I have so indicated, and I believe such information to be true.
2. This motion is for an Order that the stay of proceedings (the “Stay”) granted pursuant to Justice Hainey’s Order, dated March 11, 2019 (the “Receivership Order”), be lifted for the purpose

-2-

of allowing an appeal in the Court of Queen's Bench of Alberta from the Order of Master Schlosser, dated March 11, 2019 (the "Schlosser Order").

3. The Schlosser Order arises from an action involving Distinct Infrastructure Group Inc. and iVac Services West Inc., Court File No. 1703-13921, in the Court of Queen's Bench of Alberta, involving the determination of the status of the certain Writs of Enforcement registered in the Alberta Personal Property Registry over assets owned by DIG and iVac Services West Inc., and entitlement to net proceeds of sale from disposition of assets covered by the writs (the "Priority Dispute Appeal").

History of the Alberta Proceedings

4. On July 31, 2017, MD Holdings and I obtained consent judgment in the amount of \$422,398.81, plus costs, against Distinct Infrastructure Group Inc. ("DIG"), and Mega Diesel Excavating Ltd. Attached hereto as **Exhibit "A"** is a copy of the Consent Judgment, dated July 31, 2017.

5. On or about January 3, 2017, Mega Diesel Excavating Ltd. amalgamated into iVac Services West Inc. ("iVac West"). Attached hereto as **Exhibit "B"** is a copy of the corporate search result showing the amalgamation.

6. On September 1, 2017, my Alberta counsel filed a Writ of Enforcement with the Clerk of the Court of Queen's Bench of Alberta in the amount of \$424,789.45 (representing the Consent Judgment plus costs) (the "First Writ"). Attached hereto as **Exhibit "C"** is a copy of the First Writ of Enforcement, filed September 1, 2017.

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7. On September 1, 2017, the First Writ was also registered in the Alberta Personal Property Registry. Attached hereto as **Exhibit "D"** is a copy of an excerpt from Personal Property Registry Report for DIG showing the registered First Writ.

8. On September 13, 2018, the MD Holdings and I obtained summary judgment in the amount of \$149,922.00, plus costs, against DIG and iVac West pursuant to the Order of Master Schlosser, dated September 13, 2018. Attached hereto as **Exhibit "E"** is a copy of Master Schlosser's Order, dated September 13, 2018.

9. On or about October 10, 2018, my Alberta counsel filed a Writ of Enforcement with the Clerk of the Court of the Queen's Bench of Alberta in the amount of \$154,145.11 (representing the summary judgment order plus costs) (the "Second Writ"). Attached hereto as **Exhibit "F"** is a copy of the Second Writ of Enforcement, filed October 10, 2018.

10. On or about October 10, 2018 the Second Writ was also registered in the Alberta Personal Property Registry. Attached hereto as **Exhibit "G"** is a copy of an excerpt from Personal Property Registry Report for DIG showing the registered Second Writ.

11. The First and Second Writs were registered in the Alberta Personal Property Registry against 17 serial number good owned by DIG and/or iVac West.

RBC's Security Interest and Debt Position

12. On or about September 21, 2016, DIG entered into a general security agreement (the "Security Agreement") with the Royal Bank of Canada ("RBC").

13. The Security Agreement provided RBC with a security interest in all of DIG's present and future Personal Property as security for all present and future indebtedness to RBC.

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14. On September 23, 2016, RBC registered its Security Agreement under the Alberta Personal Property Registry. Attached hereto as **Exhibit "H"** is the Alberta Personal Property Registry for DIG showing RBC's registered Security Agreement.

15. As set out in the court-appointed receiver's prefiling report, dated February 28, 2019 (the "Prefiling Report"), as of February 27, 2019, DIG owed RBC approximately \$52,700,000.00 under the Security Agreement. Attached hereto as **Exhibit "I"** is a copy of the Receiver's Prefiling Report, dated February 28, 2019.

16. On review of the Prefiling Report, as of December 31, 2018, DIG owed its creditors, not including me and MD Holdings, approximately \$82,400,000.00 and has incurred an equity deficit of approximately \$82,600,000.00. See Exhibit "I", above.

17. I also understand from reviewing DIG's public disclosure that RBC is expected to suffer losses on its debt position and subordinated lenders and shareholders are not expected to see any recovery of monies owed. Attached hereto as **Exhibit "J"** is a copy DIG's final News Release, dated March 11, 2019.

The Ritchie Bros Auction

18. On or about December 11, 2018, DIG directed Ritchie Bros Auctioneers (Canada) Ltd. ("Ritchie Bros) to conduct an auction in Edmonton, Alberta and Toronto, Ontario, to sell various equipment owned by DIG. Attached hereto as **Exhibit "K"** is a copy of an Owner's Detail Report prepared by Ritchie Bros, including the descriptions, serial numbers, and sale prices of the equipment sold at the auction in Edmonton.

19. Of the equipment sold at the Edmonton Auction, the First and Second Writs were registered in the Alberta Personal Property Registry against the following DIG/iVac West vehicles:

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<i>Lot</i>	<i>Serial Number</i>	<i>Sale Price</i>
421	5KKPALD12FPGK2956	\$327,500.00
423	5KKPALD10EPPF3871	\$260,000.00
424	5KKPALD12EPPF3870	\$300,000.00
428	5KKPALDRXDPFA9979	\$260,000.00

(collectively, the "Subject Vehicles")

20. I am advised that my Alberta counsel contacted Ritchie Bros on or about December 20, 2019 to advise of the Writs and request payment of the net proceeds of sale of the Subject Vehicles. Attached hereto as **Exhibit "L"** is a copy of email correspondence between my counsel, Sal Tinajero and Kal Chaube at Ritchie Bros, dated December 20, 2018.

21. I am advised my counsel followed up with Ritchie Bros after the holidays in early 2019 and was informed that DIG instructed Ritchie Bros not to pay the outstanding net proceeds of sale to MD Holdings and me. Attached hereto as **Exhibit "M"** is a copy of email correspondence between Sal Tinajero and Kal Chaube, between January 2 to January 9, 2019.

RBC's Apparent Waiver

22. Pursuant to the Security Agreement, on or about December 19, 2018, DIG sought RBC's consent to dispose of certain of its assets via the Ritchie Bros auction. In so doing, RBC confirmed that so long as DIG made a "voluntary prepayment" of "at least" \$2,000,000.00 towards its indebtedness, RBC consented to the auction (the "Prepayment Agreement"). Attached hereto as **Exhibit "N"** is a copy of an email exchange between William Nurnberger of DIG, and Gary Ivany, of RBC, dated December 19, 2018.

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23. In connection with RBC's consent, the bank sent Ritchie Bros a completed Security Interest Form (the "Security Form"), having reviewed the assets being sold through the auction, including the Subject Vehicles, and selecting that with respect to its interest in the assets, "We [RBC] have no interest in the Equipment nor in 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." Attached hereto as **Exhibit "O"** is a copy the Ritchie Bros document, dated December 12, 2018.

24. As a result of completing the Security Form as indicated, Ritchie Bros contacted my Alberta counsel to request a payout statement and arrange payment of the amounts owing under the First and Second Writs.

The Waiver Dispute

25. On the basis of the Security Form and the Prepayment Agreement, MD Holdings and I take the position that RBC effectively waived its priority security interest over the Subject Vehicles pursuant to section 40 of the *Personal Property Security Act*, RSA 2000, c P-7.

26. As a result of the waiver, RBC is estopped from enforcing and benefitting from its Security Agreement over the Subject Vehicles.

27. In early February 2019, DIG brought an application in the Court of Queen's Bench of Alberta seeking to discharge the registration of the First and Second Writs, and seeking direction of payment of the net proceeds of sale of the Subject Vehicles to RBC.

28. The application was ultimately adjourned to allow RBC to be properly served and instruct counsel to attend. Attached hereto as **Exhibit "P"** is a copy of the Transcript of Proceedings from the February 15, 2019 Application.

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29. On March 11, 2019, the return date of DIG's application, Master Schlosser of the Court of Queen's Bench of Alberta granted DIG's application, discharging the First and Second Writs and ordering the net proceeds of the Subject Vehicles be paid directly to RBC. Attached hereto as **Exhibit "Q"** is a copy of Master Schlosser's Order, dated March 11, 2019, and the Transcript of Proceedings from the March 11, 2019 Application.

30. On March 13, 2019, I instructed my Alberta counsel to prepare and file a Notice of Appeal of Master Schlosser's March 11, 2019 Order. Attached hereto as **Exhibit "R"** is a copy of the Notice of Appeal, dated March 13, 2019.

31. On or about April 23, 2019, the Priority Dispute Appeal was perfected in the Court of Queen's Bench of Alberta. Attached hereto as **Exhibit "S"** is a copy of the filed Brief of the Appellants, dated April 23, 2019.

The Receivership Order is Resulting in Material Prejudice

32. On or about September 9, 2019, my Ontario counsel sent correspondence to Rachel Bengino of Thornton Grout Finnigan LLP, counsel to the Receiver, requesting that it consent to lift the Stay in order to allow the Priority Dispute Appeal to proceed. Counsel for the Receiver refused to consent and I am advised has not responded to the correspondence to-date. Attached hereto as **Exhibit "T"** is a copy of correspondence to and from the Receiver's counsel, dated September 9, 2019.

33. As a result of Master Schlosser's March 13, 2019 Order, the First and Second Writs have been discharged, and the net proceeds of sale from the Subject Vehicles has been paid to RBC.

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34. From reviewing the Receiver's public disclosure, I understand it is in the process of disposing of various of DIG's assets on behalf of RBC in an effort to minimize the losses suffered under the Security Agreement.

35. Given the amounts outstanding under the Security Agreement with RBC, along with DIG's expectations that RBC will suffer losses and other creditors will not see any recovery, there is a real risk that there will be no funds available to satisfy the outstanding Consent and Summary Judgment Orders should we ultimately be successful in the Priority Dispute Appeal.

36. If I am successful in the Priority Dispute Appeal, then RBC was never entitled to the net proceeds from the sale of the Subject Vehicles and such funds should be paid to MD Holdings and I immediately.

37. The issue of competing security priorities is a live issue before the Alberta courts and the Receivership Order is operating to effectively estop a merits hearing on the issues in Alberta.

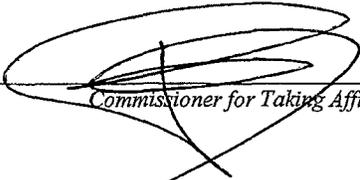
38. As a result of the Receivership Order and Stay, MD Holdings and I have been forced to participate in the receivership proceedings when we may otherwise be justifiably extricated from them should the Alberta courts find in our favour.

39. I, along with MD Holdings have suffered, and will continue to suffer, a material prejudice if the Stay is not lifted to allow the Priority Dispute Appeal to proceed.

40. The Priority Dispute Appeal will be dealt with expeditiously as MD Holdings and I have already served and filed our materials with the Court of Queen's Bench of Alberta. Attached hereto as **Exhibit "U"** is a copy of correspondence, dated April 23, 2019, from my Alberta counsel serving all parties with a copy of materials for the Priority Dispute Appeal.

41. I swear this affidavit in support of the within motion and for no other, or improper, purpose.

SWORN BEFORE ME at the City of Kelowna, in the Province of British Columbia on October 15, 2019.



Commissioner for Taking Affidavits

PAUL JOHNSON
Barrister & Solicitor
830 BERNARD AVENUE
KELOWNA, BC V1Y 6P5

}



CHRIS ARON WOOD

Tab A

COURT FILE NUMBER 1703-13921

COURT COURT OF QUEEN'S BENCH OF ALBERTA

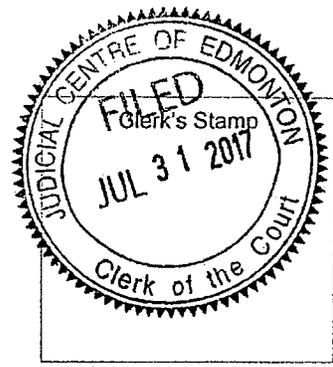
JUDICIAL CENTRE EDMONTON

PLAINTIFFS CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

DEFENDANTS MEGA DIESEL EXCAVATING LTD. and DISTINCT INFRASTRUCTURE GROUP INC.

DOCUMENT CONSENT ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT BOSECKE & ASSOCIATES
 Attn: Sal Tinajero
 102, 9333-47 Street NW
 Edmonton, Alberta, T6B 2R7
 Tel: 780-469-0494
 Fax: 780-464-4181
 File no: 2409917



I hereby certify this to be a true copy of the original.

[Signature]
 for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: July 31, 2017

NAME OF MASTER WHO MADE THIS ORDER: L. A. Smart

LOCATION OF HEARING: Edmonton, Alberta

UPON THE APPLICATION of the Applicant;
 AND UPON having read the Application of the Applicant;
 AND UPON having read the Affidavit of _____

This is EXHIBIT "A" referred to in the Affidavit of Chris Wood
 Sworn before me at Kelowna
 in the Province of British Columbia this 15 day of October, 2014

[Signature]
 A Commissioner for taking Affidavits in the Province of British Columbia

IT IS HEREBY ORDERED THAT:

1. The Respondents are hereby ordered to pay the sum of \$422,398.81 (inclusive of interest) to the Applicants for default on payment which was due under a Share Purchase Agreement dated March 10, 2016.
2. Service of the Statement of Claim is deemed good and sufficient.

- 3. The costs of the application shall be awarded on a full indemnity basis.
- 4. This Order may be consented to by facsimile or PDF and in counterpart and any such facsimile, electronic, or counterpart copy of this Consent Order shall be deemed to be an original and shall have the same force and effect as an original.

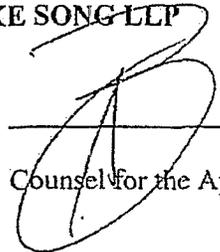
"L.A. Smart"

Justice of the Court of Queen's Bench of Alberta
Monday

Approved as to the Order granted:

BOSECKE SONG LLP

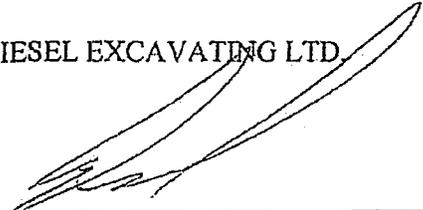
Per:



Counsel for the Applicant

MEGA DIESEL EXCAVATING LTD.

Per:



DISTINCT INFRASTRUCTURE GROUP INC.

Per:

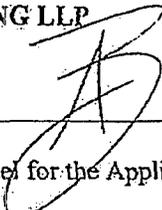
- 3. The costs of the application shall be awarded on a full indemnity basis.
- 4. This Order may be consented to by facsimile or PDF and in counterpart and any such facsimile, electronic, or counterpart copy of this Consent Order shall be deemed to be an original and shall have the same force and effect as an original.

Justice of the Court of Queen's Bench of Alberta
W. J. A. S.

Approved as to the Order granted:

BOSECKE SONG LLP

Per:

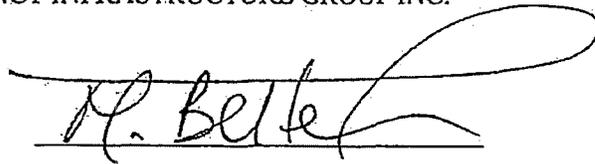

Counsel for the Applicant

MEGA DIESEL EXCAVATING LTD.

Per:

DISTINCT INFRASTRUCTURE GROUP INC.

Per:



Tab B

Government Corporation/Non-Profit Search of Alberta ■ Corporate Registration System

Date of Search: 2018/08/08
Time of Search: 02:37 PM
Search provided by: JOY ROSIN

Service Request Number: 29456718
Customer Reference Number:

Corporate Access Number: 2020144685
Legal Entity Name: IVAC SERVICES WEST INC.

Legal Entity Status: Active
Alberta Corporation Type: Named Alberta Corporation
Method of Registration: Amalgamation
Registration Date: 2017/01/03 YYYY/MM/DD

Registered Office:

Street: 2300, 10180-101 STREET
City: EDMONTON
Province: ALBERTA
Postal Code: T5J 1V3

Records Address:

Street: 2300, 10180-101 STREET
City: EDMONTON
Province: ALBERTA
Postal Code: T5J 1V3

Directors:

Last Name: AGIUS
First Name: ALEXANDER
Middle Name: JOSEPH
Street/Box Number: 2938 COULSON COURT
City: MISSISSAUGA
Province: ONTARIO
Postal Code: L5M 5S8

Last Name: BETTENCOURT
First Name: EMANUEL (MANNY)
Street/Box Number: 305 GLEBEHOLME BLVD.
City: TORONTO
Province: ONTARIO
Postal Code: M4J 1T1

This is EXHIBIT "B" referred to in the
Affidavit of Chris Wood
Sworn before me at Colan
in the Province of British Columbia this
15 day of October, 2019

[Signature]
A Commissioner for taking Affidavits
in the Province of British Columbia

Last Name: LANNI
First Name: GIUSEPPE (JOE)
Street/Box Number: 9 WARWOOD ROAD
City: ETOBICOKE
Province: ONTARIO
Postal Code: M9B 5B2

Voting Shareholders:

Legal Entity Name: DISTINCT INFRASTRUCTURE GROUP INC.
Corporate Access Number: 2017017928
Street: 2300, 10180 - 101 STREET
City: EDMONTON
Province: ALBERTA
Postal Code: T5J 1V3
Percent Of Voting Shares: 100

Details From Current Articles:

The information in this legal entity table supersedes equivalent electronic attachments

Share Structure: SEE ATTACHED SCHEDULE "A"
Share Transfers Restrictions: SEE ATTACHED SCHEDULE "B"
Min Number Of Directors: 1
Max Number Of Directors: 7
Business Restricted To: NONE
Business Restricted From: NONE
Other Provisions: SEE ATTACHED SCHEDULE "C"

Other Information:

Amalgamation Predecessors:

Corporate Access Number	Legal Entity Name
2018107868	IVAC SERVICES LTD.
2010032585	MEGA DIESEL EXCAVATING LTD.

Last Annual Return Filed:

File Year	Date Filed (YYYY/MM/DD)
2018	2018/03/01

Filing History:

List Date (YYYY/MM/DD)	Type of Filing
2017/01/03	Amalgamate Alberta Corporation
2018/03/01	Enter Annual Returns for Alberta and Extra-Provincial Corp.

Attachments:

Attachment Type	Microfilm Bar Code	Date Recorded (YYYY/MM/DD)
Statutory Declaration	10000907114945477	2017/01/03
Share Structure	ELECTRONIC	2017/01/03
Restrictions on Share Transfers	ELECTRONIC	2017/01/03
Other Rules or Provisions	ELECTRONIC	2017/01/03

This is to certify that, as of this date, the above information is an accurate reproduction of data contained within the official records of the Corporate Registry.



Tab C

This is EXHIBIT "B" referred to in the Affidavit of Chris Wood

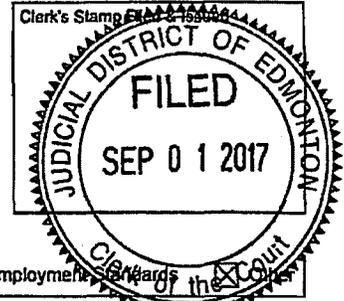
Sworn before me at Edmonton

in the Province of British Columbia this 15 day of September 2017

A Commissioner for taking Affidavits in the Province of British Columbia

Writ of Enforcement

Financing Statement
Civil Enforcement Act



Court Location Court of Queen's Bench Of Alberta	Court File Number 1703 13921	Type of Judgment <input type="checkbox"/> Crown <input type="checkbox"/> Employment
---	---------------------------------	--

This Writ authorizes enforcement proceedings in accordance with the Civil Enforcement Act. The particulars of the Writ are as follows:

Debtor

Select one Business Individual

Occupation

Business Name or Last Name Mega Diesel Excavating Ltd.	First Name	Middle Name
Street Address 2300, 10180 - 101 Street	City Edmonton	Province AB
Postal Code T5J 1V3	Gender <input checked="" type="checkbox"/> M <input type="checkbox"/> F	Birthdate (if known) yyyy-mm-dd

Creditor

Select one Business Individual

Personal Property Registry (P.P.R.) Party Code

Business Name or Last Name Wood	First Name Chris	Middle Name Aron
Street Address c/o Bosecke & Associates 102, 9333 - 47 Street NW	City Edmonton	Province AB
Postal Code T6B 2R7		

- Additional Debtors and Creditors and/or other information listed on attached addendum.
- If claiming priority based on an Attachment Order or partial Assignment, indicate previous P.P.R. Registration Number.

Date of Judgment (or date Judgment effective, if different) 31 day of July, 2017

Original Judgment	\$ 422,398.81	Costs	\$ 2,390.64
Post Judgment Interest	\$	Current Amount Owing	\$ 424,789.45

Solicitor/Agent/Creditor

Personal Property Registry (P.P.R.) Party Code

Name in Full Bosecke & Associates	City Edmonton	Province Alberta	Postal Code T6B 2R7
Street Address 102, 9333 - 47 Street	Telephone Number 780-469-0494	Fax Number 780-469-4181	Call Box Your Reference Number 2409917

To Register Against Serial # Goods at Personal Property Registry, complete the following:

Serial Number (Only applicable to serial number goods, e.g. motor vehicles.)	Year (yyyy)	Make and Model	Category

Authorized Signature
Sal Tinajero

Name of Person Authorized to Complete this Form (PRINT)
Sal Tinajero

Registry Agent Office Use Only
Date of Submission (yyyy/mm/dd)

Page 1 of 2

Form 10.1
Civil Enforcement Regulation

Financing Statement

Writ of Enforcement Addendum

Court File Number: 1703 13921

DEBTOR Individual Male Other
 Female

yyyy/mm/dd

Distinct Infrastructure Group Inc.

2300, 10180 - 101 Street	Edmonton	Alberta	T5J 1V3
Address	City	Province	Postal Code

CREDITOR Individual Other P.P.R. Party Code _____

Mega Diesel Holdings Ltd.

102, 9333 - 47 Street NW	Edmonton	Alberta	T6B 2R7
--------------------------	----------	---------	---------

X ADDITIONAL INFORMATION

Please find attached, filed Bill of Costs filed with the court on August 21, 2017 for reference if needed.

Control Number _____

Tab D

**Government
of Alberta**

**Personal Property Registry
Search Results Report**

Page 38 of 49

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 17090137319

Registration Type: WRIT OF ENFORCEMENT

Registration Date: 2017-Sep-01

Registration Status: Current

Expiry Date: 2019-Sep-01 23:59:59

Issued in Edmonton Judicial Centre

Court File Number is 1703 13921

Judgment Date is 2017-Jul-31

This Writ was Issued on 2017-Sep-01

Type of Judgment is Other

Original Judgment Amount: \$422,398.81

Costs Are: \$2,390.64

Post Judgment Interest: \$3,815.31

Current Amount Owng: \$428,604.76

Exact Match on: Debtor

No: 6

Amendments to Registration

18080930601	Amendment	2018-Aug-09
18081031345	Amendment	2018-Aug-10
18101203555	Amendment	2018-Oct-12
18120516483	Amendment	2018-Dec-05

Solicitor / Agent

**BOSECKE & ASSOCIATES
102, 9333-47 STREET
EDMONTON, AB T6B 2R7**

Phone #: 780 469 0494

Fax #: 780 469 4181

Reference #: 2409917

This is EXHIBIT "D" referred to in the
Affidavit of Chris Wood

Sworn before me at Kelowna

in the Province of British Columbia this
day of October, 2019

A Commissioner for taking Affidavits
in the Province of British Columbia

Debtor(s)

Government of Alberta

Personal Property Registry Search Results Report

Page 39 of 49

Search ID#: Z10982803

Block

1 MEGA DIESEL EXCAVATING LTD.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Deleted by
18080930601

Block

2 DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Deleted by
18101203555

Block

3 JVAC SERVICES WEST INC.
2300, 10180 - 101 STREET
EDMONTNO, AB T5J 1V3

Status

Deleted by
18081031345

Block

4 IVAC SERVICES WEST INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Current by
18081031345

Block

5 MEGA DIESEL EXCAVATING LTD.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Deleted by
18101203555

Block

6 DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Current by
18101203555

Block

7 MEGA DIESEL EXCAVATING LTD.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Current by
18101203555

Creditor(s)**Block**

1 WOOD, CHRIS, ARON
C/O BOSECKE & ASSOCIATES 102, 9333-47 ST
EDMONTON, AB T6B 2R7

Status

Current

Block

2 MEGA DIESEL HOLDINGS LTD.
102, 9333-47 STREET NW
EDMONTON, AB T6B 2R7

Status

Current

**Government
of Alberta**

**Personal Property Registry
Search Results Report**

Page 40 of 49

Search ID#: Z10982803

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1FTSW31P54EC30274	2004	Ford, F350	MV - Motor Vehicle	Current By 18101203555
2	3GTPZVE72DG121819	2013	GMC, Sierra 1500	MV - Motor Vehicle	Current By 18101203555
3	3GTU2UEC8EG104172	2014	GMC, Sierra 1500	MV - Motor Vehicle	Current By 18101203555
4	4ZECH202681054374	2008	Load Trail, 7 x20 T/A Ca	TR - Trailer	Current By 18101203555
5	70000020100046	2000	Skyreach Utility Trailer,	TR - Trailer	Current By 18101203555
6	5KKPALDR0DPFJ2264	2013	Western Star with Tornado	MV - Motor Vehicle	Current By 18101203555
7	5KKPALDR6DPBZ2142	2013	Western Star with Tornado	MV - Motor Vehicle	Current By 18101203555
8	5KKPALDRXDPFA9979	2013	Western Star with Foremos	MV - Motor Vehicle	Current By 18101203555
9	5KKPALD10EPFP3870	2014	Western Star with Foremos	MV - Motor Vehicle	Current By 18101203555
10	5KKPALD12EPF3871	2014	Western Star with Foremos	MV - Motor Vehicle	Current By 18101203555
11	5KKPALD12FP GK2056	2015	Western Star Tornado F4 S	MV - Motor Vehicle	Current By 18101203555
12	SLP217FC7U0910325	2008	JCB, 217a	MV - Motor Vehicle	Current By 18101203555
13	670902680	2009	Westeel, 4100 L Fuel Vaul	TR - Trailer	Current By 18101203555
14	5KKPALD12EPFP3871	2014	Western Star with Foremos	MV - Motor Vehicle	Current By 18120516483
15	5KKPALD17FPGB2242	2015	Western Star Truck with H	MV - Motor Vehicle	Current By 18120516483
16	5KKPALD12FP GK2956	2015	Western Star Truck with 4	MV - Motor Vehicle	Current By 18120516483
17	3GTU2UEC8EG184172	2014	GMC Sierra 1500	MV - Motor Vehicle	Current By 18120516483

Particulars

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
1		Current

**Government
of Alberta** ■

**Personal Property Registry
Search Results Report**

Page 41 of 49

Search ID#: Z10982803

Address for Creditor
WOOD, CHRIS, ARON
c/o Bosecke & Associates 102, 9333-47 Street NW
Edmonton, AB - Alberta T6B 2R7

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
2	SWORN FINANCIAL STATEMENT OF DEBTOR RECEIVED ON OCTOBER 2, 2018	Current By 18101203555
3	<p>FULL DESCRIPTION AS FOLLOWS:</p> <p>4ZECH202681054374 : 2008 : Load Trail, 7 x20 T/A Car Hauler : TR - Trailer 7000002010046 : 2000 : Skyreach Utility Trailer, width 6'6"length 20' : TR - Trailer 5KKPALDR0DPFJ2264 : 2013 : Western Star with TornadoF4 Slope, 4900SB : MV - Motor Vehicle 5KKPALDR6DPBZ2142 : 2013 : Western Star with TornadoF4 Slope, 4900SB : MV - Motor Vehicle 5KKPALDRXDPPFA9979 : 2013 : Western Star with Foremost 2000 Hydrovac System, 4900SB : MV - Motor Vehicle 5KKPALD10EPFP3870 : 2014 : Western Star with Foremost 2000 Hydrovac System, 4900SB : MV - Motor Vehicle 5KKPALD12EPF3871 : 2014 : Western Star with Foremost 2000 Hydrovac System, 4900SB : MV - Motor Vehicle 5KKPALD12FPGK2056 : 2015 : Western Star Tornado F4 Slope, 4900SB : MV - Motor Vehicle 670902680 : 2009 : Westeel, 4100 L Fuel Vault : TR - Trailer</p>	Current By 18101203555
4	<p>Non-Serial Good:</p> <p>Construction Equipment Hammer 8550 Hammer Hoe Attachment NPK Hoe Pack Shoring Boxes GME Light 10' Panels, (Quantity listed as 23) Sewage Tank 500 Gal Sewage Tank Water Tank 500 Gal Water Tank 2008 Storage Container ACC-11392 8x20' Storage Container 2000 Mobile Office Atco ATC-16194</p>	Current By 18101203555
5		Current By 18120516483

Tab E

This is EXHIBIT "E" referred to in the Affidavit of Chris Wood Sworn before me at Edmonton in the Province of British Columbia this 15 day of October 2019

A Commissioner for taking Affidavits in the Province of British Columbia

COURT FILE NUMBER 1703 21939

COURT COURT OF QUEEN'S BENCH OF ALBERTA

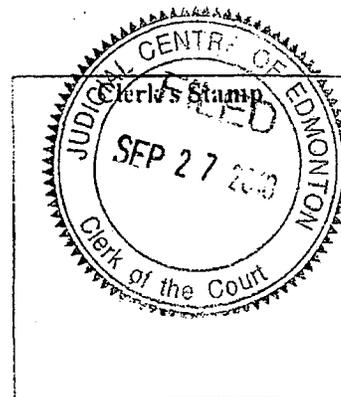
JUDICIAL CENTRE EDMONTON

PLAINTIFFS (Applicants) CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

DEFENDANT (Respondent) DISTINCT INFRASTRUCTURE GROUP INC.

DOCUMENT ORDER FOR SUMMARY JUDGMENT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT BOSECKE & ASSOCIATES Attention: Sal Tinajero 102, 9333 47 Street Edmonton, Alberta, T6B 2R7 Tel: 780-469-0494 Fax: 780-469-4181 File: 2402718



I hereby certify this to be a true copy of the original for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: September 13, 2018

NAME OF MASTER WHO MADE THIS ORDER: W.S. Schlosser

LOCATION OF HEARING: Edmonton, Alberta

UPON THE APPLICATION of the Plaintiffs; AND UPON having read the affidavit of Chris Wood; AND UPON having read the affidavit of Royston Rachpaul; AND UPON having heard representations from counsel for the Plaintiffs and the Defendant;

IT IS HEREBY ORDERED THAT:

- 1. The Plaintiffs are granted summary judgment.
2. In accordance with paragraph 2.5(a) of the Share Purchase Agreement between the parties (the "SPA"), the Defendant is ordered to pay to the Plaintiffs a Working Capital Adjustment in the amount of \$83,045.00 plus interest pursuant to the Judgment Interest Act, RSA, 2000 c J-1 from October 29, 2017, the date the cause of action arose.

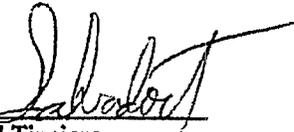
- 2 -

3. In accordance with paragraph 2.5(b) of the SPA, the Defendant is ordered to pay to the Plaintiffs a Corporate Debt Adjustment in the amount of \$66,877.00 plus interest pursuant to the *Judgment Interest Act, RSA, 2000 c J-1* from October 29, 2017, the date the cause of action arose.
4. The Plaintiffs are awarded costs of this action to be assessed pursuant to Schedule C, Column 2, of the *Alberta Rules of Court, Alta Reg 124/2010*.

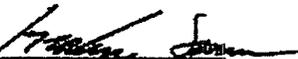
"W.S. Schlosser"
Master of the Court of Queen's Bench of Alberta

APPROVED AS TO FORM AND CONTENTS BY:

BOSECKE & ASSOCIATES

Per: 
Sal Tinajero
Solicitor for the Plaintiffs

BISHOP & MCKENZIE LLP

Per: 
Graham W. Sanson
Solicitor for the Defendant

Tab F

This is EXHIBIT "F" referred to in the Affidavit of Chris Wood

Sworn before me at Calgary

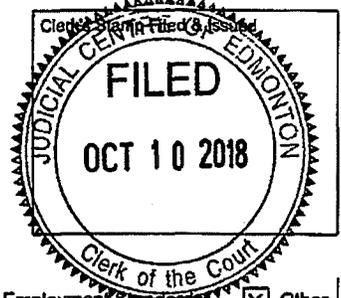
in the Province of British Columbia this

15 Alberta Oct 2018

A Commissioner for taking Affidavits in the Province of British Columbia

Writ of Enforcement

Financing Statement
Civil Enforcement Act



Court Location Court of Queen's Bench of Alberta	Court File Number 1703 21939	Type of Judgment <input type="checkbox"/> Crown <input type="checkbox"/> Employment Standards <input checked="" type="checkbox"/> Other
---	---------------------------------	--

This Writ authorizes enforcement proceedings in accordance with the Civil Enforcement Act. The particulars of the Writ are as follows:

Debtor

Select one Business Individual Occupation _____

Business Name or Last Name Distinct Infrastructure Group Inc.	First Name	Middle Name
Street Address 2300, 10180-101 Street	City Edmonton	Province Alberta
Postal Code T5J 1V3	Gender <input type="checkbox"/> M <input type="checkbox"/> F	Birthdate (if known) yyyy-mm-dd

Creditor

Select one Business Individual

Personal Property Registry (P.P.R.) Party Code _____

Business Name or Last Name Wood	First Name Chris	Middle Name Aron
Street Address c/o Bosecke & Associates 102, 9333 - 47 Street	City Edmonton	Province Alberta
Postal Code T6B 2R7		

Additional Debtors and Creditors and/or other information listed on attached addendum.

If claiming priority based on an Attachment Order or partial Assignment, indicate previous P.P.R. Registration Number. _____

Date of Judgment (or date Judgment effective, if different) 13 day of September, 2018 year

Original Judgment	\$ 150,976.14	Costs	\$ 3,168.97
Post Judgment Interest	\$ _____	Current Amount Owing	\$ 154,145.11

Solicitor/Agent/Creditor

Personal Property Registry (P.P.R.) Party Code _____

Name in Full Bosecke & Associates	City Edmonton	Province Alberta	Postal Code T6B 2R7
Street Address 102, 9333 - 47 Street	Telephone Number 780-469-0494	Fax Number 780-469-4181	Call Box E 101
Your Reference Number 2402718			

To Register Against Serial # Goods at Personal Property Registry, complete the following:

Serial Number (Only applicable to serial number goods, e.g. motor vehicles.)	Year (yyyy)	Make and Model	Category

Authorized Signature

Name of Person Authorized to Complete this Form (PRINT)

SALVADOR TINAJERO
Barrister & Solicitor

Registry Agent Office Use Only
Date of Submission (yyyy/mm/dd)



Writ of Enforcement Addendum
Financing Statement
Civil Enforcement Act

Court File Number

1703 21939

Debtor

Select one Business Individual

Business Name or Last Name				First Name	Middle Name
Street Address	City	Province	Postal Code	Gender <input type="checkbox"/> M <input type="checkbox"/> F	Birthdate (if known) yyyy-mm-dd
Occupation				Debtor's Block Number (if adding alias)	

Debtor

Select one Business Individual

Business Name or Last Name				First Name	Middle Name
Street Address	City	Province	Postal Code	Gender <input type="checkbox"/> M <input type="checkbox"/> F	Birthdate (if known) yyyy-mm-dd
Occupation				Debtor's Block Number (if adding alias)	

Creditor

Select one Business Individual

Personal Property Registry (P.P.R.) Party Code	Business Name or Last Name	First Name	Middle Name
	Mega Diesel Holdings Ltd.		
Street Address	City	Province	Postal Code
c/o Bosecke & Associates 102, 9333 - 47 Street NW	Edmonton	Alberta	T6B 2R7

Creditor

Select one Business Individual

Personal Property Registry (P.P.R.) Party Code	Business Name or Last Name	First Name	Middle Name
Street Address	City	Province	Postal Code

Additional Information

Tab G

Government of Alberta

Personal Property Registry Search Results Report

Page 44 of 49

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 18101624102

Registration Type: WRIT OF ENFORCEMENT

Registration Date: 2018-Oct-15

Registration Status: Current

Expiry Date: 2020-Oct-15 23:59:59

Issued in Edmonton Judicial Centre

Court File Number is 1703 21939

Judgment Date is 2018-Sep-13

This Writ was issued on 2018-Oct-10

Type of Judgment is Other

Original Judgment Amount: \$150,976.14

Costs Are: \$3,168.97

Post Judgment Interest: \$0.00

Current Amount Owing: \$154,145.11

Exact Match on: Debtor

No: 1

Solicitor / Agent

**BOSECKE & ASSOCIATES
102, 9333-47 STREET
EDMONTON, AB T6B 2R7**

Phone #: 780 469 0494

Fax #: 780 469 4181

Reference #: 2402718

Debtor(s)

Block

1 **DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3**

Status

Current

Creditor(s)

Block

1

This is EXHIBIT "G" referred to in the Affidavit of Chris Wood

Sworn before me at Kelowna

in the Province of British Columbia this 15 day of October 2019

Status

Current

[Signature]
A Commissioner for taking Affidavits
in the Province of British Columbia

Search ID#: Z10982803

WOOD, CHRIS, ARON
C/O BOSECKE & ASSOCIATES 102, 9333-47 ST
EDMONTON, AB T6B 2R7

Block

2 MEGA DIESEL HOLDINGS LTD.
C/O BOSECKE & ASSOCIATES 102, 9333-47 ST
EDMONTON, AB T6B 2R7

Status

Current

Tab H

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 14032420718

Registration Type: SECURITY AGREEMENT

Registration Date: 2014-Mar-24

Registration Status: Current

Expiry Date: 2024-Mar-24 23:59:59

Exact Match on: Debtor

No: 3

Amendments to Registration

17030623273

Amendment

2017-Mar-06

Debtor(s)

Block

1 QE2 ACQUISITION CORP.
1981 - 246 STEWART GREEN SW
CALGARY, AB T3H 3C8

Status

Deleted by
17030623273

Block

2 PILLAR CONTRACTING LTD.
1981 - 246 STEWART GREEN SW
CALGARY, AB T3H 3C8

Status

Current

Block

3 DISTINCT INFRASTRUCTURE GROUP INC.
1981 - 246 STEWART GREEN SW
CALGARY, AB T3H 3C8

Status

Current by
17030623273

Secured Party / Parties

Block

1 ELEMENT FLEET MANAGEMENT INC.
900 - 4 ROBERT SPECK PARKWAY
MISSISSAUGA, ON L4Z 1S1

Status

This is EXHIBIT "H" referred to in the Current

Affidavit of Cherie Wood

Sworn before me at Kelowna

in the Province of British Columbia this

15 day of October, 2018

Commissioner for taking Affidavits
in the Province of British Columbia

Collateral: General

Search ID#: Z10982803

Block	Description	Status
1	All present and after-acquired motor vehicles and other goods	Current
2	provided to the debtor by the secured party pursuant to one or	Current
3	more lease agreements and all accessions thereto and proceeds	Current
4	thereof, including money, chattel paper, intangibles, goods,	Current
5	accounts, documents of title, instruments, investment property,	Current
6	substitutions, trade ins, licences, insurance proceeds and any	Current
7	other form of proceeds.	Current

Particulars

Block	Additional Information	Status
1	Changed debtor name from QE2 ACQUISITION CORP. to DISTINCT INFRASTRUCTURE GROUP INC.	Current By 17030623273

Search ID#: Z10982803

Business Debtor Search For:**DISTINCT INFRASTRUCTURE GROUP INC**

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 14041537328

Registration Type: SECURITY AGREEMENT

Registration Date: 2014-Apr-15

Registration Status: Current

Expiry Date: 2020-Apr-15 23:59:59

Exact Match on: Debtor

No: 4

Amendments to Registration

17050517387

Amendment

2017-May-05

Debtor(s)**Block**

1 MEGA DIESEL EXCAVATING LTD.
22434 TWP 534
SHERWOOD PARK, AB T8A4G3

Status

Current

Block

2 WOOD, CHRISTOPHER, ARON
5493 SOUTH PERIMETER WAY
KELOWNA, BC V1W5H9

StatusDeleted by
17050517387Birth Date:
1973-Apr-16**Block**

3 WOOD, ARON, CHRISTOPHER
5493 SOUTH PERIMETER WAY
KELOWNA, BC V1W5H9

StatusDeleted by
17050517387Birth Date:
1973-Apr-16**Block**

4 DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

StatusCurrent by
17050517387

Search ID#: Z10982803

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	ELEMENT FINANCIAL CORPORATION 161 BAY STREET, SUITE 4600, PO BOX 621 TORONTO, ON M5J2S1	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	5KKPALD12EPFP3871	2014	WSTRN STAR TRI-DRIVE	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	1 NEW 2014 WESTERN STAR TRI DRIVE TRI-DRIVE HWY TRACTOR S/N 5KKPALD12EPFP3871 1 NEW 2014 SOG HYDRO SVS2000 HYDROVAC S/N WO5-028741	Current

TOGETHER WITH ANY AND ALL PRESENT AND FUTURE ACQUIRED PARTS, ATTACHMENTS, ACCESSORIES, ACCESSIONS, ADDITIONS, SUBSTITUTIONS, IMPROVEMENTS, REPAIR AND REPLACEMENT PARTS AND OTHER EQUIPMENT PLACED ON OR FORMING PART OF THE GOODS DESCRIBED HEREIN AND ANY PROCEEDS THEREOF AND THEREFROM INCLUDING, WITHOUT LIMITATION, ANY AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS THEREOF AND WITHOUT LIMITATION, MONEY, CHEQUES, DEPOSITS IN DEPOSIT TAKING INSTITUTIONS, GOODS, ACCOUNTS RECEIVABLE, RENTS OR OTHER PAYMENTS ARISING FROM THE LEASE OF THE COLLATERAL, INCLUDING ALL GOODS, SECURITIES, INSTRUMENTS, DOCUMENTS OF TITLE, CHATTEL PAPER, INTANGIBLES (AS DEFINED IN THE PERSONAL PROPERTY SECURITY ACT), RIGHTS OF INSURANCE PAYMENTS OR ANY OTHER PAYMENT AS INDEMNITY OR COMPENSATION FOR LOSS OR DAMAGE TO THE COLLATERAL OR PROCEEDS OF THE COLLATERAL.

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 14123010647

Registration Type: SECURITY AGREEMENT

Registration Date: 2014-Dec-30

Registration Status: Current

Expiry Date: 2020-Dec-30 23:59:59

Exact Match on: Debtor

No: 6

Amendments to Registration

17020725823	Amendment	2017-Feb-07
17020809849	Amendment	2017-Feb-08
17020914190	Amendment	2017-Feb-09
17031006622	Amendment	2017-Mar-10

Debtor(s)**Block**

1 MEGA DIESEL EXCAVATING LTD.
409 116 AVE NW
EDMONTON, AB T6S 1G3

StatusDeleted by
17020809849**Block**

2 WOOD, CHRISTOPHER, ARON
409 116 AVE NW
EDMONTON, AB T6S 1G3

StatusDeleted by
17020809849Birth Date:
1973-Apr-16**Block**

3 WOOD, CHRISTOPHER, A
409 116 AVE NW
EDMONTON, AB T6S 1G3

StatusDeleted by
17020809849Birth Date:
1973-Apr-16

Government of Alberta

Personal Property Registry Search Results Report

Page 7 of 49

Search ID#: Z10982803

Block

4 WOOD, CHRISTOPHER
409 116 AVE NW
EDMONTON, AB T6S 1G3

Birth Date:
1973-Apr-16

Status

Deleted by
17020809849

Block

5 WOOD, CHRIS
409 116 AVE NW
EDMONTON, AB T6S 1G3

Birth Date:
1973-Apr-16

Status

Deleted by
17020809849

Block

6 DISTINCT INFRASTRUCTURE GROUP INC.
409 116 AVE NW
EDMONTON, AB T6S 1G3

Status

Current by
17020809849

Block

7 MEGA DIESEL EXCAVATING LTD.
409 116 AVE NW
EDMONTON, AB T6S 1G3

Status

Deleted by
17031006822

Block

8 IVAC SERVICES WEST INC.
409 116 AVE NW
EDMONTON, AB T6S 1G3

Status

Current by
17031006822

Secured Party / Parties**Block**

1 CIT FINANCIAL LTD.
5035 SOUTH SERVICE ROAD
BURLINGTON, ON L7R 4C8

Status

Deleted by
17020725823

Block

2 LBEL INC.
5035 SOUTH SERVICE ROAD
BURLINGTON, ON L7R 4C8

Status

Current by
17020725823

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	5KKPALD12FPGK2956	2015	WESTERN STAR TRI DRIVE MV - Motor Vehicle		Current

Search ID#: Z10982803

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	ONE (1) 2014 TORNADO F4 SLOPE HYDROVAC UNIT S/N: 028726 TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO. PROCEEDS: GOODS, CHATTEL PAPER, INVESTMENT PROPERTY, DOCUMENTS OF TITLE, INSTRUMENTS, MONEY AND INTANGIBLES (ALL AS DEFINED IN THE PERSONAL PROPERTY SECURITY ACT) AND INCLUDING INSURANCE PROCEEDS.	Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16031522028

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Mar-15

Registration Status: Current

Expiry Date: 2021-Mar-15 23:59:59

Exact Match on: Debtor

No: 2

Amendments to Registration

18022629602

Amendment

2018-Feb-26

Debtor(s)**Block**

1 DISTINCTTECH INC.
77 BELFIELD ROAD
TORONTO, ON M9W1G6

Status

Current

Block

2 DISTINCT INFRASTRUCTURE GROUP INC.
333-7TH AVENUE
CALGARY, AB T2P2Z1

Status

Current

Secured Party / Parties**Block**

1 ELEMENT FINANCIAL INC
900-4 ROBERT SPECK PARKWAY
MISSISSAUGA, ON L4Z1S1

StatusDeleted by
18022629602**Block**

2 ELEMENT FINANCIAL INC, WITH AN ASSUMED NAME OF EFN FINANCIAL INC
900-4 ROBERT SPECK PARKWAY
MISSISSAUGA, ON L4Z1S1

StatusDeleted by
18022629602**Block**

3

Status

Search ID#: Z10982803

EFN FINANCIAL INC
900-4 ROBERT SPECK PARKWAY
MISSISSAUGA, ON L4Z1S1

Deleted by
18022629602

Block

4 CWB NL FINANCIAL INC.
1525 BUFFALO PLACE
WINNIPEG, MB R3T1L9

Status

Current by
18022629602

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1NKDX4EX7HJ986318	2017	KENWORTH T800	MV - Motor Vehicle	Current
2	1NKDX4EX9HJ986319	2017	KENWORTH T800	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	<p>ONE 2017 KENWORTH T800 TRIDEM VAC TRUCK SN 1NKDX4EX7HJ986318 ONE 2017 KENWORTH T800 TRIDEM VAC TRUCK SN 1NKDX4EX9HJ986319 ONE 2016 FOREMOST 2000 HYDROVAC UNIT SN 63325 ONE 2016 FOREMOST 2000 HYDROVAC UNIT SN 63325 TOGETHER WITH ANY AND ALL PRESENT AND FUTURE ACQUIRED PARTS, ATTACHMENTS, ACCESSORIES, ACCESSIONS, ADDITIONS, SUBSTITUTIONS, IMPROVEMENTS, REPAIR AND REPLACEMENT PARTS AND OTHER EQUIPMENT PLACED ON OR FORMING PART OF THE GOODS DESCRIBED HEREIN AND ANY PROCEEDS THEREOF AND THEREFROM INCLUDING, WITHOUT LIMITATION, ANY AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS THEREOF AND WITHOUT LIMITATION, MONEY, CHEQUES, DEPOSITS IN DEPOSIT TAKING INSTITUTIONS, GOODS, ACCOUNTS RECEIVABLE, RENTS OR OTHER PAYMENTS ARISING FROM THE LEASE OF THE COLLATERAL, INCLUDING ALL GOODS, SECURITIES, INSTRUMENTS, DOCUMENTS OF TITLE, CHATTEL PAPER, INTANGIBLES (AS DEFINED IN THE PERSONAL PROPERTY SECURITY ACT), RIGHTS OF INSURANCE PAYMENTS OR ANY OTHER PAYMENT AS INDEMNITY OR COMPENSATION FOR LOSS OR DAMAGE TO THE COLLATERAL OR PROCEEDS OF THE COLLATERAL.</p>	Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16032213714

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Mar-22

Registration Status: Current

Expiry Date: 2021-Mar-22 23:59:59

Exact Match on: Debtor

No: 2

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCTTECH INC. 77 BELFIELD ROAD, SUITE 100 TORONTO, ON M9W1G6	Current
2	DISTINCT INFRASTRUCTURE GROUP INC. 1600 333 - 7TH AVENUE CALGARY, AB T2P2Z1	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	ELEMENT FINANCIAL INC 900-4 ROBERT SPECK PARKWAY MISSISSAUGA, ON L4Z1S1	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1FDUF5GT0GEA74377	2016	FORD F550	MV - Motor Vehicle	Current
2	1FDUF5GT2GEA74381	2016	FORD F550	MV - Motor Vehicle	Current
3	1FDUF5GT4GEA74379	2016	FORD F550	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

- 1 **ONE NEW 2016 FORD F550 BUCKET TRUCK S/N 1FDUF5GT0GEA74377 C/W ONE
NEW 2016 ALTEC AT37G AERIAL DEVICE S/N 1015DE18341
ONE NEW 2016 FORD F550 BUCKET TRUCK S/N 1FDUF5GT2GEA74381 C/W ONE
NEW 2016 ALTEC AT37G AERIAL DEVICE S/N 1015DE18373
ONE NEW 2016 FORD F550 BUCKET TRUCK S/N 1FDUF5GT4GEA74379 C/W ONE
NEW 2016 ALTEC AT37G AERIAL DEVICE S/N 1015DE18342
TOGETHER WITH ANY AND ALL PRESENT AND FUTURE ACQUIRED PARTS,
ATTACHMENTS, ACCESSORIES, ACCESSIONS, ADDITIONS, SUBSTITUTIONS,
IMPROVEMENTS, REPAIR AND REPLACEMENT PARTS AND OTHER EQUIPMENT
PLACED ON OR FORMING PART OF THE GOODS DESCRIBED HEREIN AND ANY
PROCEEDS THEREOF AND THEREFROM INCLUDING, WITHOUT LIMITATION, ANY
AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM
ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS THEREOF
AND WITHOUT LIMITATION, MONEY, CHEQUES, DEPOSITS IN DEPOSIT TAKING
INSTITUTIONS, GOODS, ACCOUNTS RECEIVABLE, RENTS OR OTHER PAYMENTS
ARISING FROM THE LEASE OF THE COLLATERAL, INCLUDING ALL GOODS,
SECURITIES, INSTRUMENTS, DOCUMENTS OF TITLE, CHATTEL PAPER, INTANGIBLES
(AS DEFINED IN THE PERSONAL PROPERTY SECURITY ACT), RIGHTS OF
INSURANCE PAYMENTS OR ANY OTHER PAYMENT AS INDEMNITY OR
COMPENSATION FOR LOSS OR DAMAGE TO THE COLLATERAL OR PROCEEDS OF
THE COLLATERAL.**
- Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16041919568

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Apr-19

Registration Status: Current

Expiry Date: 2021-Apr-19 23:59:59

Exact Match on: Debtor

No: 2

Amendments to Registration

17030705167

Amendment

2017-Mar-07

Debtor(s)**Block**

1 DISTINCTTECH INC.
77 BELFIELD ROAD, SUITE 100
TORONTO, ON M9W1G6

Status

Current

Block

2 DISTINCT INFRASTRUCTURE GROUP INC.
77 BELFIELD ROAD, SUITE 100
TORONTO, ON M9W1G6

Status

Current

Block

3 IVAC SERVICES WEST INC.
2300, 10180-101 STREET
EDMONTON, AB T5J1V3

StatusCurrent by
17030705167**Secured Party / Parties****Block**

1 ELEMENT FINANCIAL INC
900-4 ROBERT SPECK PARKWAY
MISSISSAUGA, ON L4Z1S1

Status

Current

Block**Status**

Search ID#: Z10982803

2 EFN FINANCIAL INC.
900-4 ROBERT SPECK PARKWAY
MISSISSAUGA, ON L4Z1S1 Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1NKDX4EX5HJ986320	2017	KENWORTH T800	MV - Motor Vehicle	Current
2	1NKDX4EX9HJ986322	2017	KENWORTH T800	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	<p>ONE 2017 KENWORTH T800 TRIDEM VAC TRUCK SN 1NKDX4EX5HJ986320 ONE 2017 KENWORTH T800 TRIDEM VAC TRUCK SN 1NKDX4EX9HJ986322 ONE 2016 FOREMOST 2000 HYDRO VAC UNIT SN 63327 ONE 2016 FOREMOST 2000 HYDRO VAC UNIT SN 63328 TOGETHER WITH ANY AND ALL PRESENT AND FUTURE ACQUIRED PARTS, ATTACHMENTS, ACCESSORIES, ACCESSIONS, ADDITIONS, SUBSTITUTIONS, IMPROVEMENTS, REPAIR AND REPLACEMENT PARTS AND OTHER EQUIPMENT PLACED ON OR FORMING PART OF THE GOODS DESCRIBED HEREIN AND ANY PROCEEDS THEREOF AND THEREFROM INCLUDING, WITHOUT LIMITATION, ANY AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS THEREOF AND WITHOUT LIMITATION, MONEY, CHEQUES, DEPOSITS IN DEPOSIT TAKING INSTITUTIONS, GOODS, ACCOUNTS RECEIVABLE, RENTS OR OTHER PAYMENTS ARISING FROM THE LEASE OF THE COLLATERAL, INCLUDING ALL GOODS, SECURITIES, INSTRUMENTS, DOCUMENTS OF TITLE, CHATTEL PAPER, INTANGIBLES (AS DEFINED IN THE PERSONAL PROPERTY SECURITY ACT), RIGHTS OF INSURANCE PAYMENTS OR ANY OTHER PAYMENT AS INDEMNITY OR COMPENSATION FOR LOSS OR DAMAGE TO THE COLLATERAL OR PROCEEDS OF THE COLLATERAL.</p>	Current

Search ID#: Z10982803

Business Debtor Search For:**DISTINCT INFRASTRUCTURE GROUP INC**

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16042527035

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Apr-25

Registration Status: Current

Expiry Date: 2021-Apr-25 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCT INFRASTRUCTURE GROUP INC. 180 STRATHMOOR DR SHERWOOD PARK, AB T8H 2B7	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	JOHN DEERE FINANCIAL INC. 3430 SUPERIOR COURT OAKVILLE, ON L6L 0C4	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	HCMACB60J00260113	2015	HITACHI ZX26U-5	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

- 1 **ONE HITACHI ZX26U-5 HITACHI COMPACT EXCAVATORS TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES, CHATTEL PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS, SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL OR THE PROCEEDS OF THE COLLATERAL.**
- Current

Search ID#: Z10982803

Business Debtor Search For:**DISTINCT INFRASTRUCTURE GROUP INC**

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16042527095

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Apr-25

Registration Status: Current

Expiry Date: 2021-Apr-25 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCT INFRASTRUCTURE GROUP INC. 180 STRATHMOOR DR SHERWOOD PARK, AB T8H 2B7	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	JOHN DEERE FINANCIAL INC. 3430 SUPERIOR COURT OAKVILLE, ON L6L 0C4	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	HCMACB60V00260115	2015	HITACHI ZX26U-5	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

- 1 **ONE HITACHI ZX26U-5 HITACHI COMPACT EXCAVATORS TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES, CHATTEL PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS, SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL OR THE PROCEEDS OF THE COLLATERAL.**
- Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16042527142

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Apr-25

Registration Status: Current

Expiry Date: 2021-Apr-25 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)**Block**

1 DISTINCT INFRASTRUCTURE GROUP INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H 2B7

Status

Current

Secured Party / Parties**Block**

1 JOHN DEERE FINANCIAL INC.
3430 SUPERIOR COURT
OAKVILLE, ON L6L 0C4

Status

Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	HCMACB60E00260119	2015	HITACHI ZX26U-5	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

- 1 **ONE HITACHI ZX26U-5 HITACHI COMPACT EXCAVATORS TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES, CHATTEL PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS, SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL OR THE PROCEEDS OF THE COLLATERAL.**
- Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16042527221

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Apr-25

Registration Status: Current

Expiry Date: 2021-Apr-25 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCT INFRASTRUCTURE GROUP INC. 180 STRATHMOOR DR SHERWOOD PARK, AB T8H 2B7	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	JOHN DEERE FINANCIAL INC. 3430 SUPERIOR COURT OAKVILLE, ON L6L 0C4	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	HCMADG60T00272915	2016	HITACHI 35U5ZFF	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

- 1 ONE HITACHI 35U5ZFF HITACHI COMPACT EXCAVATORS TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES, CHATTEL PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS, SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL OR THE PROCEEDS OF THE COLLATERAL.

Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16042527265

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Apr-25

Registration Status: Current

Expiry Date: 2021-Apr-25 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCT INFRASTRUCTURE GROUP INC. 180 STRATHMOOR DR SHERWOOD PARK, AB T8H 2B7	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	JOHN DEERE FINANCIAL INC. 3430 SUPERIOR COURT OAKVILLE, ON L6L 0C4	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	HCMADG60T00274048	2016	HITACHI 35U5ZFF	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

- 1 **ONE HITACHI 35U5ZFF HITACHI COMPACT EXCAVATORS TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES, CHATTEL PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS, SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL OR THE PROCEEDS OF THE COLLATERAL.**

Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16042721438

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Apr-27

Registration Status: Current

Expiry Date: 2021-Apr-27 23:59:59

Exact Match on: Debtor

No: 2

Debtor(s)**Block**

		<u>Status</u>
1	DISTINCTTECH INC. 77 BELFIELD ROAD TORONTO, ON M9W1G6	Current

Block

2	DISTINCT INFRASTRUCTURE GROUP INC. 77 BELFIELD ROAD TORONTO, ON M9W1G6	Current
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Secured Party / Parties**Block**

1	ELEMENT FINANCIAL INC 900-4 ROBERT SPECK PARKWAY MISSISSAUGA, ON L4Z1S1	Current
---	---	---------

Block

2	EFN FINANCIAL INC. 900-4 ROBERT SPECK PARKWAY MISSISSAUGA, ON L4Z1S1	Current
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Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1NKDX4EX7HJ986321	2017	KENWORTH T800	MV - Motor Vehicle	Current
2	1NKDX4EX0HJ986323	2017	KENWORTH T800	MV - Motor Vehicle	Current

Search ID#: Z10982803

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	<p>ONE 2017 KENWORTH T800 TRIDEM VAC TRUCK SN 1NKDX4EX7HJ986321 ONE 2017 KENWORTH T800 TRIDEM VAC TRUCK SN 1NKDX4EX0HJ986323 ONE 2016 FOREMOST 2000 HYDROVAC UNIT SN 63329 ONE 2016 FOREMOST 2000 HYDROVAC UNIT SN 63330 TOGETHER WITH ANY AND ALL PRESENT AND FUTURE ACQUIRED PARTS, ATTACHMENTS, ACCESSORIES, ACCESSIONS, ADDITIONS, SUBSTITUTIONS, IMPROVEMENTS, REPAIR AND REPLACEMENT PARTS AND OTHER EQUIPMENT PLACED ON OR FORMING PART OF THE GOODS DESCRIBED HEREIN AND ANY PROCEEDS THEREOF AND THEREFROM INCLUDING, WITHOUT LIMITATION, ANY AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS THEREOF AND WITHOUT LIMITATION, MONEY, CHEQUES, DEPOSITS IN DEPOSIT TAKING INSTITUTIONS, GOODS, ACCOUNTS RECEIVABLE, RENTS OR OTHER PAYMENTS ARISING FROM THE LEASE OF THE COLLATERAL, INCLUDING ALL GOODS, SECURITIES, INSTRUMENTS, DOCUMENTS OF TITLE, CHATTEL PAPER, INTANGIBLES (AS DEFINED IN THE PERSONAL PROPERTY SECURITY ACT), RIGHTS OF INSURANCE PAYMENTS OR ANY OTHER PAYMENT AS INDEMNITY OR COMPENSATION FOR LOSS OR DAMAGE TO THE COLLATERAL OR PROCEEDS OF THE COLLATERAL.</p>	Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16051720605

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-May-17

Registration Status: Current

Expiry Date: 2021-May-17 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCT INFRASTRUCTURE GROUP INC. SUITE 100 - 77 BELFIELD ROAD TORONTO, ON M9W1G6	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	TRAVELERS LEASING LTD. 500 - 4180 LOUGHEED HIGHWAY BURNABY, BC V5C6A7	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1VR4100C7G1000333	2016	VERMEER D6X66VP	MV - Motor Vehicle	Current
2	1VRX030U8GF004503	2016	VERMEER MX1252VP	MV - Motor Vehicle	Current
3	1VR1120H0F1000358	2015	VERMEER D9X13III	MV - Motor Vehicle	Current
4	1VRX030UXGF004504	2016	VERMEER MX1252VP	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

1

ONE (1) NEW 2016 VERMEER D8X66VP NAVIGATOR S/N 1VR4100C7G1000333 ,
ONE (1) NEW 2016 VERMEER MX1252VP MIXING SYSTEM S/N 1VRX030U8GF004503 ,
ONE (1) USED 2015 VERMEER D9X13III NAVIGATOR S/N 1VR1120H0F1000358 ,
ONE (1) NEW 2016 VERMEER MX1252VP MIXING SYSTEM S/N 1VRX030UXGF004504
TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS,
REPLACEMENTS, SUBSTITUTIONS, ADDITIONS, AND IMPROVEMENTS THERETO,
AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM
ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS OF THE
COLLATERAL AND A RIGHT TO ANY INSURANCE PAYMENT OR OTHER PAYMENT
THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE
COLLATERAL OR PROCEEDS OF THE COLLATERAL.

Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16082235932

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Aug-22

Registration Status: Current

Expiry Date: 2020-Aug-22 23:59:59

Exact Match on: Debtor

No: 1

Amendments to Registration

16082322324

Amendment

2018-Aug-23

Debtor(s)**Block**

1 DISTINCT INFRASTRUCTURE GROUP INC.
 2300, 10180-101 STREET
 EDMONTON, AB T5J1V3

Status

Current

Secured Party / Parties**Block**

1 TRAVELERS LEASING LTD.
 800-9900 KING GEORGE BLVD.
 SURREY, BC V3T0K7

Status

Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	3HAMMAAN2CL461810	2012	INTRNTNL 4300	MV - Motor Vehicle	Current
2	1FDUF5GT3CEA43800	2012	FORD F550	MV - Motor Vehicle	Deleted By 18082322324

Collateral: General**Block****Description****Status**

Search ID#: Z10982803

- 1 ONE (1) USED 2012 ALTEC DM47BR DIGGER DERRICK S/N 0611DV5141 MOUNTED ON ONE (1) USED 2012 INTERNATIONAL 4300 CAB CHASSIS S/N 3HAMMAAN2CL461810 AND ONE (1) USED 2012 ALTEC AT37G AERIAL DEVICE S/N 1211DE13657 MOUNTED ON ONE (1) USED 2012 FORD F550 CHASSIS S/N 1FDUF5GT3CEA43800 TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS, AND IMPROVEMENTS THERETO, AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS OF THE COLLATERAL AND A RIGHT TO ANY INSURANCE PAYMENT OR OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL OR PROCEEDS OF THE COLLATERAL. Deleted By 18082322324
- 2 ONE (1) USED 2012 ALTEC DM47BR DIGGER DERRICK S/N 0611DV5141 MOUNTED ON ONE (1) USED 2012 INTERNATIONAL 4300 CAB CHASSIS S/N 3HAMMAAN2CL461810 TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS, AND IMPROVEMENTS THERETO, AND ALL PROCEEDS IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY SALE AND OR DEALINGS WITH THE COLLATERAL OR PROCEEDS OF THE COLLATERAL AND A RIGHT TO ANY INSURANCE PAYMENT OR OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL OR PROCEEDS OF THE COLLATERAL. Current By 18082322324

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 16092308741

Registration Type: SECURITY AGREEMENT

Registration Date: 2016-Sep-23

Registration Status: Current

Expiry Date: 2024-Sep-23 23:59:59

Exact Match on: Debtor

No: 1

Amendments to Registration

17042115605

Renewal

2017-Apr-21

Debtor(s)**Block**

1 DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180 - 101 STREET
EDMONTON, AB T5J1V3

Status

Current

Secured Party / Parties**Block**

1 ROYAL BANK OF CANADA
36 YORK MILLS ROAD, 4TH FLOOR
TORONTO, ON M2P0A4

Status

Current

Collateral: General**Block****Description**

1 ALL OF THE DEBTOR'S PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY.

Status

Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 17032830496

Registration Type: SECURITY AGREEMENT

Registration Date: 2017-Mar-28

Registration Status: Current

Expiry Date: 2022-Mar-28 23:59:59

Exact Match on:	Debtor	No: 2
Exact Match on:	Debtor	No: 4
Inexact Match on:	Debtor	No: 1

Amendments to Registration

18113025782

Amendment

2018-Nov-30

Debtor(s)**Block**

1 DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DRIVE
SHERWOOD PARK, AB T8H2B7

Status

Current

Block

2 DISTINCT INFRASTRUCTURE GROUP INC.
77 BELFIELD ROAD
TORONTO, ON M9W1G6

Status

Current

Block

3 DISTINCTTECH INC.
77 BELFIELD ROAD
TORONTO, ON M9W1G6

StatusCurrent by
18113025782**Block**

4 DISTINCT INFRASTRUCTURE GROUP INC.
180 STRATHMOOR DRIVE
SHERWOOD PARK, AB T8H2B7

StatusCurrent by
18113025782

Search ID#: Z10982803

Secured Party / Parties**Block**

1 SOMERVILLE NATIONAL LEASING & RENTALS LTD.
75 ARROW ROAD
TORONTO, ON M9M2L4

Status

Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1N6AF0LY6HN803364	2017	NISSAN NV 3500	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	PURSUANT TO LEASE AGREEMENT (UNIT#G3490), ALL PRESENT AND FUTURE EQUIPMENT ENCOMPASSED BY LEASE AGREEMENT (UNIT#G3490) TOGETHER WITH ALL ATTACHMENTS ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES, CHATTEL, PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS, SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL INCLUDING BUT NOT LIMITED TO THE FOLLOWING (2017 NISSAN NV 3500 CARGO TECH HIGH ROOF)	Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 17050124690

Registration Type: SECURITY AGREEMENT

Registration Date: 2017-May-01

Registration Status: Current

Expiry Date: 2022-May-01 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCT INFRASTRUCTURE GROUP INC. 180 STRATHMOOR DR SHERWOOD PARK, AB T8H2B7	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	JOHN DEERE FINANCIAL INC. 3430 SUPERIOR COURT OAKVILLE, ON L6L 0C4	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1FF035GXJGK278322	2017	JOHN DEERE 035GXFF	MV - Motor Vehicle	Current
2	1FF035GXCGK278323	2017	JOHN DEERE 035GXFF	MV - Motor Vehicle	Current
3	1FF035GXAGK278325	2017	JOHN DEERE 035GXFF	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
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Search ID#: Z10982803

- 1 **ONE JOHN DEERE 035GXFF COMPACT EXCAVATORS ONE JOHN DEERE 035GXFF
COMPACT EXCAVATORS ONE JOHN DEERE 035GXFF COMPACT EXCAVATORS
TOGETHER WITH ALL ATTACHMENTS, ACCESSORIES, ACCESSIONS,
REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND
ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED
DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING
WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES,
CHattel PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS,
SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL
PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY
OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE
TO THE COLLATERAL OR THE PROCEEDS OF THE COLLATERAL.** **Current**

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 17051817046

Registration Type: SECURITY AGREEMENT

Registration Date: 2017-May-18

Registration Status: Current

Expiry Date: 2022-May-18 23:59:59

Exact Match on:	Debtor	No: 2
Exact Match on:	Debtor	No: 3
Inexact Match on:	Debtor	No: 1

Amendments to Registration

17051916939

Amendment

2017-May-19

18113020693

Amendment

2018-Nov-30

Debtor(s)**Block**

1 DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DRIVE
SHERWOOD PARK, AB T8H2B7

Status

Current

Block

2 DISTINCT INFRASTRUCTURE GROUP INC.
180 STRATHMOOR DRIVE
SHERWOOD PARK, AB T8H2B7

Status

Current

Block

3 DISTINCT INFRASTRUCTURE GROUP INC.
77 BELFIELD ROAD
TORONTO, ON M9W1G6

StatusCurrent by
17051916939**Block**

4 DISTINCTTECH INC.
77 BELFIELD ROAD
TORONTO, ON M9W1G6

StatusCurrent by
18113020693

Search ID#: Z10982803

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	SOMERVILLE NATIONAL LEASING & RENTALS LTD. 75 ARROW ROAD TORONTO, ON M9M2L4	Current

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1N6AF0LY0HN805898	2017	NISSAN NV 3500	MV - Motor Vehicle	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	PURSUANT TO LEASE AGREEMENT (UNIT#G3535), ALL PRESENT AND FUTURE EQUIPMENT ENCOMPASSED BY LEASE AGREEMENT (UNIT#G3535) TOGETHER WITH ALL ATTACHMENTS ACCESSORIES, ACCESSIONS, REPLACEMENTS, SUBSTITUTIONS, ADDITIONS AND IMPROVEMENTS THERETO AND ALL PROCEEDS OF EVERY TYPE, ITEM OR KIND IN ANY FORM DERIVED DIRECTLY OR INDIRECTLY FROM ANY DEALING WITH COLLATERAL INCLUDING WITHOUT LIMITATION TRADE-INS, EQUIPMENT, INVENTORY, GOODS, NOTES, CHATTEL, PAPER, CONTRACT RIGHTS, ACCOUNTS, RENTAL PAYMENTS, SECURITIES, INTANGIBLES, DOCUMENTS OF TITLE AND MONEY AND ALL PROCEEDS OF PROCEEDS AND A RIGHT TO ANY INSURANCE PAYMENT AND ANY OTHER PAYMENT THAT INDEMNIFIES OR COMPENSATES FOR LOSS OR DAMAGE TO THE COLLATERAL INCLUDING BUT NOT LIMITED TO THE FOLLOWING 2017 NISSAN NV 3500 CARGOVAN SV TECH HIGHROOF	Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 17090137319

Registration Type: WRIT OF ENFORCEMENT

Registration Date: 2017-Sep-01

Registration Status: Current

Expiry Date: 2019-Sep-01 23:59:59

Issued in Edmonton Judicial Centre

Court File Number is 1703 13921

Judgment Date is 2017-Jul-31

This Writ was issued on 2017-Sep-01

Type of Judgment is Other

Original Judgment Amount: \$422,398.81

Costs Are: \$2,390.64

Post Judgment Interest: \$3,815.31

Current Amount Owing: \$428,604.76

Exact Match on: Debtor

No: 6

Amendments to Registration

18080930601	Amendment	2018-Aug-09
18081031345	Amendment	2018-Aug-10
18101203555	Amendment	2018-Oct-12
18120516483	Amendment	2018-Dec-05

Solicitor / Agent
**BOSECKE & ASSOCIATES
102, 9333-47 STREET
EDMONTON, AB T6B 2R7**

Phone #: 780 469 0494

Fax #: 780 469 4181

Reference #: 2409917

Debtor(s)

**Government
of Alberta** ■

**Personal Property Registry
Search Results Report**

Page 39 of 49

Search ID#: Z10982803

Block

1 MEGA DIESEL EXCAVATING LTD.
2300, 10180-101 STREEET
EDMONTON, AB T5J 1V3

Status

Deleted by
18080930601

Block

2 DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180-101 STREEET
EDMONTON, AB T5J 1V3

Status

Deleted by
18101203555

Block

3 JVAC SERVICES WEST INC.
2300, 10180 - 101 STREET
EDMONTNO, AB T5J 1V3

Status

Deleted by
18081031345

Block

4 IVAC SERVICES WEST INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Current by
18081031345

Block

5 MEGA DIESEL EXCAVATING LTD.
2300, 10180-101 STREEET
EDMONTON, AB T5J 1V3

Status

Deleted by
18101203555

Block

6 DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Current by
18101203555

Block

7 MEGA DIESEL EXCAVATING LTD.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Current by
18101203555

Creditor(s)

Block

1 WOOD, CHRIS, ARON
C/O BOSECKE & ASSOCIATES 102, 9333-47 ST
EDMONTON, AB T6B 2R7

Status

Current

Block

2 MEGA DIESEL HOLDINGS LTD.
102, 9333-47 STREET NW
EDMONTON, AB T6B 2R7

Status

Current

Search ID#: Z10982803

Collateral: Serial Number Goods

<u>Block</u>	<u>Serial Number</u>	<u>Year</u>	<u>Make and Model</u>	<u>Category</u>	<u>Status</u>
1	1FTSW31P54EC30274	2004	Ford, F350	MV - Motor Vehicle	Current By 18101203555
2	3GTPZVE72DG121819	2013	GMC, Sierra 1500	MV - Motor Vehicle	Current By 18101203555
3	3GTU2UEC8EG104172	2014	GMC, Sierra 1500	MV - Motor Vehicle	Current By 18101203555
4	4ZECH202681054374	2008	Load Trail, 7 x20 T/A Ca	TR - Trailer	Current By 18101203555
5	70000020100046	2000	Skyreach Utility Trailer,	TR - Trailer	Current By 18101203555
6	5KKPALDR0DPFJ2264	2013	Western Star with Tomado	MV - Motor Vehicle	Current By 18101203555
7	5KKPALDR6DPBZ2142	2013	Western Star with Tomado	MV - Motor Vehicle	Current By 18101203555
8	5KKPALDRXDPFA9979	2013	Western Star with Foremos	MV - Motor Vehicle	Current By 18101203555
9	5KKPALD10EPFP3870	2014	Western Star with Foremos	MV - Motor Vehicle	Current By 18101203555
10	5KKPALD12EPF3871	2014	Western Star with Foremos	MV - Motor Vehicle	Current By 18101203555
11	5KKPALD12FPGK2056	2015	Western Star Tomado F4 S	MV - Motor Vehicle	Current By 18101203555
12	SLP217FC7U0910325	2008	JCB, 217a	MV - Motor Vehicle	Current By 18101203555
13	670902680	2009	Westeel, 4100 L Fuel Vault	TR - Trailer	Current By 18101203555
14	5KKPALD12EPFP3871	2014	Western Star with Foremos	MV - Motor Vehicle	Current By 18120516483
15	5KKPALD17FPGB2242	2015	Western Star Truck with H	MV - Motor Vehicle	Current By 18120516483
16	5KKPALD12FPGK2956	2015	Western Star Truck with 4	MV - Motor Vehicle	Current By 18120516483
17	3GTU2UEC8EG194172	2014	GMC Sierra 1500	MV - Motor Vehicle	Current By 18120516483

Particulars

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
1		Current

Search ID#: Z10982803

Address for Creditor
WOOD, CHRIS, ARON
c/o Bosecke & Associates 102, 9333-47 Street NW
Edmonton, AB - Alberta T6B 2R7

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
2	SWORN FINANCIAL STATEMENT OF DEBTOR RECEIVED ON OCTOBER 2, 2018	Current By 18101203555

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
3	FULL DESCRIPTION AS FOLLOWS:	Current By 18101203555

4ZECH202681054374 : 2008 : Load Trall, 7 x20 T/A Car Hauler : TR - Trailer
70000020100046 : 2000 : Skyreach Utility Trailer, width 6'6"length 20' : TR - Trailer
5KKPALDR0DPFJ2264 : 2013 : Western Star with TornadoF4 Slope, 4900SB : MV - Motor Vehicle
5KKPALDR6DPBZ2142 : 2013 : Western Star with TornadoF4 Slope, 4900SB : MV - Motor Vehicle
5KKPALDRXDPFA9979 : 2013 : Western Star with Foremost 2000 Hydrovac System, 4900SB : MV - Motor Vehicle
5KKPALD10EPFP3870 : 2014 : Western Star with Foremost 2000 Hydrovac System, 4900SB : MV - Motor Vehicle
5KKPALD12EPF3871 : 2014 : Western Star with Foremost 2000 Hydrovac System, 4900SB : MV - Motor Vehicle
5KKPALD12FPGK2056 : 2015 : Western Star Tornado F4 Slope, 4900SB : MV - Motor Vehicle
670902680 : 2009 : Westeel, 4100 L Fuel Vault : TR - Trailer

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
4	Non-Serial Good: Construction Equipment Hammer 8550 Hammer Hoe Attachment NPK Hoe Pack Shoring Boxes GME Light 10' Panels, (Quantity listed as 23) Sewage Tank 500 Gal Sewage Tank Water Tank 500 Gal Water Tank 2008 Storage Container ACC-11392 8x20' Storage Container 2000 Mobile Office Atco ATC-16194	Current By 18101203555

<u>Block</u>	<u>Additional Information</u>	<u>Status</u>
5		Current By 18120516483

Search ID#: Z10982803

FULL DESCRIPTION AS FOLLOWS:

5KKPALD12EFPF3871 : 2014 : Western Star with Foremost 2000 Hydrovac System
4900SB Tri Drive Hydro Vac Truck W05-028741 : MV - Motor Vehicle
5KKPALD17FPG82242 : 2015 : Western Star Truck with Hydrovac System S/N 025925 :
MV - Motor Vehicle
5KKPALD12FPGK2956 : 2015 : Western Star Truck with 4900SA with Tri Drive Hydrovac
S/N 028726 : MV - Motor Vehicle

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 18041026389

Registration Type: SECURITY AGREEMENT

Registration Date: 2018-Apr-10

Registration Status: Current

Expiry Date: 2023-Apr-10 23:59:59

Exact Match on: Debtor

No: 1

Debtor(s)

<u>Block</u>		<u>Status</u>
1	DISTINCT INFRASTRUCTURE GROUP INC. 77 BELFIELD ROAD, SUITE 102 TORONTO, ON M9W 1G6	Current

Secured Party / Parties

<u>Block</u>		<u>Status</u>
1	ROYAL BANK OF CANADA, AS ADMINISTRATIVE AGENT 20 KING STREET WEST, 4TH TORONTO, ON M4H 1C4	Current

<u>Block</u>		<u>Status</u>
2	ROYAL BANK OF CANADA 20 KING STREET WEST, 4TH TORONTO, ON M4H 1C4	Current

Collateral: General

<u>Block</u>	<u>Description</u>	<u>Status</u>
1	ALL OF THE DEBTOR'S PRESENT AND AFTER-ACQUIRED PERSONAL PROPERTY.	Current

Search ID#: Z10982803

Business Debtor Search For:

DISTINCT INFRASTRUCTURE GROUP INC

Search ID #: Z10982803

Date of Search: 2018-Dec-06

Time of Search: 10:14:52

Registration Number: 18101524102

Registration Type: WRIT OF ENFORCEMENT

Registration Date: 2018-Oct-15

Registration Status: Current

Expiry Date: 2020-Oct-15 23:59:59

Issued in Edmonton Judicial Centre

Court File Number is 1703 21939

Judgment Date is 2018-Sep-13

This Writ was issued on 2018-Oct-10

Type of Judgment is Other

Original Judgment Amount: \$150,976.14

Costs Are: \$3,168.97

Post Judgment Interest: \$0.00

Current Amount Owing: \$154,145.11

Exact Match on: Debtor

No: 1

Solicitor / Agent

BOSECKE & ASSOCIATES
102, 9333-47 STREET
EDMONTON, AB T6B 2R7

Phone #: 780 469 0494

Fax #: 780 469 4181

Reference #: 2402718

Debtor(s)**Block**

1 DISTINCT INFRASTRUCTURE GROUP INC.
2300, 10180-101 STREET
EDMONTON, AB T5J 1V3

Status

Current

Creditor(s)**Block**

1

Status

Current

Search ID#: Z10982803

WOOD, CHRIS, ARON
C/O BOSECKE & ASSOCIATES 102, 9333-47 ST
EDMONTON, AB T6B 2R7

Block

2 MEGA DIESEL HOLDINGS LTD.
C/O BOSECKE & ASSOCIATES 102, 9333-47 ST
EDMONTON, AB T6B 2R7

Status

Current

Search ID#: Z10982803

Note:

The following is a list of matches closely approximating your Search Criteria,
which is included for your convenience and protection.

Debtor Name / Address	Reg. #
DISTINCT ENVIRONMENTAL SOLUTIONS INC. 77 BELFIELD ROAD TORONTO, ON M9W1G6	16092309392
SECURITY AGREEMENT	
Debtor Name / Address	Reg. #
DISTINCT INFRASTRUCTURE GROUP (ALBERTA) LTD. 2300, 10180 - 101 STREET EDMONTON, AB T5J1V3	16092607879
SECURITY AGREEMENT	
Debtor Name / Address	Reg. #
DISTINCT INFRASTRUCTURE GROUP (ALBERTA) LTD. 180 STRAHMOOR DR SHERWOOD PARK, AB T8H2B7	17030109818
SECURITY AGREEMENT	
Debtor Name / Address	Reg. #
DISTINCT INFRASTRUCTURE GROUP WEST INC. 2300, 10180-101 STREET EDMONTON, AB T5J 1V3	16092309364
SECURITY AGREEMENT	
Debtor Name / Address	Reg. #
DISTINCT INFRASTRUCTURE GROUP WEST INC. 2300, 10180-101 STREET EDMONTON, AB T5J 1V3	16092607879
SECURITY AGREEMENT	

Search ID#: Z10982803

Debtor Name / Address**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DRIVE
SHERWOOD PARK, AB T8H2B7****Reg. #****17032830496****SECURITY AGREEMENT****Debtor Name / Address****DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7****Reg. #****17042523842****SECURITY AGREEMENT****Debtor Name / Address****DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7****Reg. #****17051023136****SECURITY AGREEMENT****Debtor Name / Address****DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DRIVE
SHERWOOD PARK, AB T8H2B7****Reg. #****17051817046****SECURITY AGREEMENT****Debtor Name / Address****DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7****Reg. #****17051820872****SECURITY AGREEMENT****Debtor Name / Address****Reg. #****17082312311**

Search ID#: Z10982803

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7**

SECURITY AGREEMENT**Debtor Name / Address**

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7**

Reg. #

17082317169

SECURITY AGREEMENT**Debtor Name / Address**

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7**

Reg. #

17082320805

SECURITY AGREEMENT**Debtor Name / Address**

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7**

Reg. #

17092512325

SECURITY AGREEMENT**Debtor Name / Address**

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H 2B7**

Reg. #

17103132018

SECURITY AGREEMENT**Debtor Name / Address****Reg. #**

17103134002

Search ID#: Z10982803

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7**

SECURITY AGREEMENT**Debtor Name / Address**

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
180 STRATHMOOR DR
SHERWOOD PARK, AB T8H2B7**

Reg. #

17111415533

SECURITY AGREEMENT**Debtor Name / Address**

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
77 BELFIELD ROAD, SUITE 102
TORONTO, ON M9W 1G6**

Reg. #

18041026405

SECURITY AGREEMENT**Debtor Name / Address**

**DISTINCT INFRASTRUCTURE GROUP WEST INC.
2103 - 8TH STREET
NISKU, AB T9E7Z1**

Reg. #

18052833576

SECURITY AGREEMENT

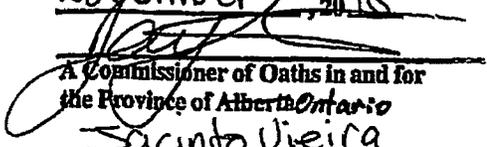
Result Complete

Balance Reporting - Balance Summary Report

Scott Green, DISTINCTTECH INC.

Report Creation Date: Dec 17, 2018 01:12:53PM ET

Report Date: Dec 17, 2018

Account Type	Account	Currency	Balance
<p>REDACTED</p> <p>This is Exhibit <u>"B"</u> referred to in the Affidavit of <u>William Nurnberger</u> sworn before me this <u>15th</u> day of <u>November</u>, 20<u>18</u>  A Commissioner of Oaths in and for the Province of <u>Alberta Ontario</u> <u>Jacinto Vieira</u> Lawyer / Notary Public</p>			
BUS LOAN	DISTINCT INFRASTRUCT-06069-02005846	CAD	16,800,000.00 <i>LDA</i>
BUS LOAN	DISTINCT INFRASTRUCT-06069-02033882	CAD	1,000,000.00 <i>LDA</i>
BUS LOAN	DISTINCT INFRASTRUCT-06069-02033917	CAD	8,000,000.00 <i>LDA</i>

Balance Reporting - Balance Summary Report

Report Date: Dec 17, 2018

Account Type	Account	Currency	Balance
BUS LOAN	DISTINCT INFRASTRUCT-06069-02036437	CAD	11,625,000.00
BUS LOAN	DISTINCT INFRASTRUCT-06069-02036448	CAD	17,000,000.00
BUS LOAN	DISTINCT INFRASTRUCT-06069-02081204	USD	2,000.00

LOAN
EDC

*** End of report ***

LOAN 19625,000
~~*17,000,000*~~

Tab I

Court File No.

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

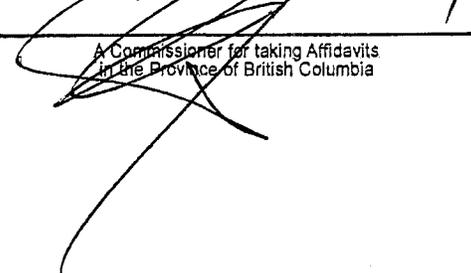
DISTINCT INFRASTRUCTURE GROUP INC., DISTINCT INFRASTRUCTURE
GROUP WEST INC., DISTINCTTECH INC., IVAC SERVICES INC., IVAC SERVICES
WEST INC., and CROWN UTILITIES LTD.

Respondents

REPORT OF DELOITTE RESTRUCTURING INC. IN ITS CAPACITY AS PROPOSED
RECEIVER OF DISTINCT INFRASTRUCTURE GROUP INC. AND ITS
SUBSIDIARIES

DATED FEBRUARY 28, 2019

This is EXHIBIT "I" referred to in the
Affidavit of Chris Wood
Sworn before me at Kelowna
in the Province of ~~British~~ Columbia this
15 day of October, 2019


A Commissioner for taking Affidavits
in the Province of British Columbia

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APPENDICES

APPENDIX "A":	SUBJECT SUBSIDIARIES
APPENDIX "B"	DIG CORPORATE ORGANIZATIONAL STRUCTURE
APPENDIX "C":	CASH FLOW FORECAST
APPENDIX "D"	DISTINCT INFRASTRUCTURE GROUP INC. - FINANCIAL STATEMENTS AS AT SEPTEMBER 30, 2018

INTRODUCTION AND PURPOSE OF THIS REPORT

1. Deloitte Restructuring Inc. ("**Deloitte**") understands that an application will be made before the Ontario Superior Court of Justice (Commercial List) (the "**Court**") by the Royal Bank of Canada ("**RBC**"), for an Order (the "**Receivership Order**"), *inter alia*, appointing Deloitte as receiver to exercise the powers and duties set out in the Receivership Order, pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), and section 101 of the *Courts of Justice Act* R.S.O. 1990 c. C.43, as amended (the "**Receiver**"), without security, of all the assets, properties and undertakings (collectively, the "**Property**") of Distinct Infrastructure Group Inc. (the "**Company**") and its subsidiaries set out in Appendix "A" hereto (collectively with the Company, "**DIG**").
2. Deloitte was retained by RBC to act as its financial consultant to review the current operations and financial position of DIG. Deloitte also worked with RBC and its legal counsel, Thornton Grout Finnigan LLP ("**TGF**"), with regard to the proposed receivership proceeding, as discussed below.
3. Deloitte is a licensed insolvency trustee within the meaning of section 2 of the BIA and has consented to act as Receiver in these proceedings in the event that the Court grants the relief sought by RBC. Deloitte has prepared this pre-filing report as proposed Court-appointed Receiver of DIG ("**Proposed Receiver**") to provide background to the Court for the pending receivership application and the relief being sought as part of the application (the "**Report**").
4. Deloitte has also engaged Aird & Berlis LLP ("**A&B**") to act as the Proposed Receiver's independent legal counsel.

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5. This Report will cover:
- a) DIG's current financial position (including assets, liabilities and security interests), causes of financial difficulty, certain financial reporting irregularities and DIG's immediate cash requirements;
 - b) The outcome of Deloitte's review of DIG's operations;
 - c) A summary of DIG's major creditors;
 - d) The result of RBC issuing its ten-day notice to enforce its security;
 - e) A&B's preliminary review of the validity and enforceability of RBC's security; and
 - f) Deloitte's consent to act as Receiver should the Court see fit to grant the Receivership Order.

TERMS OF REFERENCE

6. In preparing this Report, Deloitte has been provided with, and has relied upon unaudited, draft and/or internal financial information, DIG's books and records, discussions with management of DIG, discussions with the Special Committee (as defined below) and its legal counsel, and information from third-party sources (collectively, the "**Information**"). Except as described in this Report:

- (a) Deloitte has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, Deloitte has not audited or otherwise attempted to verify the accuracy or completeness of the

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Information in a manner that would wholly or partially comply with Canadian Auditing Standards (“CAS”) pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Proposed Receiver expresses no opinion or other form of assurance contemplated under CAS in respect of the Information;

- (b) Deloitte notes that the Company has recently issued press releases and guidance to the financial markets advising that its financial statements are misstated and should not be relied upon. Deloitte is aware of material write downs to the Company’s accounts receivable, work in progress and inventory balances and, accordingly, Deloitte cautions that the financial information reported herein is subject to further verification and may require material revision; and
- (c) Deloitte has prepared this Report in its capacity as Proposed Receiver to provide background to the Court for its consideration of the relief being sought. Parties using the Report other than for the purposes outlined herein are cautioned that it may not be appropriate for their purposes.

7. Unless otherwise stated, all dollar amounts contained in the Report are expressed in Canadian dollars. Financial information reported herein is presented on a consolidated basis and not at the individual operating company level.
8. The Report has been prepared with reference to the Affidavit of Gary Ivany sworn February 28, 2019 (the “**Ivany Affidavit**”) in this matter, a copy of which will be filed separately with Court by RBC.

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9. This Report should be read concurrently with the Ivany Affidavit for further context and background regarding DIG and the activities leading up to RBC's application.

OVERVIEW OF DIG

10. The Company is a public company listed on the TSX Venture Exchange under the symbol "DUG" whose assets consist of its ownership interests in operating subsidiaries that are engaged in the following lines of business:

- (a) Aerial construction – This line of business involves the installation of utility poles for telecommunications use and also involves the installation of cabling for telecommunications purposes;
- (b) Underground construction – As part of this line of business, DIG is involved in directional drilling for telecommunications infrastructure, hydro excavation, open trench installations and the placement of cable for telecommunications purposes;
- (c) Technical services – The primary activities related to DIG's technical services offering relates to fibre splicing and coaxial splicing and testing;
and
- (d) Third party material management – This offering relates to the storing of materials for DIG's various customers.

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11. DIG provides these services to customers in both the Greater Toronto Area (as far as the Niagara Region) and in Winnipeg, its two primary operating geographies. Significant customers in Toronto include:
 - (a) Bell Canada and Bell Mobility (together, “**Bell**”);
 - (b) Rogers Communications (“**Rogers**”);
 - (c) Toronto Hydro Electric System (“**Toronto Hydro**”);
 - (d) Beanfield Technologies (“**Beanfield**”); and
 - (e) Other smaller customers.
12. Of the customers above, Bell and Rogers together represent in excess of 56% of DIG’s reported revenue for the first 11 months of 2018, although the Company’s financial reports have proven to be unreliable.
13. Customers in Manitoba primarily include Bell, Rogers and Manitoba Hydro.
14. The Company was founded by Alex Agius and Joe Lanni. Until recently, the two founders were retained by DIG through consulting services contracts as joint chief executives (together, the “**Co-CEOs**”).
15. DIG currently employs approximately 310 employees in total between its various locations. The hourly employees in Toronto are represented by the Labourers’ International Union of North America, Ontario Provincial District Council Local 183. All other employees (both in Winnipeg and Toronto) are non-unionized (other than two pipefitters employed in Winnipeg).

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16. A corporate organizational chart setting out the corporate relationships within the DIG structure is included as Appendix “B” attached hereto.
17. Pursuant to the terms of a credit agreement dated March 23, 2017 (as amended, the “**Credit Agreement**”) between the Company, as borrower, and RBC, borrowings are subject to a borrowing base cap based on the level of accounts receivable and other working capital balances. The borrowing base is calculated on a monthly basis. As of the date of this Report, advances made by RBC under the Credit Agreement are approximately \$52.7 million, of which \$18.4 million is in respect of a term loan with the balance, or approximately \$34.3 million, representing a revolving credit facility.
18. As security for the Company’s obligations and liabilities to RBC under the Credit Agreement, DIG executed, among other things, a general security agreement in favour of RBC granting a security interest over DIG’s assets.

DIG’S STAKEHOLDERS

19. The total indebtedness of DIG to its creditors as of December 31, 2018 is approximately \$82.4 million. The following table sets out the nature of the relationship between DIG and each of its major creditors and stakeholders as detailed on the Company’s financial statements:

Stakeholder	Nature of relationship	Amount owing
RBC	<ul style="list-style-type: none"> Senior secured lender including a term and revolving credit facility 	<ul style="list-style-type: none"> \$52.7 million at February 27, 2019
Rogers Financial Management Corporation	<ul style="list-style-type: none"> Holder of \$10 million unsecured debenture issued in September, 2018 	<ul style="list-style-type: none"> \$9.1 million at December 31, 2018
Trade creditors	<ul style="list-style-type: none"> Ongoing trade credit 	<ul style="list-style-type: none"> \$12.9

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Stakeholder	Nature of relationship	Amount owing
		million at December 31, 2018
Lessors	<ul style="list-style-type: none"> • Leased construction equipment and vehicles to DIG to provide services to DIG's customers • Security over individual assets 	<ul style="list-style-type: none"> • \$3.0 million at December 31, 2018
Union	<ul style="list-style-type: none"> • Owed amounts on account of outstanding union dues, vacation pay, health benefits and pension contributions. Such amounts are included in "accounts payable and accrued liabilities" 	<ul style="list-style-type: none"> • \$1.5 million at February 27, 2019

DELOITTE'S PRIOR INVOLVEMENT WITH DIG

20. On November 29, 2018, RBC engaged Deloitte to perform an independent business review with respect to DIG's affairs and financial position, including an assessment of RBC's collateral position. As part of its scope of work, Deloitte undertook the following:
- (a) a review of DIG's business plan and financial forecast;
 - (b) preparation of an estimate of RBC's security position;
 - (c) a review of the borrowing base calculations provided to RBC; and
 - (d) other matters as directed by RBC.
21. Deloitte began its work shortly after the execution of its engagement letter by RBC and provided its report to RBC on January 31, 2019.
22. A chronology of certain events related to Deloitte's engagement is set out below:
- (a) Deloitte began its work in December, 2018. Such work was carried out at DIG's premises in Toronto, Ontario.

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- (b) On January 14, 2019, DIG engaged the services of a new Chief Financial Officer (the “New CFO”).
- (c) As part of its work, Deloitte sought support for various accounts that Management could not provide. The New CFO provided the accounts receivable subledgers at month end for each of October, November and December, 2018 (the “A/R Subledgers”) and backup to DIG’s work in process (“WIP”) accounts at the same dates. Deloitte analyzed the A/R Subledgers and noticed that each contained a number of invoices that had been issued for identical amounts on the same day or over a short period of time. For example:
- i. 51 invoices for \$144,616 (totalling \$7.4 million) were entered into the A/R Subledgers in December 2017 and between July and September 2018;
 - ii. 5 invoices for \$289,232 (totalling \$1.4 million) were entered into the A/R Subledgers between July 15 and August 13, 2018;
 - iii. 3 invoices for \$162,693 (totalling \$488,079) were entered into the A/R Subledgers in August 2018.
- (d) In addition, Deloitte identified seven duplicate invoices, each in the amount of \$144,616, in October 2018 totalling \$1.01 million and a further 14 duplicate invoices totalling approximately \$925,000 in November 2018.
- (e) When Deloitte asked DIG management (“Management”) to explain the reason for the issuance of these invoices, a satisfactory response was not provided by

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Management. Deloitte also asked for backup to certain of these invoices.

Management was unable to provide the required supporting documents.

- (f) Management was unable to provide appropriate support for the \$35 million WIP balances as at September 30, 2018.
- (g) Noting the lack of support or explanations for these financial reporting irregularities, Deloitte issued its report to RBC on January 31, 2019. The report noted that Deloitte had identified material irregularities with respect to Bell accounts receivable and invoices and that Deloitte reserved the right to amend its findings as necessary once further information was provided.
- (h) On February 4, 2019, the New CFO met with Mr. Ivany and a representative from Deloitte. At that meeting, the New CFO advised that he had identified approximately \$16 million of entries in the A/R Subledgers for which there was no support. He further advised that certain members of DIG's executive team, the Interim CFO and Vice President of Finance, were to be suspended and that a special committee of DIG's board of directors (the "**Special Committee**") had been formed to investigate these accounting irregularities.

23. The New CFO and the Special Committee continued to investigate DIG's finances and identified several unsupportable entries in the Company's accounts. As a result, the New CFO and Special Committee advised RBC and Deloitte that:

- (a) The employment of the Interim CFO and Vice President of Finance were terminated effective February 11, 2019.

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- (b) Significant personal charges had been incurred on the Co-CEOs' corporate credit cards. The nature of these charges included, among other charges, the following:
- i. Personal expenses such as family vacations;
 - ii. Excessive meal and entertainment charges that do not appear to be for the benefit of DIG;
 - iii. Rental of personal storage lockers; and
 - iv. Ski club memberships.

Management has since issued a demand to the Co-CEOs for the repayment of amounts that were identified as not being for the benefit of DIG.

- (c) Until recently, the Co-CEOs were directing operations at DIG in addition to being members of the Board of Directors. However, as a result of the reported overstatement of accounts receivable and WIP and expense account irregularities, the employment of the Co-CEOs was terminated on February 18, 2019. The Co-CEOs, through legal counsel, have denied any allegations of impropriety and remain directors.
- (d) As a result of the termination of the Co-CEOs' employment, a new interim CEO was appointed on February 21, 2019.

24. The Special Committee continues to investigate the financial irregularities. On February 26, 2019 it discovered documentation evidencing that Company funds were used to repay \$1 million of personal loans of the Co-CEOs (\$500,000 each) contrary to the terms of the

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Credit Agreement and the related Shareholder Postponement Agreement dated September 12, 2018 executed by each of the co-CEOs. The Proposed Receiver has been advised that this information was provide to RBC and its counsel on February 27, 2019.

DIG'S CURRENT FINANCIAL POSITION

DIG's past performance

25. The table below sets out certain of DIG's balance sheet amounts publicly reported in prior years:

Distinct Infrastructure Group Inc.					
Summary of Key Financials					
(in CAD \$000's)					
For the period FY2014 to Q3 2018					
Unaudited					
	FY2014	FY2015	FY2016	FY2017	Q3 2018
Income Statement					
Select Income Statement Items					
Revenue	25,614	37,104	55,180	56,421	61,464
EBITDA	4,159	6,794	3,483	301	6,781
Net Income/(Loss)	2,293	2,270	(3,147)	(13,181)	(2,776)
Balance Sheet					
Select Asset Items					
Accounts Receivable	9,435	14,959	10,320	16,279	36,685
Work in Progress	4,956	9,074	29,758	46,739	35,456
Inventory	192	244	246	140	2,239
Prepaid Expenses and Deposit	108	1,048	665	1,034	3,419
Select Liability Items					
Accounts Payable and Accrued Liabilities	5,339	4,961	6,503	13,557	13,145
Debentures and Other Debt	97	985	1,471	1,482	2,472
Finance Lease Obligations	4,166	7,190	7,815	5,449	4,641
RBC Revolving Loan	-	-	-	27,638	30,609
Term Loan	-	18,929	18,877	19,872	19,625
Unsecured convertible debentures	-	-	-	-	7,969

26. The table below compares certain balances to the quantum of reported revenue in the relevant year:

Balance as a % of sales	FY2014	FY2015	FY2016	FY2017	Q3 2018
Accounts Receivable	37%	40%	19%	29%	60%
Work in Progress	19%	24%	54%	83%	58%
Inventory	1%	1%	0%	0%	4%

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27. As detailed in the tables above, there has been a significant increase in the quantum of reported accounts receivable and WIP since 2014 without a corresponding increase in reported revenue. In addition, inventory and prepaid expenses have increased substantially in the nine-month period from December 31, 2017 to September 30, 2018. Such increases, particularly in respect of accounts receivable and WIP, had the specific effect of significantly increasing DIG's borrowing base under its credit facilities with RBC.
28. On September 12, 2018, DIG closed a financing transaction (the "**September 2018 Financing**") whereby:
- (a) RBC temporarily increased the amount that could be advanced against WIP under the borrowing base formula from \$6 million to \$14 million; and
 - (b) Rogers Financial Management Corp. ("**RFM**") provided \$10 million in exchange for unsecured convertible debentures.
29. Subsequent to the September 2018 Financing, RBC became concerned with the growth in the Company's balance sheet and its liquidity position, which had not materially improved notwithstanding the funding provided from the September 2018 Financing.

Current status and impact of irregularities

30. As a result of the accounting irregularities described above, the Company publicly disclosed on February 13, 2019 that its financial statements should no longer be relied upon. This disclosure applies to the 2017-year end audited financial statements and the three quarterly unaudited financial statements issued in 2018.

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31. DIG's consolidated updated accounts as at December 31, 2018 are compared with the September 30, 2018 records and are summarized below. As a result of the material write-offs of unsupported asset balances, DIG has incurred a significant equity deficit on its balance sheet in the approximate amount of \$82.6 million.

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Distinct Infrastructure Group Inc.	As Reported	As At	Variance	Write off	Notes
Consolidated Balance Sheet	Sep 30, 2018	Dec 31, 2018	(\$)	(\$)	
ASSETS					
Current Assets					
Accounts receivable	36,685,835	13,036,449	(23,649,386)	(23,246,549)	1
Contract asset (i.e. Work in Progress)	35,455,983	1,480,000	(33,975,983)	(33,975,983)	2
Prepaid expenses and deposits	3,309,899	594,784	(2,715,115)	(2,250,000)	3
Inventory	2,239,829	207,987	(2,031,842)	(1,700,000)	4
Cash	1,201,254	-	(1,201,254)		
Income tax recoverable	1,116,052	1,116,052	(0)		
Assets held for sale	153,147	47,244	(105,903)		
Due from ABL Professional Management Inc.	1,716,185	1,641,577	(74,608)		5
Due from Alex Agius	-	237,787	237,787		6
Due from Joe Lanni	-	94,559	94,559		7
Total current assets	81,878,184	18,456,438	(63,421,746)		
Non-Current Assets					
Deposits	110,306	20,306	(90,000)		
Property and equipment	21,177,132	15,050,698	(6,126,434)		8
Intangibles	378,682	336,606	(42,076)		
Goodwill	2,795,212	2,795,212	-		
Total non-current assets	24,461,332	18,202,822	(6,258,510)		
TOTAL ASSETS	106,339,516	36,659,261	(69,680,256)		
LIABILITIES AND SHAREHOLDERS' EQUITY					
Current liabilities					
Accounts payable and accrued liabilities	12,300,310	12,872,733	572,423		
Income tax payable	643,159	339,159	(304,000)		
Debentures and other debt	2,472,385	1,479,467	(992,918)		
Current portion of finance lease obligations	2,511,823	1,084,379	(1,427,444)		
RBC Revolving Loan	30,608,967	34,258,770	3,649,803		
Liabilities directly associated with assets held for sale	1,107,869	415,482	(692,387)		
Total current liabilities	49,644,513	50,449,990	805,477		
Non-current liabilities					
RBC Term Loan	19,625,000	18,375,000	(1,250,000)		
Unsecured convertible debentures	7,968,805	9,138,581	1,169,776		
Finance lease obligations	2,129,501	1,901,801	(227,700)		
Deferred tax payable	2,544,300	2,544,300	(0)		
Total non-current liabilities	32,267,606	31,959,681	(307,925)		
TOTAL LIABILITIES	81,912,119	82,409,671	497,552		
Shareholders' equity					
Share capital	34,572,427	34,572,427	(0)		
Contributed surplus	2,307,760	2,326,323	18,563		
Deficit	(12,452,790)	(82,649,160)	(70,196,370)	(61,172,532)	9
Total shareholders equity	24,427,397	(45,750,411)	(70,177,808)		
TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY	106,339,516	36,659,261	(69,680,256)		

NOTES

- \$15.1M writedown of unsupported A/R (the "WIP AR Account") and \$8.1M from unsupported Bell invoices.
- \$33.9M of WIP with no support.
- Reversal of unsupported journal entry (\$800K DistinctTech Inc. and \$1.45M Crown).
- Reversal of unsupported \$1.7M journal entry.
- ABL Professional Management Inc. is a company owned by the former Co-CEOs who personally guaranteed the amount due from ABL (50% each). Demands were issued on Feb 26, 2019 in the amount of \$910,894 each.
- Demands for repayment of personal expenses incurred on the Company's credit cards were issued on Feb 26, 2019.
- Demands for repayment of personal expenses incurred on the Company's credit cards were issued on Feb 26, 2019.
- Certain assets from the iVac discontinued operation were sold at auction in December 2018.
- 89% of the deficit relates to the write-offs of overstated A/R, WIP, prepaid expenses and deposits and inventory.

Sources: Discussion with John Nashmi, CFO; and the Company's proposed adjustments to Q3 2018.

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32. On February 26, 2019, the Company provided a borrowing base certificate showing only \$3.8 million of available borrowing base collateral to support revolver borrowings of approximately \$34.5 million resulting in the revolver being under collateralized by over \$30 million.
33. Including the write-offs of the questionable balances in DIG's current accounts, DIG's reported equity is now a deficit of assets to liabilities of \$45.8 million, materially worse than the publicly reported surplus of \$24.4 million as at September 30, 2018. Such statements are attached as Appendix "D" to this Report.

CASH FLOW FORECAST

34. Management has prepared a weekly cash flow forecast for the 14-week period February 25 to May 31, 2019 (the "Cash Flow Forecast") that quantifies DIG's near-term cash needs. Receipts are projected primarily based on the weekly cash flow realized at this time in 2018 with some adjustment to reflect the current revised accounts receivable balances and the conversion of WIP and new sales into accounts receivable. Deloitte notes that, to date, the Company has limited confirmed new projects for 2019; accordingly there is risk that receipts may not materialize as forecast. In addition, the Company has not, to date, provided support for costs to complete its WIP. The Cash Flow Forecast reflects headcount reductions implemented on February 27, 2019. The Cash Flow Forecast is attached to this Report as Appendix "C" attached hereto.
35. Notwithstanding the preceding paragraph, Deloitte expects that a receivership cash flow will be materially different than the one prepared by Management as the receivership is

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implemented and the Receiver is able to determine, with customer and additional Management input, which projects can be completed and which costs must be incurred to do so.

36. The Cash Flow Forecast is premised on ongoing operations and forecasts total receipts of \$12.6 million, total disbursements of \$13.3 million (including \$629,000 of interest paid to RBC in the week ending March 1, 2019) for net cash outflows of approximately \$665,000 during the 14-week cash flow period. The 5-week period ending March 29, 2019 is the largest cash need for DIG, as net cash outflows are approximately \$1.5 million.
37. DIG does not have sufficient liquidity to fund its operations as it has borrowed to the limit of its revolving credit facility, and as noted above, its borrowing base to support such borrowings is approximately \$30 million under margin given the adjustments to the Company's previously overstated working capital balances. As noted in the Ivany Affidavit, RBC is unwilling to provide such funding to the Company given its collateral shortfall. Accordingly, DIG is facing a liquidity crisis and cannot continue in its current form. As such, there is an urgent need for a receiver to minimize future operating losses, to collect accounts receivable and WIP, if possible, and to market the assets of the Company on an *en bloc* or piecemeal basis as quickly as possible to maximize creditor recoveries for DIG's creditors on a commercially reasonable basis.
38. DIG has borrowed up to its permitted limit and requires a further \$1.5 million in financing over the next four to six weeks. Based on available margin, this financing will not be made available by RBC for reasons discussed above. Further, pursuant to the terms of the Credit Agreement, the Company is required to make monthly payments to RBC in respect of the

term loan outstanding. The Company is currently unable to make the payment to RBC, as it doesn't have sufficient available cash nor sufficient borrowing capacity under its revolving credit facility (which is also funded by RBC).

THE RBC DEMAND

39. On February 23, 2019, RBC issued its notice of intention to enforce security over DIG's assets. Although the required ten-day period has not yet expired, Deloitte has been advised by RBC that DIG will cooperate and work constructively with the RBC and Deloitte as the Proposed Receiver.

A&B PRELIMINARY SECURITY REVIEW

40. In preparing this Report, Deloitte engaged independent legal counsel to undertake, among other things, a high-level review of RBC's loan documents, including the security granted by DIG in favour of RBC in connection therewith. At this stage, and based on its discussions with A&B, the Proposed Receiver is of the initial view that RBC holds valid and enforceable security as against DIG. To the extent that the Court grants the Orders sought by RBC in this application, the Proposed Receiver will, in due course, obtain a formal independent security opinion from A&B, a copy of which will be made available to the Court upon request and, in any event, prior to any distribution to RBC or any other party.

DELOITTE'S CONSENT TO ACT AS RECEIVER

41. As mentioned in the Ivany Affidavit, Deloitte confirms that it is willing to act as Receiver should the Court see fit to grant RBC's request to appoint a receiver over DIG's assets.

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42. In light of Deloitte's recent engagement by RBC to review DIG's operations and financial position, Deloitte possess the knowledge and understanding of the business, including the employees and stakeholders, to administer these proceedings in an efficient manner.
43. Other than the business review described above, Deloitte has had no involvement with DIG and is independent in this regard.
44. Deloitte supports RBC's request for the appointment of a receiver given the urgent need to minimize cash outflows and to realize on the assets for the benefit of the Company's creditors.

All of which is respectfully submitted at Toronto, Ontario this 28th day of February, 2019.

DELOITTE RESTRUCTURING INC.,
solely in its capacity as the proposed
Court-appointed receiver of
Distinct Infrastructure Group Inc. and its
subsidiaries set out in Appendix "A"
hereto, and without personal or corporate
liability

Per: P. Casey
Paul Casey, CPA, CA, FCIRP, LIT
Senior Vice-President

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Appendix "A"

List of Subsidiaries

Distinct Infrastructure Group West Inc.

Distinct Infrastructure Group West Inc.

Distincttech Inc.

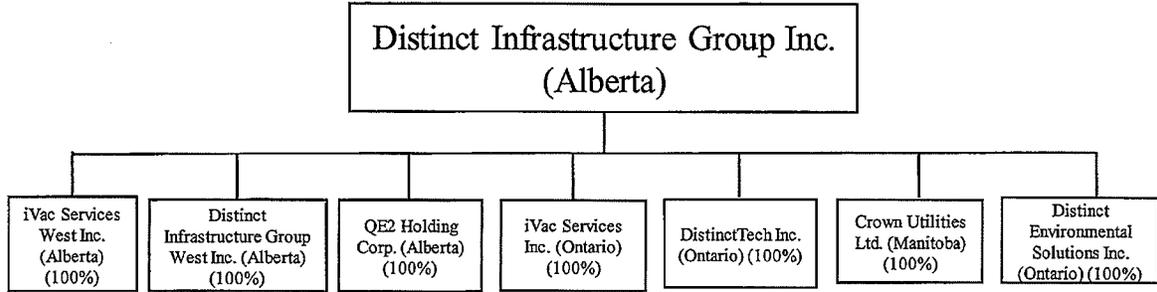
iVac Services Inc.

iVac Services West Inc.

Crown Utilities Ltd.

Appendix "B"

DIG Organizational Structure



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Appendix "C"

Cash Flow Forecast

Appendix "C"
Cash Flow Forecast

Distinct Infrastructure Group Inc.															
Cash Flow Model															
(In CAD \$000's)															
As at February 27, 2019															
Adjusted based on Management's forecast dated February 23, 2019															
	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast
	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending	Week Ending
	1-Mar-19	8-Mar-19	15-Mar-19	22-Mar-19	29-Mar-19	5-Apr-19	12-Apr-19	19-Apr-19	26-Apr-19	3-May-19	10-May-19	17-May-19	24-May-19	31-May-19	
															Forecast
															Total
Receipts															
Operating Activities															
Notes															
1	350	50	-	-	-	1,250	325	350	350	375	400	415	450	450	4,765
2	293	175	200	200	225	225	300	300	300	300	305	315	325	350	3,819
3	150	150	200	175	150	125	150	200	150	200	150	200	150	200	2,350
4	100	17	-	-	-	27	-	-	-	-	-	-	-	-	144
5	-	-	-	-	-	-	-	-	750	-	-	-	-	-	750
	893	392	400	376	376	1,627	776	850	1,660	876	856	930	926	1,000	11,822
Investing Activities															
6	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Financing Activities															
7	300	150	-	150	-	50	-	50	-	50	-	50	-	50	850
	300	150	-	150	-	50	-	50	-	50	-	50	-	50	850
Total Receipts	1,193	642	400	626	376	1,677	776	900	1,660	926	856	980	926	1,050	12,672
Disbursements															
Operating Activities															
8	(334)	(125)	(342)	(165)	(342)	(165)	(342)	(165)	(342)	(165)	(342)	(165)	(342)	(165)	(3,502)
9	(65)	(10)	-	(10)	(65)	(10)	(10)	-	(10)	(65)	(10)	-	(10)	-	(265)
10	-	(232)	(147)	(109)	-	(145)	(161)	-	(161)	(145)	(161)	(145)	(161)	-	(1,568)
11	(334)	(138)	(124)	(84)	(59)	(313)	(124)	(84)	(79)	(259)	(75)	(50)	(83)	(100)	(1,939)
11	-	(49)	-	-	-	(15)	(15)	-	(15)	(20)	(20)	(20)	(20)	(20)	(200)
11	-	(25)	-	(25)	(25)	(25)	-	-	(25)	-	(25)	-	(25)	-	(175)
12	(6)	(151)	(158)	(201)	(205)	(251)	(201)	(205)	(251)	(201)	(276)	(281)	(375)	(261)	(3,321)
13	-	-	(89)	(4)	-	-	-	(89)	(4)	-	-	(89)	(4)	-	(279)
13	-	(115)	-	-	-	(115)	-	-	(115)	-	-	-	-	-	(345)
14	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	(738)	(837)	(857)	(638)	(697)	(1,040)	(663)	(668)	(887)	(1,160)	(913)	(780)	(1,022)	(666)	(11,634)
Investing Activities															
16	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Financing Activities															
16	(37)	-	(33)	-	(33)	-	(33)	-	(33)	-	(33)	-	(33)	-	(233)
17	(629)	(2)	(2)	(2)	(120)	(63)	(3)	(3)	(63)	(63)	(3)	-	-	(650)	(1,510)
	(666)	(2)	(35)	(2)	(163)	(63)	(3)	(3)	(126)	(63)	(33)	-	(33)	(650)	(1,743)
Total Disbursement	(1,404)	(835)	(892)	(636)	(860)	(1,093)	(666)	(671)	(1,013)	(1,223)	(946)	(780)	(1,054)	(1,416)	(13,337)
Net Change In Cash	(211)	(237)	(492)	(76)	(475)	584	(114)	229	647	(279)	(81)	200	(128)	(68)	(668)

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Notes

- 1 For the period February 25, 2019 to May 31, 2019 (the "Forecast Period"), Management estimated a collection of \$4.7M of receipts from Bel.
- 2 In the Forecast Period, Management estimated a collection of \$3.8M of receipts from Rogers.
- 3 In the Forecast Period, Management estimated a collection of \$2.3M of receipts from other customers under DistinctTech Inc.
- 4 In the Forecast Period, Management estimated a collection of \$144K from customers under IVAC Services Inc.
- 5 In the Forecast Period, Management estimated a GST/HST refund of 750K.
- 6 Management did not estimate future receipt from sale of assets and other disposal activities.
- 7 Management included transfer of funds from Crown Utilities Ltd. ("Crown"), a wholly-owned subsidiary specializing in civil engineering construction in Winnipeg, Manitoba, totaling \$850K.
- 8 Payroll related expenses during the Forecast Period reflect a reduction in headcount from layoffs completed in February 2019.
- 9 Payment is forecast to be \$65,000 per Management's guidance.
- 10 Union dues and benefits are pre-rated based on historical union rates and hours worked by ULUNA unionized employees.
- 11 Leases, fuel, dumping fees and police patrol costs relate to the core operation of the Company.
- 12 Operating expenses relate to disbursements made to subcontractors and suppliers. Management estimated \$5K for the week ended March 1, 2019.
- 13 Rent and insurance forecasts are based on historical cost and timing.
- 14 HST remittance was not estimated based on future receipts and disbursements.
- 15 Management did not estimate future capex.
- 16 Management included \$33,000 in bi-weekly payroll funded by the Company for ABL Professional Management Services Inc. ("ABL"), a related party owned by Alex Agius and Joe Lanni, who provide front-end design work for projects.
- 17 Management assumed payments on interest and fees in the Forecast Period.

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Appendix "D"

Distinct Infrastructure Group Inc. Financial Statements

Nine Months Ended September 30, 2018

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Appendix "D"

Distinct Infrastructure Group Inc. Financial Statements

Nine Months Ended September 30, 2018

Distinct Infrastructure Group Inc.
Condensed Interim Consolidated Statements of Financial Position
As at September 30, 2018 and December 31, 2017
(Unaudited)

	Notes	September 30, 2018 \$	December 31, 2017 \$
ASSETS			
Current assets			
Cash		1,201,254	3,657,134
Accounts receivable	7(a)	36,685,835	16,279,671
Inventory		2,239,829	139,828
Prepaid expenses and deposits		3,309,899	929,919
Contract asset	7(b)	35,455,983	46,739,453
Income taxes recoverable		1,116,052	-
Due from related party	13	-	250,000
		<u>80,008,852</u>	<u>67,996,005</u>
Assets held for sale	6	153,147	-
Total current assets		<u>80,161,999</u>	<u>67,996,005</u>
Non-current assets			
Accounts receivable		-	247,413
Deposits		110,306	105,000
Property and equipment, net	8	21,177,132	23,977,709
Intangibles		378,682	504,908
Goodwill		2,795,212	2,795,212
Due from related party	13	1,716,185	872,928
		<u>26,177,517</u>	<u>28,503,170</u>
TOTAL ASSETS		<u>106,339,516</u>	<u>96,499,175</u>
LIABILITIES AND SHAREHOLDERS EQUITY			
Current liabilities			
Accounts payable and accrued liabilities	5	12,300,310	13,556,714
Income taxes payable		643,159	637,978
Current portion of debentures and other debt	9(a),(b)	2,472,385	1,469,462
Current portion of finance lease obligations		2,511,823	1,696,695
Revolving loan	9(d)	-	27,638,408
Current portion of long-term debt	9(d)	-	19,871,636
		<u>17,927,677</u>	<u>65,870,893</u>
Liabilities directly associated with assets held for sale	6	1,187,869	-
Total current liabilities		<u>19,035,546</u>	<u>65,870,893</u>
Non-current liabilities			
Debentures and other debt	9(a),(b)	-	12,361
Revolving loan	9(d)	30,608,967	-
Long-term debt	9(d),(e)	27,593,805	-
Finance lease obligations		2,129,501	2,752,478
Deferred tax liability		2,544,300	2,544,300
		<u>62,876,573</u>	<u>5,308,139</u>
TOTAL LIABILITIES		<u>81,912,119</u>	<u>71,180,032</u>
Shareholders equity			
Share capital	10	34,572,427	34,531,210
Contributed surplus		2,307,760	464,418
Deficit		(12,452,790)	(9,676,485)
		<u>24,427,397</u>	<u>25,319,143</u>
TOTAL LIABILITIES AND SHAREHOLDERS EQUITY		<u>106,339,516</u>	<u>96,499,175</u>

(See going concern uncertainty - note 1)

"Alexander Agius"
Director

"Joe Lammi"
Director

The accompanying notes are an integral part of these condensed interim consolidated financial statements.

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Distinct Infrastructure Group Inc.
Condensed Interim Consolidated Statements of Comprehensive Income (Loss)
For the three and nine months ended September 30, 2018 and 2017
(Unaudited)

	Notes	For the three months ended		For the nine month ended	
		September 30, 2018	September 30, 2017 (restated – note 4 and 6)	September 30, 2018	September 30, 2017 (restated – note 4 and 6)
		\$	\$	\$	\$
Revenue		21,447,255	21,037,836	61,464,917	45,161,385
Expenses					
Direct costs		14,629,335	11,315,938	45,451,253	34,721,552
Selling, general and administrative		3,451,605	2,458,209	9,232,014	7,346,637
Depreciation and amortization	8	1,233,759	512,681	3,483,247	1,489,079
Total expenses		<u>19,314,699</u>	<u>14,286,828</u>	<u>58,166,513</u>	<u>43,557,269</u>
Income from operations		<u>2,132,556</u>	<u>6,741,008</u>	<u>3,298,404</u>	<u>1,604,116</u>
Other expenses					
Interest expense		1,477,030	615,426	2,997,770	1,984,495
Interest on capital leases		78,793	89,951	227,027	292,524
Other finance expense		-	127,175	-	2,060,484
Finance expense	14	1,555,823	832,552	3,224,797	4,337,503
Income (loss) before income taxes		<u>576,733</u>	<u>5,908,456</u>	<u>73,607</u>	<u>(2,733,387)</u>
Income tax recovery		(213,307)	-	(3,307)	-
Net income (loss) from continuing operations		<u>790,040</u>	<u>5,908,456</u>	<u>76,914</u>	<u>(2,733,387)</u>
Loss after income taxes from discontinued operations	6	(1,356,565)	(482,820)	(2,833,219)	(2,433,417)
Net and comprehensive income (loss)		<u>(566,525)</u>	<u>5,426,436</u>	<u>(2,776,305)</u>	<u>(5,166,804)</u>
Earnings (loss) per share:					
Basic and diluted	12	<u>(0.01)</u>	<u>0.15</u>	<u>(0.06)</u>	<u>(0.15)</u>

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Distinct Infrastructure Group Inc.
Condensed Interim Consolidated Statements of Cash Flows
For the nine months ended September 30, 2018 and 2017
(Unaudited)

	Notes	For the nine months ended	
		September 30, 2018	September 30, 2017
		\$	\$
NET INFLOW (OUTFLOW) OF CASH RELATED TO THE FOLLOWING ACTIVITIES:			
OPERATING ACTIVITIES			
Net loss from continuing operations		76,014	(2,733,387)
Loss from discontinued operations	6	(2,853,219)	(2,433,417)
		(2,776,305)	(5,166,804)
Items not affecting cash from continuing operations			
Accretion		183,812	28,426
Loss on extinguishment of long-term debt	9(a),(e)	-	1,122,567
Amortization of finance fees		25,431	-
Share-based compensation		95,534	56,473
Shares issued for services		-	125,000
Depreciation and amortization	8	3,483,247	1,489,079
Gain/(loss) on disposal		170,173	(260,089)
Items not affecting cash from discontinued operations			
Depreciation		775,172	508,465
Loss on disposal		13,226	-
		1,970,190	(2,096,883)
Changes in non-cash working capital items from continuing operations			
Accounts receivable		(21,032,385)	(3,457,151)
Inventory		(2,100,001)	112,238
Contract asset		11,283,470	(7,230,553)
Prepaid expenses and deposits		(2,446,829)	(15,606)
Accounts payable and accrued liabilities		(535,404)	1,210,376
Income taxes payable		(1,044,633)	(963,764)
		(15,905,492)	(12,431,343)
Changes in non-cash working capital items from discontinued operations			
Assets held for sale		1,146,702	-
Liabilities directly associated with assets held for sale		(463,058)	-
Cash flows used in operating activities		(15,321,838)	(12,421,343)
INVESTING ACTIVITIES			
Purchase of property and equipment from continuing operations	8	(235,670)	(779,266)
Proceeds from disposition of assets from continuing operations		915,000	669,130
Proceeds from disposition of assets from discontinued operations		109,089	-
Cash from (used in) investing activities		788,419	(110,136)
FINANCING ACTIVITIES			
Repayment from shareholder		-	67,685
Repayment of long-term debt		-	(20,000,000)
Proceeds from long-term debt, net of financing fees		-	12,000,000
Proceeds from revolving loan, net of financing fees		-	27,853,000
Proceeds from convertible debentures		9,411,983	-
Proceeds from credit facilities		2,970,559	(9,996,975)
Proceeds from (repayment of) debentures and other debt		982,139	(9,206)
Proceeds from (repayment of) related parties		(593,257)	102,933
Payment of finance lease obligations		(2,835,076)	(2,172,027)
Issuance of shares, net of share issuance costs		41,217	121,297
Cash flows from financing activities		9,977,565	7,943,707
NET CASH OUTFLOW		(2,455,880)	(4,587,772)
CASH, BEGINNING OF PERIOD		3,657,134	9,448,829
CASH, END OF PERIOD		1,201,254	4,861,057

The accompanying notes are an integral part of these condensed interim consolidated financial statements.

Tab J



DISTINCT INFRASTRUCTURE GROUP INC. HAS BEEN PLACED INTO RECEIVERSHIP

TSXV: DUG

March 11, 2019 - Toronto, Ontario – Distinct Infrastructure Group Inc. (“Distinct” or the “Company”) announced that the Ontario Superior Court of Justice (Commercial List) has issued an order placing the Company (and several of its wholly owned subsidiaries) into receivership with the cooperation of the Special Committee. Deloitte Restructuring Inc. is acting as receiver and manager. The company’s independent directors have resigned. At this time, the secured bank lender is expected to suffer losses on its debt position. The subordinated lender and shareholders are not expected to see any recovery. Material filed in connection with the receivership will be posted to the receiver’s website at www.insolvencies.deloitte.ca/en-ca/dig.

For further information please contact:

John Nashmi
 Chief Financial Officer
 Distinct Infrastructure Group
 Email: john.nashmi@diginc.ca

Neither TSX Venture Exchange nor its Regulation Services Provider (as that term is defined in policies of the TSX Venture Exchange) accepts responsibility for the adequacy or accuracy of this release.

Forward Looking Statements

This news release contains "forward-looking statements" within the meaning of applicable securities legislation. Distinct is subject to significant risks and uncertainties which may cause the actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by the forward looking statements contained in this release. Distinct cannot assure investors that actual results will be consistent with these forward looking statements.

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This is EXHIBIT "J" referred to in the Affidavit of Chris Wood

Sworn before me at Kelowna

in the Province of British Columbia this 15 day of October, 2019

 A Commissioner for taking Affidavits
 in the Province of British Columbia

Tab K



Print Date: 2018/12/12
Print Time: 13:28

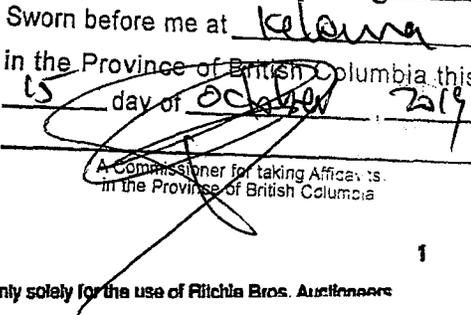
Owner's Detail Report

L22

Sale Information:

Edmonton
2018/12/11
2018231

Lot	Secd	Description	S/N	Sold Price	Buyer
Owner	L22	Distinct Infrastructure Group Inc 102-77 Belfield Rd Toronto ON, CAN M9W 1G6			William Nummerger Phone: 587 5838970 Fax: BLAIR GOGOWICH
164W	49	Dodge 3500 Van Truck Owner EQ ID: CV07	3D6WG46D28G202298	2,500.00 *	65026
170B	147	2015 International 7400 Workstar S/A w/Terex HRX55 Bucket Truck	1HTWCAZR2FH533196	55,000.00 *	83644
172W	33	International 4900 T/A w/Altec Digger Derrick Truck Owner EQ ID: 309	1HTSHPCR7MH377150	4,000.00 *	752
354W	38	Peterbilt 377 Sleeper Truck Tractor (T/A) Owner EQ ID: TT 04	1XPCDB9X9TN397811	10,000.00 *	76087
356W	37	Mack CH613 Day Cab Truck Tractor (T/A) Owner EQ ID: TT01	1M1AA18Y8TW064144	8,500.00 *	73385
407	7	2015 Western Star 4800 10913 Litre T/A T/A Hydro Vac Truck Owner EQ ID: 15154	5KKMBBDV8FPGM7812	170,000.00 *	56403
408	16	2017 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16235	1NKDX4EX0HJ986323	417,500.00 *	1550
409	21	2017 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 17333	1NKDX4EX9HJ986322	417,500.00 *	1550
410	15	2017 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16234	1NKDX4EX7HJ986321	410,000.00 *	26300
411	14	2017 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16233	1NKDX4EX5HJ986320	410,000.00 *	26300
412	13	2017 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16232	1NKDX4EX7HJ986318	410,000.00 *	26300
413	12	2017 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16231	1NKDX4EX9HJ986319	417,500.00 *	39325

This is EXHIBIT "K" referred to in the
Affidavit of Chris Wood
Sworn before me at Kelowna
in the Province of British Columbia this
15 day of October 2019

A Commissioner for taking Affidavits
in the Province of British Columbia



Print Date: 2018/12/12
Print Time: 13:28

Owner's Detail Report

L22

Sale Information:

Edmonton
2018/12/11
2018231

Lot	Secd	Description	S/N	Sold Price	Buyer
414	8	2016 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16187	1NKDX4TXXGR978104	380,000.00 *	1550
415	9	2016 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16188	1NKDX4TX8GR978103	395,000.00 *	36694
416	11	2016 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16190	1NKDX4EX1GJ983753	395,000.00 *	1550
417	10	2016 Kenworth T800 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 16189	1NKDX4EXXGJ983752	380,000.00 *	1550
418	3	2015 Western Star 4900FA Tri Drive Hydro Vac Truck Owner EQ ID: 15127	5KKPAED60FPGJ5270	245,000.00 *	24095
419	4	2015 Western Star 4900FA Tri Drive Hydro Vac Truck Owner EQ ID: 15128	5KKPAED62FPGJ5271	245,000.00 *	65153
420	5	2015 Western Star 4900SF Tri Drive Hydro Vac Truck Owner EQ ID: 15135	5KKPAED62FPGK1880	245,000.00 *	65153
✓ 421	20	2015 Western Star 4900SA 2066 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 15332	5KKPALD12FPGK2956	327,500.00 *	423
422	2	2015 Western Star 4900 Tri Drive Hydro Vac Truck Owner EQ ID: 14119	5KKPAED61FFPX1005	282,500.00 *	65153
✓ 423	18	2014 Western Star 4900SA 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 14330	5KKPALD12EPFP3871	260,000.00 *	620
✓ 424	19	2014 Western Star 4900SA 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 14331	5KKPALD10EPFP3870	300,000.00 *	1652
425	1	2014 Western Star 4900FA Tri Drive Hydro Vac Truck Owner EQ ID: 14099	5KKPAED63EPFD4919	240,000.00 *	721
✓ 428	17	2013 Western Star 4900SA 2000 Gallon Tri Drive Hydro Vac Truck Owner EQ ID: 13329	5KKPALDRXDPFA9979	260,000.00 *	16938
431	176	2012 Freightliner M2112 Tri Drive Hydro Vac Truck	1FVMC7DV7CHBJ4047	167,500.00 *	68575

Page: 2



Print Date: 2018/12/12
Print Time: 13:28

Owner's Detail Report

L22

Sale Information:

Edmonton
2018/12/11
2018231

Lot	Scd	Description	S/N	Sold Price	Buyer
437W	25	Freightliner FL80 8865 Litre T/A Hydro Vac Truck Owner EQ ID: H07	1FVXJJCB1XHA20422	10,000.00 *	22582
438W	27	Freightliner FL80 10000 Litre T/A Hydro Vac Truck Owner EQ ID: H09	1FVXJJCB3XHB63596	10,500.00 *	22582
439W	26	Freightliner FL80 8865 Litre T/A Hydro Vac Truck Owner EQ ID: H08	1FVXJJCB1WH912813	9,500.00 *	11396
501W	29	Ford LN7000 S/A w/Hiab 65071 Boom Truck Owner EQ ID: 300	1FDPR72C2SVA61797	1,000.00 *	46846
1106W	53	Caterpillar D5 Cable Plow	96J5768	0.00	
1107W	50	Case 860 4x4 Cable Plow Owner EQ ID: 139	JAF0157034	0.00	
1108W	51	Case 760 4x4x4 Combo Cable Plow Owner EQ ID: 134	JAF009618	0.00	
1110W	55	Ditch Witch R100JD Vibratory Cable Plow Owner EQ ID: 15P	6M0220	0.00	
1111W	54	Ditch Witch HT100 Vibratory Cable Plow Owner EQ ID: 15-135	6K0096	0.00	
1330W	57	Ditch Witch JT4020 Directional Drill Owner EQ ID: DR18		41,000.00	61452
1331W	152	Ditch Witch JT3020 Directional Drill Owner EQ ID: DR10	CMWJ30M1P90000294	21,000.00	77783
1332W	59	Ditch Witch JT2020 Crawler Directional Drill Owner EQ ID: DR17	CMWJT2020T90000971	21,000.00	77783
1333W	60	Ditch Witch JT520 Directional Drill	CMWJT5200000045	8,500.00	57950
1334W	61	Ditch Witch JT520 Directional Drill	2Y1128	6,500.00	68699
1335W	56	Ditch Witch JT4020 Directional Drill	CMWJ40T3CA0000109	31,000.00	77783
1336W	58	Ditch Witch JT2020 Directional Drill	2Z1371	5,000.00	58398
1688W	64	Hyster 35 Ft T/A Steel Step Deck Trailer	19032	800.00 *	31175
1790W	63	Ditch Witch FX60 Vacuum Trailer	1DSB202S361701969	0.00 *	
6650W	66	Quincy QS500 Electric Air Compressor	90558J	0.00	
6651W	67	Quincy QS500 Electric Air Compressor	98960H	0.00	

Page: 3



Print Date: 2018/12/12
Print Time: 13:28

Owner's Detail Report

L22

Sale Information:

Edmonton
2018/12/11
2018231

Lot	Scd	Description	S/N	Sold Price	Buyer
7441W	40	2011 Ford F350 Crew Cab 4x4 Pickup . Owner EQ ID: 105	1FT8W3BT0BEB64185	0.00 *	
7442W	31	GMC 3500 Flatbed Truck . Owner EQ ID: 303	1GBJC34R9VF048319	0.00 *	
7445W	30	Ford F250 Extended Cab 4x4 Pickup . Owner EQ ID: 202	1FTNX21L43EB58838	0.00 *	
7451W	45	Ford E450 Van Truck Owner EQ ID: CV05	1FDXE45P86DB22728	0.00 *	
7452W	42	Ford E450 Van Truck Owner EQ ID: CV03	1FDXE45F53HC02581	0.00 *	
7453W	46	GMC 3500 Van Truck	1GDKC34F4WJ501939	0.00 *	
7454W	47	GMC 3500 Savana Van Truck Owner EQ ID: CV01	1GDJG31R8V1085794	0.00 *	
7455W	44	Ford E350 Van Truck Owner EQ ID: CV02	1FDWE35LX4HA17763	0.00 *	
7457W	43	Ford E350 Van Truck	1FDKE30G5PHB60116	0.00 *	
7458W	48	Chevrolet Express Van Truck Owner EQ ID: CV06	1GBHG31U351214133	0.00 *	
7469W	36	Sterling L7500 T/A Dump Truck Owner EQ ID: DT16	2FZHATDJ77AY21537	0.00 *	
7513W	39	Ford F550 Service Truck Owner EQ ID: 216	1FDAF56PX4EA30051	0.00 *	
7516W	28	GMC 3500 Extended Cab 4x4 Flatbed Truck Owner EQ ID: 200	1GDJK39U51F137452	0.00 *	
8163W	35	Ford F350 Crew Cab 4x4 Pickup . Owner EQ ID: 215	1FTWW31528EB64868	0.00 *	
8214W	32	Ford LTLA9000 T/A Flatbed Truck Owner EQ ID: DD01	1FTYA95V7SVA47606	0.00 *	
8248W	189	2010 Ford F350 Extended Cab 4x4 Pickup . Owner EQ ID: 227	1FTWX3BR7AEB21776	0.00 *	
8249W	190	Chevrolet 3500 Extended Cab 4x4 Pickup .	1GCJK39G41E258820	0.00 *	
8273W	191	Ford F350 King Ranch Crew Cab 4x4 Pickup .	1FTWW31R88EB64683	0.00 *	
8291W	52	Ditch Witch 8020 4x4x4 Cable Plow .	5N037B	0.00	

Total for this Owner 7,020,800.00

Lots subject to documentation fee 31 X 65.00 2,015.00

Proceeds of Lots sold for 2,500.00 or less 4,300.00

Proceeds of Lots sold for more than 2,500.00 7,016,500.00

All amounts stated in CAD

Page: 4

Tab L

From: [Kal Chaube](#)
To: [Sal Tinajero](#)
Cc: [Beth M. Brown](#)
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations
Date: December 20, 2018 5:21:54 PM
Attachments: [image011.png](#)

Hi Sal

Thank you for the below amount. I know the funds will not be available for tomorrow, but possibly be ready for next week. We can EFT the funds to you no problem, but can you provide me with an interest amount that I can added after tomorrow's date.

Thank you again,

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,
 Burnaby, BC V5J 0C6
 T: 778.331.5494
 F: 778. 331. 5921
 E: kchaube@rbauction.com
 W: www.rbauction.com



RitchieBros.com | IronPlanet.com



From: Sal Tinajero <S.Tinajero@edmontonlaw.ca>
Sent: Thursday, December 20, 2018 1:54 PM
To: Kal Chaube <kchaube@rbauction.com>
Cc: Beth M. Brown <B.Brown@edmontonlaw.ca>
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Kal,

Thanks for your email. I have attached the updated calculation of the amount owing, being \$429,489.62 as of December 21, 2018.

Given the upcoming holidays, our office will be closed next week and reopening again on January 2, 2019. To avoid any delays in getting these funds to our client, please deposit the funds into our trust account and provide us with a receipt once this is done. Our trust account information is attached

This is EXHIBIT " L " referred to in the Affidavit of Chris Wood
 Sworn before me at Kalchaube
 in the Province of British Columbia this
15 day of October, 2019
 A Commissioner for taking Affidavits
 in the Province of British Columbia

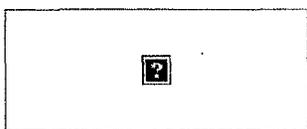
for your records.

Otherwise, if the cheque will be drafted in Edmonton, please advise of the amount owing us when it will be ready tomorrow. We will arrange for a courier to pick it up and bring it to our office.

Thanks again. Let me know if you have any questions or concerns.

Yours truly,

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca
T: 780.469.0494 ext. 233 | F: 780.469.4181 |
#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



From: Kal Chaube [<mailto:kchaube@rbauction.com>]

Sent: Thursday, December 20, 2018 2:30 PM

To: Sal Tinajero

Subject: FW: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Sal,

As per our telephone conversation, if you can please provide me with an updated amount and a valid date?

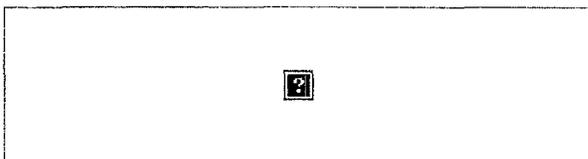
If you have any questions, please feel free to contact me.

Thank you

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,
Burnaby, BC V5J 0C6
T: 778.331.5494
F: 778. 331. 5921
E: kchaube@rbauction.com
W: www.rbauction.com



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Hi Laurey,

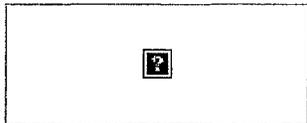
Further to our phone conversation, our firm acts for Chris Wood and Mega Diesel Holdings Ltd. with respect to the above noted matter. For your records, we have enclosed copies of our latest PPR search outlining all the vehicles against which our clients have a security interest, by way of a judgment granted on July 31, 2017. Please note that we updated this registration today to include 4 previously undisclosed vehicles.

As of December 11, 2018, the total amount owing to our clients will be \$429,232.51. We have enclosed a summary of our calculations for your records.

Let me know if you have any questions or concerns.

Yours truly,

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca
T: 780.469.0494 ext. 233 | F: 780.469.4181 |
#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



This email originated from the Internet

This email originated from the Internet

Tab M

This is EXHIBIT "M" referred to in the
 Affidavit of Chris Wood
 Sworn before me at Kobena
 in the Province of British Columbia this
15 day of October, 2019

 A Commissioner for taking Affidavits
 in the Province of British Columbia

From: Kal Chaube [mailto:kchaube@rbauction.com]

Sent: Wednesday, January 09, 2019 3:37 PM

To: Sal Tinajero

Cc: Beth M. Brown; chris wood

Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Sal,

Sorry for not getting back to you sooner, I will provide you documentation tomorrow.

Thank you

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,

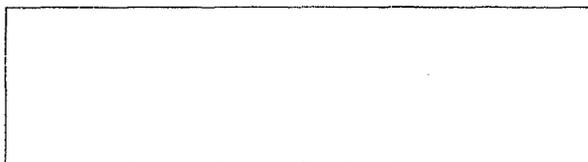
Burnaby, BC V5J 0C6

T: 778.331.5494

F: 778. 331. 5921

E: kchaube@rbauction.com

W: www.rbauction.com



RitchieBros.com | IronPlanet.com



From: Sal Tinajero <S.Tinajero@edmontonlaw.ca>

Sent: Wednesday, January 09, 2019 10:55 AM

To: Kal Chaube <kchaube@rbauction.com>

Cc: Beth M. Brown <B.Brown@edmontonlaw.ca>

Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Kal,

Thanks again for your response. Can you provide me with a copy of the form outlining the proposed distribution of the sale proceeds?

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca
T: 780.469.0494 ext. 233 | F: 780.469.4181 |
#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



From: Kal Chaube [<mailto:kchaube@rbauction.com>]
Sent: Wednesday, January 09, 2019 8:43 AM
To: Sal Tinajero
Cc: Beth M. Brown
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Good Morning Sal,

The update as of now is I received an email from Distinct is disputing this Writ at the current moment and has their lawyers involved. I am holding back the funds until they provide me with direction as per the Writ.

Feel free to give me a call to discuss, if you have any questions,

Thank you

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,
Burnaby, BC V5J 0C6
T: 778.331.5494
F: 778. 331. 5921
E: kchaube@rbauction.com
W: www.rbauction.com



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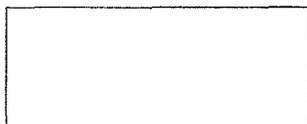


From: Sal Tinajero <S.Tinajero@edmontonlaw.ca>
Sent: Tuesday, January 08, 2019 3:18 PM
To: Kal Chaube <kchaube@rbauction.com>
Cc: Beth M. Brown <B.Brown@edmontonlaw.ca>
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Kal,

Any updates on this?

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca
T: 780.469.0494 ext. 233 | F: 780.469.4181 |
#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



From: Kal Chaube [<mailto:kchaube@rbauction.com>]
Sent: Wednesday, January 02, 2019 11:51 AM
To: Sal Tinajero
Cc: Beth M. Brown
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Sal

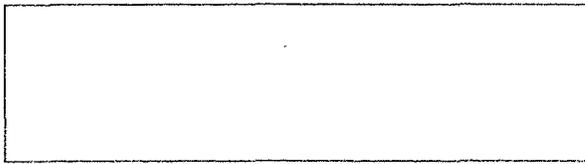
Happy New Year to you as well. I received an email from Distinct last week, asking to hold off on paying this Writ. I have sent a follow up email to find out the status on their end, once I have some more information, I will let you know.

Thank you for your patience's.

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,
Burnaby, BC V5J 0C6
T: 778.331.5494
F: 778. 331. 5921
E: kchaube@rbauction.com
W: www.rbauction.com



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From: Sal Tinajero <S.Tinajero@edmontonlaw.ca>
Sent: Wednesday, January 02, 2019 9:59 AM
To: Kal Chaube <kchaube@rbaction.com>
Cc: Beth M. Brown <B.Brown@edmontonlaw.ca>
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Kal,

Happy new year. Could you provide an update as to when we can expect to receive the funds?

Thanks,

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca
T: 780.469.0494 ext. 233 | F: 780.469.4181 |
#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



From: Kal Chaube [<mailto:kchaube@rbaction.com>]
Sent: Friday, December 21, 2018 7:32 AM
To: Sal Tinajero
Cc: Carl Bosecke; Julie Green
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Good Morning Sal,

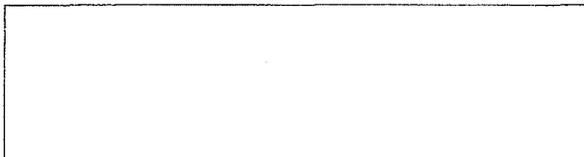
Thank you, I will confirm with you and Carl once funds are ready to be sent.

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,

Burnaby, BC V5J 0C6
T: 778.331.5494
F: 778. 331. 5921
E: kchaube@rbauction.com
W: www.rbauction.com



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From: Sal Tinajero <S.Tinajero@edmontonlaw.ca>
Sent: Thursday, December 20, 2018 2:52 PM
To: Kal Chaube <kchaube@rbauction.com>
Cc: Carl Bosecke <C.Bosecke@edmontonlaw.ca>; Julie Green <ja.green@edmontonlaw.ca>
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Kal,

As to the EFT, please use ja.green@edmontonlaw.ca and make the password "Bosecke1". Please also confirm with Carl Bosecke and myself once the funds have been sent. I have included Carl in this email for your reference.

Thanks again for your help.

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca
T: 780.469.0494 ext. 233 | F: 780.469.4181 |
#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



From: Kal Chaube [<mailto:kchaube@rbauction.com>]
Sent: Thursday, December 20, 2018 3:36 PM
To: Sal Tinajero
Cc: Beth M. Brown
Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

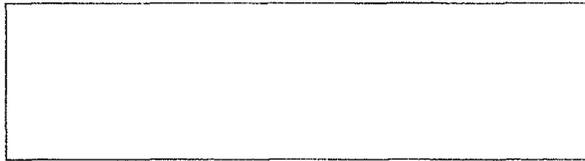
Awesome thanks Sal

Have a great day

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,
Burnaby, BC V5J 0C6
T: 778.331.5494
F: 778. 331. 5921
E: kchaube@rbaction.com
W: www.rbaction.com



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From: Sal Tinajero <S.Tinajero@edmontonlaw.ca>

Sent: Thursday, December 20, 2018 2:28 PM

To: Kal Chaube <kchaube@rbaction.com>

Cc: Beth M. Brown <B.Brown@edmontonlaw.ca>

Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Thanks Kal,

The per diem interest accruing after tomorrow's date (December 21, 2018) will be \$10.13.

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca

T: 780.469.0494 ext. 233 | F: 780.469.4181 |

#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



From: Kal Chaube [<mailto:kchaube@rbaction.com>]

Sent: Thursday, December 20, 2018 3:22 PM

To: Sal Tinajero

Cc: Beth M. Brown

Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Sal

Thank you for the below amount. I know the funds will not be available for tomorrow, but possibly be ready for next week. We can EFT the funds to you no problem, but can you provide me with an interest amount that I can added after tomorrow's date.

Thank you again,

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,
Burnaby, BC V5J 0C6
T: 778.331.5494
F: 778. 331. 5921
E: kchaube@rbauction.com
W: www.rbauction.com



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From: Sal Tinajero <S.Tinajero@edmontonlaw.ca>

Sent: Thursday, December 20, 2018 1:54 PM

To: Kal Chaube <kchaube@rbauction.com>

Cc: Beth M. Brown <B.Brown@edmontonlaw.ca>

Subject: RE: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Kal,

Thanks for your email. I have attached the updated calculation of the amount owing, being \$429,489.62 as of December 21, 2018.

Given the upcoming holidays, our office will be closed next week and reopening again on January 2, 2019. To avoid any delays in getting these funds to our client, please deposit the funds into our trust account and provide us with a receipt once this is done. Our trust account information is attached for your records.

Otherwise, if the cheque will be drafted in Edmonton, please advise of the amount owing us when it will be ready tomorrow. We will arrange for a courier to pick it up and bring it to our office.

Thanks again. Let me know if you have any questions or concerns.

Yours truly,

Sal Tinajero | BA, JD | E: s.tinajero@edmontonlaw.ca
T: 780.469.0494 ext. 233 | F: 780.469.4181 |
#102, 9333 - 47 Street NW, Edmonton, Alberta T6B 2R7
www.edmontonlaw.ca



From: Kal Chaube [<mailto:kchaube@rbaction.com>]

Sent: Thursday, December 20, 2018 2:30 PM

To: Sal Tinajero

Subject: FW: Chris Wood and Mega Diesel Holdings Ltd. v. iVac Services West Inc. and Distinct Infrastructure Group Inc. (2402818) - Writ and PPR Vehicle Registrations

Hi Sal,

As per our telephone conversation, if you can please provide me with an updated amount and a valid date?

If you have any questions, please feel free to contact me.

Thank you

Kal Chaube

Team Lead – Search Department

9500 Glenlyon Parkway,
Burnaby, BC V5J 0C6
T: 778.331.5494
F: 778.331.5921
E: kchaube@rbaction.com
W: www.rbaction.com



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Hi Laurey,

Tab N

Graham Sanson

From: William Nurnberger <William.Nurnberger@diginc.ca>
Sent: December-19-18 11:17 AM
To: Ivany, Gary
Cc: Joe Lanni; Alex Agius; Du, Alicia; O'Gorman, Philip; Jay Vieira
Subject: Re: RBC/DIG

Thank you Gary, as soon as I have confirmation of it moving and how I will let you know. I will confirm which account. Thank you

Sent from my Samsung Galaxy smartphone.

This is EXHIBIT "N" referred to in the
 Affidavit of Chris Wood
 Sworn before me at Kelowna
 in the Province of British Columbia this
15 day of October, 2019

 A Commissioner for taking Affidavits
 in the Province of British Columbia

----- Original message -----

From: "Ivany, Gary" <gary.ivany@rbc.com>
Date: 2018-12-19 1:14 PM (GMT-05:00)
To: William Nurnberger <William.Nurnberger@diginc.ca>
Cc: Joe Lanni <joe.lanni@diginc.ca>, Alex Agius <alex.agius@diginc.ca>, "Du, Alicia" <alicia.du@rbc.com>, "O'Gorman, Philip" <philip.ogorman@rbc.com>, Jay Vieira <Jay.Vieira@diginc.ca>
Subject: RE: RBC/DIG

Thank you William.

We have provided our waiver to Ritchie Bros.

Please advise which account you expect the proceeds to be into.

Gary

From: William Nurnberger [mailto:William.Nurnberger@diginc.ca]
Sent: 2018, December, 19 12:13 PM
To: Ivany, Gary <gary.ivany@rbc.com>
Cc: Joe Lanni <joe.lanni@diginc.ca>; Alex Agius <alex.agius@diginc.ca>; Du, Alicia <alicia.du@rbc.com>; O'Gorman, Philip <philip.ogorman@rbc.com>; Jay Vieira <Jay.Vieira@diginc.ca>
Subject: RE: RBC/DIG

Hi Gary, we accept the below statement and look forward to moving forward with you and your team.

Thank you



William Nurnberger, Interim Chief Financial Officer & Vice President Corporate Development
 Distinct Infrastructure Group

Tab 0



RITCHIE BROS. AUCTIONEERS (CANADA) LTD.
9500 Glenlyon Parkway, Burnaby, British Columbia, Canada,
V5J 0C6
Phone: 778.331.5500
Internet: www.rbauktion.com

December 12, 2018

Fax: +1.778.331.5932

To: Royal Bank of Canada
36 York Mills Road 4th Floor, Toronto, ON, M2P0A4, Canada

Fax: , Email:

Re: Our Consignor: Distinct Infrastructure Group Inc/ Distincttech Inc

Our above noted customer has placed the following equipment ("Equipment") for sale with us in Edmonton, AB, CAN - Dec 11, 2018:

See Attached Schedule A

(Including any miscellaneous serial number changes or additions, attachments, accessories)

Our searches indicate you have a security interest registration/filing against the customer. Please indicate the option of your choice by placing a checkmark in the box next to #1 or #2 (if #2, include payout).

- 1. We have no interest in the Equipment nor in 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.
2. We represent that we have a valid security interest in the Equipment and are entitled to the proceeds thereof. You are authorized to sell the Equipment. Our security interest in the Equipment and the proceeds from the sale thereof is hereby released on the condition that we will receive the lesser of:
a) the Net Proceeds generated from the sale of the Equipment. Net Proceeds being gross proceeds of the sale of the Equipment less amounts owing to (i) prior ranking secured creditors, if any, and (ii) Ritchie Bros. Auctioneers for commission charged and costs incurred; or
b) \$ on or about January 7, 2019 with a per diem rate of \$ thereafter (inclusive of all applicable taxes), being the amount that we are owed which is secured by, among other things, the Equipment.

We appreciate your prompt response by no later than five (5) business days from the date of this letter. If we do not hear from you within the period stated above, we will proceed on the basis that you have no interest in the Equipment nor in the proceeds from the sale thereof, and we may pay out the proceeds accordingly.

Please complete:

Form with fields: Name (Andrew McLaughlin), Email (andrew.mclaughlin@rbccm.com), Phone ((416) 842-8551), Signature (Andrew McLaughlin), Date Signed (19/12/2018)

Would you like to be notified if serial numbers are revised or if additional items are added to the Sale? Yes/No

Please include below any additional information, if the payouts noted above in #2 covers specific items or updated contact information if the above is incorrect.

This is EXHIBIT "0" referred to in the Affidavit of ANIS WOOD Sworn before me at Kelowna in the Province of British Columbia this 5 day of December 2018. Email: raurora@rbauktion.com A Commissioner for taking Affidavits in the Province of British Columbia

Ria Aurora, RITCHIE BROS. AUCTIONEERS (CANADA) LTD. Per: Ria Aurora Phone: +1.778.331.5499 Fax: +1.778.331.5932

Lien Event Owner Code: L22 Lien Search Summary: LSS-00173910

CAN Three Choice Letter GSA_05_17 Ritchie Bros. Makes no representation, written or verbal, except as contained herein. This letter supersedes all previous correspondence between ourselves, concerning the above equipment. This letter is governed by the laws of the Province of British Columbia.



RITCHIE BROS. AUCTIONEERS (CANADA) LTD.
 9500 Glenlyon Parkway, Burnaby, British Columbia, Canada,
 V5J 0C6
 Phone: 778.331.5500
 Internet: www.rbauction.com

Schedule A for L22 -- Edmonton Auction

Owner's Name: **Distinct Infrastructure Group Inc**

Auction Site	
Edmonton, AB, CAN - Dec 11, 2018	
Contract Number	Lien Search Summary Number
00370658	LSS-00173910

#	Item Description (Year, Make, Model, Model Description, Asset Type)	Serial Number	Comes With
1	2014, Western Star, 4900FA, Tri Drive, Hydro Vac Truck	5KKPAED63EPFD4919	Detroit DD15, 505 hp, eng brake, Eaton Fuller RTLO16918B, trip diff lock, dbl frame, AirLiner A/R susp, 20000 lb ft, RZ166 rears, 316 in. WB, Vactor HXX tank, full open rear gate, holst, Cat triplex pump, reel & hose, SWS Canada scale, Ingersoll-Rand Bl
2	2015, Western Star, 4900, Tri Drive, Hydro Vac Truck	5KKPAED61PPFX1005	Detroit DD15, 505 hp, Allison A/T, trip diff lock, dbl frame, AirLiner A/R susp, 20000 lb ft, RZ166RSRS rears, 316 in. WB, Vactor HXX tank, full open rear gate, CAT 3560 triplex pump, reel & hose, blower
3	2015, Western Star, 4900FA, Tri Drive, Hydro Vac Truck	5KKPAED60FPGJ5270	Detroit DD15, 505 hp, eng brake, Eaton Fuller RTLO16918B, trip diff lock, dbl frame, AirLiner A/R susp, 20000 lb ft, RZ69166 rears, 316 in. WB, Vactor HXX tank, Cat triplex pump, 49785 heater, hose reel, Hibon slav 8702 blower
4	2015, Western Star, 4900FA, Tri Drive, Hydro Vac Truck	5KKPAED62FPGJ5271	Detroit DD15TC, 505 hp, eng brake, Eaton Fuller RTLO16918B, trip diff lock, dbl frame, AirLiner A/R susp, 20000 lb ft, RZ69166 rears, 316 in. WB, Vactor HXX tank, Cat triplex pump, 49785 heater, Hibon slav 8702 blower
5	2015, Western Star, 4900SF, Tri Drive, Hydro Vac Truck	5KKPAED62FPGK1880	Detroit DD15, 505 hp, eng brake, Eaton Fuller RTLO16918B, trip diff lock, AirLiner A/R susp, 20000 lb ft, RZ69166 rears, 56 in. axle spread, 316 in. WB, Vactor HXX tank, Cat triplex pump, 49785 heater, Hibon SIAV 8702 blower

Receivers Initials

Lien Event Owner Code: L22

Lien Search Summary: LSS-00173910

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7	2015, Western Star, 4800, 10913 Litre T/A T/A, Hydro Vac Truck	5KKMBBDV8FPGM7812	PHOTOCOPY OF REGISTRATION ONLY UNABLE TO PROVIDE DOCUMENTS TO REGISTER/TITLE IN THE USA, Detroit DD13, 450 hp, eng brake, Eaton Fuller RTLO16918B, dbl diff lock, dbl frame, AirLiner A/R susp, 80000 lb ft, RT46164 rears, 326 in. WB, Presvac 10913 L tank,
8	2016, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4TXGR978104	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 20000 lb ft, T69170HP rears, 310 in. WB, 2015 Foremost water tank, hyd lift rear gate, debris tank, Cat 3560 triplex pump, Dynablast HV700F heater, Rob
9	2016, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4TX8GR978103	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 20000 lb ft, T69170HP rears, 310 in. WB, 2015 Foremost 2000 gal water tank, hyd lift rear gate, CAT 3560 triplex pump, Dynablast heater, hose reel, Rob
10	2016, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EXXG1983752	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, AirLiner A/R susp, 19940 lb ft, RZXX166PWT rears, 310 in. WB, 2015 Foremost tank, Pratissoll HF25 pump, Dynablast heater, hose reel
11	2016, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EX1GJ983753	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 19940 lb ft, RZXX166PWT rears, 312 in. WB, 2015 Foremost tank, hyd lift rear gate, Cat 3560 pump, Dynablast HV700FSO heater, Robuschi 145 blower
12	2017, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EX9HJ986319	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 19940 lb ft, RZXX166PWT rears, 310 in. WB, 2016 Foremost 2000 gal water tank, hyd lift rear gate, Pratissoll HF25 triplex pump, Dynablast HV700FSO heat

Receivers Initials



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13	2017, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EX7HJ986318	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, dbl diff lock, Neway A/R susp, 19940 lb ft, RZOX166PWT rears, 310 in. WB, 2016 Foremost tank, hyd lift rear gate, Pratissoli HF25A pump, Dynablast HV700FSO heater, Robuschf 145 blower
14	2017, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EX5HJ986320	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 19940 lb ft, RZOX166PWT rears, 310 in. WB, 2016 Foremost 2000 gal tank, hyd lift rear gate, Pratissoli HF25 triplex pump, Dynablast HV700F heater, hose
15	2017, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EX7HJ986321	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 19940 lb ft, RZOX166PWT rears, 310 in. WB, 2016 Foremost tank, hyd lift rear gate, Pratissoli HF25 pump, Dynablast HV700F heater, Robuschi 145 blower
16	2017, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EX0HJ986323	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 19940 lb ft, RZOX166PWT rears, 310 in. WB, 2016 Foremost water tank, hyd lift rear gate, Pratissoli HF25 Triplex pump, reel & hose, Robuschi blower, Dyn
17	2013, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALDRXDPPFA9979	Detroit DD15, 560 hp, eng brake, Eaton Fuller RTLO18918B, dbl diff lock, dbl frame, A/R susp, 20000 lb ft, RZ166RSRS rears, 300 in. WB, 2013 Foremost water tank, hyd lift rear gate, Cat 3560 triplex pump, Holsy heater, reel & hose, Hison 840 blower, 13
18	2014, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALD12EPPF3871	PHOTOCOPY OF REGISTRATION ONLY UNABLE TO PROVIDE DOCUMENTS TO REGISTER/TITLE IN THE USA, Detroit DD16, 560 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, AirLiner A/R susp, 20000 lb ft, RZ166 rears, 308 in. WB, Foremost water tank, C

Receivers Initials

CAN Three Choice Letter GSA_5_17

Lien Event Owner Code: L22
 Lien Search Summary: LSS-00173910

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19	2014, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KXPALD10EPP3870	Detroit DD16, 600 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, AirLiner A/R susp, 20000 lb fit, RZ166 rears, 308 in. WB, 2013 Foremost tank, hyd lift rear gate, Cat 3560 pump, Hotsy wb9450 heater, reel & hose, Hibon 840 blower
20	2015, Western Star, 4900SA, 2066 Gallon Tri Drive, Hydro Vac Truck	5KXPALD12FPGK2956	Detroit DD15, 500 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, AirLiner A/R susp, 20000 lb fit, RZ69166 rears, 303 in. WB, 2014 Tornado Hydrovacs tank, Cat 3560 pump, Pumps & Pressure heater, Robuschi 125 blower
21	2017, Kenworth, T800, 2000 Gallon Tri Drive, Hydro Vac Truck	1NKDX4EX9HJ986322	Cummins ISX15, 525 hp, eng brake, Eaton Fuller RTLO18918B, trip diff lock, dbl frame, Neway A/R susp, 19940 lb fit, RZX166PWT rears, 2016 Foremost tank, Prattisoli HF25A pump, Dynablast HV700F heater, Robuschi 145 blower
25	1999, Freightliner, FL80, 8865 Litre T/A, Hydro Vac Truck	1FVXJCB1XHA20422	Caterpillar 3126, Fuller 9 spd, Chalmers susp, 14000 lb fit, 40000 lb rears, 230 in. WB, 1998 Provac tank, s/n 0698035, hyd lift rear gate, hoist, Cat triplex pump, TC350 code, reel & hose, Ingersoll-Rand VTB820HMA blower
26	1998, Freightliner, FL80, 8865 Litre T/A, Hydro Vac Truck	1FVXJCB1WH912813	Caterpillar 6 cyl, diesel, Eaton Fuller 9 spd, Chalmers susp, 14000 lb fit, 40000 lb rears, 228 in. WB, 1998 Provac tank, full open rear gate, hoist, CAT triplex pump, TC350 code, blower
27	1999, Freightliner, FL80, 10000 Litre T/A, Hydro Vac Truck	1FVXJCB3XHB63596	Caterpillar 3126, 300 hp, Fuller RTX11609B, Chalmers susp, 14600 lb fit, RT40145 rears, 226 in. WB, 1999 Westech Aqua-Vac tank, full open rear gate, hoist, CAT triplex pump, TC350 code
28	2001, GMC, 3500, Extended Cab 4x4 Flatbed, Parts/Stationary Trucks - Other	1GDJK39U51F137452	6.0 L, V8, A/T, 8 ft flat bed w/toolboxes, dually, INOPERABLE
29	1995, Ford, LN7000, S/A w/Hiab 65071, Boom Truck	1FDPR72C2SVA81797	6 cyl, diesel, 6 spd, spring susp, 222 in. WB, 16 ft flat bed, knuckle boom, dual ctrls, hyd outriggers
30	2003, Ford, F250, Extended Cab 4x4 Pickup, Parts/Stationary Trucks - Other	1FTNX21L43EBS8838	5.4 L, V8, A/T, INOPERABLE

Receivers Initials

CAN Three Choice Letter GSA_5_17

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31	1997, GMC, 3500, Flatbed Truck, Parts/Stationary Trucks - Other	1GBJC34R9VF048319	5.7 L, V8, A/T, 10 ft stake side bed, INOPERABLE
32	1995, Ford, LTLA9000, T/A Flatbed, Parts/Stationary Trucks - Other	1FTYA95V7SVA47606	Cummins M11, 370 hp, eng brake, Road ranger 13 spd, Hendrickson A/R susp, 12000 lb frt, 40000 lb rears, 203 in. WB, 18 ft bed, INOPERABLE
33	1991, International, 4900, T/A w/Altec, Digger Derrick Truck	1HTSHPCR7MH377150	6 cyl, diesel, A/T, spring over beam susp, 206 in. WB, Altec 15 ft 6 in. body, 3 sec boom, pole clamp, winch, turret winch
35	2008, Ford, F350, Crew Cab 4x4 Pickup, Parts/Stationary Trucks - Other	1FTWW31528EB64868	5.4L, V8, 4x4, INOPERABLE
36	2007, Sterling, L7500, T/A Dump, Parts/Stationary Trucks - Other	2FZHATDJ77AY21537	Mercedes Benz, 6 cyl, dsl, A/T, 18000 lb frt, 40000 lb rears, 18 ft box, 385/65R22.5 F, 11R22.5 R, INOPERABLE
37	1996, Mack, CH613, Day Cab, Truck Tractor (T/A)	1M1AA18Y8TW064144	E7-427, 427 hp, Eaton Fuller 13 spd, A/R susp, 165 in. WB, wet kit
38	1996, Peterbilt, 377, Sleeper, Truck Tractor (T/A)	1XPCDB9X9TN397811	Caterpillar 3406, 355 hp, eng brake, Eaton Fuller 13 spd, Air Leaf A/R susp, 12000 lb frt, 38000 lb rears, 244 in. WB, 63 in. sleeper, wet kit
39	2004, Ford, F550, Service, Parts/Stationary Trucks - Other	1FDAF56PX4EA30051	6.0 L, V8, diesel, A/T, 11 ft ITB body, Auto crane 3203 crane, VMAC UH air comp, remote, INOPERABLE
40	2011, Ford, F350, Crew Cab 4x4 Pickup, Parts/Stationary Trucks - Other	1FTBW3BT0BEB64185	6.7 litre, V8, diesel, fuel tank w/pump, 6.7 L, V8, dsl, A/T, 4x4, slip tank w/ Tutthill 15 gpm elec pump
42	2003, Ford, E450, Van, Parts/Stationary Trucks - Other	1FDXE45F53HC02581	7.3 L, V8, diesel, A/T, 16 ft body, roll up door, INOPERABLE
43	1993, Ford, E350, Van, Parts/Stationary Trucks - Other	1FDKE30G5PHB60116	NO KEYS, 7.5 L, V8, A/T, 15 ft ITB body, 7.5 L, V8, INOPERABLE
44	2004, Ford, E350, Van, Parts/Stationary Trucks - Other	1FDWE35LX4HA17763	5.4 L, V8, A/T, 15 ft body, 5.4 L, V8, INOPERABLE
45	2006, Ford, E450, Van, Parts/Stationary Trucks - Other	1FDXE45P86DB22728	6.0 L, V8, diesel, A/T, 15 ft ITB body, 6.0 L, V8, diesel, INOPERABLE
46	1998, GMC, 3500, Van, Parts/Stationary Trucks - Other	1GDKC34F4WJ501939	6.5 L, V8, diesel, A/T, 15 ft body, roll up door, INOPERABLE
47	1997, GMC, 3500, Savana Van, Parts/Stationary Trucks - Other	1GDJG31R6V1085794	5.7 L, V8, A/T, 14 ft Gruman Olsen body, roll up door, INOPERABLE

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48	2005, Chevrolet, , Express Van, Parts/Stationary Trucks - Other	1G8HG31U351214133	6.0 L, V8, A/T, 12 ft body, 6.0 L, V8, INOPERABLE
49	2008, Dodge, 3500, , Van Truck	3D6WG46D28G202296	5.7 L, V8, A/T, Supreme 12 ft body
50	1994, Case, 860, 4x4, Cable Plow	JAF0157034	4 cyl, diesel, dozer, 10891781 vib cable plow, H939301, front mtd back hoe
51	1988, Case, 760, 4x4x4 Combo, Cable Plow	JAF009618	4 cyl, diesel, dozer, vib cable plow, H939155, crab steer
52	, Ditch Witch, 8020, 4x4x4 Cable Plow, Parts/Stationary Construction-Other	5N0378	John Deere 4 cyl, diesel, dozer, H830 cable plow, cwt, crab steer, INOPERABLE
53	1976, Caterpillar, D5, , Cable Plow	96J5768	3306 6 cyl, reel carrier, canopy, Ateco 5 ft cable plow
54	1993, Ditch Witch, HT100, Vibratory, Cable Plow	6K0096	4 cyl, diesel, dozer, reel carrier, cab, VP110 vib cable plow
55	1995, Ditch Witch, R100JD, Vibratory, Cable Plow	6M0220	4 cyl, diesel, dozer, cab, VP110 cable plow, crab steer, front mtd back hoe, rubber wheel packer
56	, Ditch Witch, JT4020, Directional Drill, Parts/Stationary Construction-Other	CMWJ40T3CA0000109	Cummins 6 cyl, pipe loading system, Bean L1622HV Triplex pump, 15ft long, 3 in pipe, INOPERABLE
57	, Ditch Witch, JT4020, , Directional Drill		Cummins 6 cyl, 15 ft x 3 in. diam drill stem, 1 cartridges, rod loader, Bean L1622HVL hyd triplex pump, steering guidance sys, rubber tracks
58	, Ditch Witch, JT2020, Directional Drill, Parts/Stationary Construction-Other	2Z1371	Cummins, 4 cyl, dsl, INOPERABLE
59	, Ditch Witch, JT2020, Crawler, Directional Drill	CMWJ2020T90000971	Cummins 4 cyl, 20000 lb push/pull, 10 ft x 2 in. diam drill stem, 1 cartridges, rod loader, hyd triplex pump, steering guidance sys, rubber tracks
60	2006, Ditch Witch, JT520, , Directional Drill	CMWJT5200000045	Kubota D1105ES, Bean A8413C hyd duplex pump, rubber tracks
61	, Ditch Witch, JT520, , Directional Drill	2Y1128	Kubota D1105-E, 5 ft x 1 in. diam drill stem, Bean A0413C hyd duplex pump, rubber tracks
63	2006, Ditch Witch, FX60, , Vacuum Trailer	1DSB2025361701969	800 gal tank, hyd lift rear gate, fresh water tank, Cummins
64	1975, Hyster, , 35 Ft T/A Steel, Step Deck Trailer	19032	WB susp, 8 ft top deck, x 94 in. deck, manual tilting deck

Receivers Initials

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66	, Quincy, QS500, Electric, Air Compressor	90558J	
67	, Quincy, QS500, Electric, Air Compressor	98960H	Baldor 3 ph. 100 hp motor
147	2015, International, 7400, Workstar S/A w/Terex HRX55, Bucket Truck	1HTWCAZR2FH533196	MaxForce 9, 315 hp, A/T, Hendrickson A/R susp, 14000 lb ft, 21000 lb rears, 190 in. WB, BG Bodies 15 ft 8 in. body, folding boom, 4 hyd stabilizers
152	, Ditch Witch, JT3020, , Directional Drill	CMWJ30M1P90000294	Cummins 4 cyl, 10 ft x 2.5 in. diam drill stem, 1 cartridges, rod loader, Bean hyd triplex pump, rubber tracks
176	2012, Freightliner, M2112, Tri Drive, Hydro Vac Truck	1FVMC7DV7CHBJ4047	Detroit DD13, 435 hp, eng brake, Eaton Fuller FRO17210C, dbl frame, Hendrickson spring over beam susp, 20000 lb ft, RT46160 rears, 266 in. WB, alum wheels, RamVac tank, hyd lift rear gate, Cat 660 triplex pump, Hibon T556 blower, boiler
189	2010, Ford, F350, Extended Cab 4x4 Pickup, Parts/Stationary Trucks - Other	1FTWX3BR7AEB21776	6.4 L, V8, diesel, A/T, INOPERABLE
190	2001, Chevrolet, 3500, Extended Cab 4x4 Pickup, Parts/Stationary Trucks - Other	1GCJK39G41E258820	V8, A/T, 10 ft bed, dually, INOPERABLE
191	2008, Ford, F350, King Ranch Crew Cab 4x4 Pickup, Parts/Stationary Trucks - Other	1FTWW31R88EB64683	NO KEYS, 6.4L, V8, diesel, A/T, INOPERABLE

List of Equipment for C25 – Toronto Auction

Owner's Name: Distinct Infrastructure Group Inc. / Distincttech Inc.

Auction Site	
Edmonton, AB, CAN - Dec 11, 2018	
Contract Number	Lien Search Summary Number
00370658	LSS-00173947

#	Item Description (Year, Make, Model, Model Description, Asset Type)	Serial Number	Comes With
70	2012, John Deere, 27D, , Mini Excavator (1 - 4.9 Tons)	1FF027DXJBG256528	Q/C, 4 ft 10 in. stick, swing away boom, aux hyd, dozer, canopy
71	2012, John Deere, 27D, , Mini Excavator (1 - 4.9 Tons)	1FF027DXCBG256529	Q/C cleanup bkt, 4 ft 10 in. stick, swing away boom, aux hyd, dozer, canopy

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74	2009, John Deere, 35D, , Mini Excavator (1 - 4.9 Tons)	1FF035DX260747	Q/C cleanup bkt, 5 ft 8 in. stick, swing away boom, aux hyd, dozer, canopy
75	2013, John Deere, 27D, , Mini Excavator (1 - 4.9 Tons)	1FF027DXKCG257467	Q/C, 4 ft stick, swing away boom, aux hyd, dozer, canopy
76	2012, John Deere, 35D, , Mini Excavator (1 - 4.9 Tons)	1FF035DXECG269128	Q/C bkt, 5 ft 8 in. stick, swing away boom, aux hyd, dozer, A/C cab
78	2008, John Deere, 310SJ, 4x4, Loader Backhoe	1T0310SJ167013	bkt, A/C cab, extendahoe w/Q/C bkt
81	2009, Hertz, , 15' Ft T/A, Equipment Trailer	2JDUTF62391009405	spring susp, pintle hitch, 3 ft beavertail
82	2009, JDJ, , 15 Ft T/A, Equipment Trailer	2JDUTF62191009404	spring susp, pintle hitch, 3 ft beavertail
83	, TES, , S/A, Reel Trailer	313595641	hyd reel holst, spring susp
85	2008, Norte, , 16 Ft T/A, Equipment Trailer	3BZHP18288C008248	spring susp, pintle hitch, 2 ft beavertail
86	2012, Miska, , 20 Ft Tri/A, Equipment Trailer	2MSUEJ936CH005821	spring susp, pintle hitch, 4 ft beavertail
88	2015, Vermeer, D20X22II, Crawler, Directional Drill	1VR6180T5F1001812	Kubota V3800T, 1 cartridges, rod loader, rubber tracks, qty of drill rods
89	, Vermeer, D9X13, Series II Crawler, Directional Drill	1VR9160S6C1000558	Kubota V1505, Bean hyd pump, rubber tracks, qty of drill rods
90	2016, Vermeer, D6X6, Crawler, Directional Drill	1VR4100C7G1000333	Kubota D1105, rubber tracks, qty of drill rods
92	2012, RAM, 5500, Crew Cab, Dump Truck (S/A)	3C7WDMEL6GG109753	Cummins 6.7 L, A/T, Del 9 ft 4 in. landscaping box, WHITE
93	2011, Peterbilt, 325, S/A, Dump Truck (S/A)	2NPYHM5XXBM122811	Paccar PX6, 300 hp, A/T, Reyco spring susp, 8000 lb frt, 11500 lb rears, 178 in. WB, BCI 12 ft 6 in. box, WHITE
94	2012, Chevrolet, 3500HD, Silverado, Dump Truck (S/A)	1GB3CZCL5CF116816	6.6 L, V8, diesel, A/T, DEL 11 ft landscaping box, WHITE
95	2013, Ford, F550, XL Super Duty S/A w/Altec AT37G, Bucket Truck	1FDUF5GT1DEA51928	6.7 L, V8, diesel, A/T, Altec 11 ft body, ctr mtd insulated 37 ft 6 in. 2 sec folding boom, lower boom insert, 1 man basket, WHITE
96	2014, GMC, 4500, Savanna Cube, Van	1GD676CL5E1113759	6.6 L, V8, diesel, A/T, Multivans 16 ft body, WHITE

Receiver's Initials

CAN Three Choice Letter GSA_3_17

Ritchie Bros. Makes no representation, written or verbal, except as contained herein. This letter supersedes all previous correspondence between ourselves, concerning the above equipment. This letter is governed by the laws of the Province of British Columbia.

Lien Event Owner Code: L22

Lien Search Summary: LSS-00173910



RITCHIE BROS. AUCTIONEERS (CANADA) LTD.
 9500 Glenlyon Parkway, Burnaby, British Columbia, Canada,
 V5J 0C8
 Phone: 778.331.5500
 Internet: www.rbauction.com

97	2014, Chevrolet, 4500, Express Cube, Van	1GB6G6CL1E1112858	6.6 L, V8, diesel, A/T, Multivans 16 ft body, shelving
98	2014, Chevrolet, 4500, Express Cube, Van	1GB6G6CLXE1113233	6.6 L, V8, diesel, A/T, Multivans 16 ft body, shelving, WHITE
99	2014, Chevrolet, 4500, Express Cube, Van	1GB6G6CL5E1114077	6.6 L, V8, diesel, A/T, Multivans 16 ft body, shelving, WHITE
101	2013, Ford, F550, XL Super Duty S/A w/Altec AT37G, Bucket Truck	1FDUF5GT3DEB78289	6.7 L, V8, diesel, A/T, Altec 11 ft body, cr mtd Insulated 37 ft 6 in. 2 sec folding boom, lower boom insert, 1 man basket, WHITE
102	2014, Ram, 3500HD, Crew Cab 4x4, Pickup	3C63R3GL3EG193307	6.7 L, 6 cyl, diesel, A/T, WHITE
103	2014, Ram, 3500, HD Crew Cab 4x4, Pickup	3C63R3GL1EG193306	6.7 L, 6 cyl, diesel, A/T, WHITE
104	2014, Ram, 3500, HD Crew Cab 4x4, Pickup	3C63R3GL2EG196652	6.7 L, 6 cyl, diesel, A/T, WHITE
105	2014, Ram, 3500, HD Crew Cab 4x4, Pickup	3C63R3GL4EG196653	6.7 L, 6 cyl, diesel, A/T, WHITE
106	2014, Ram, 3500HD, Crew Cab 4x4, Pickup	3C63R3GL2EG193332	6.7 L, 6 cyl, diesel, A/T, WHITE
107	2014, Ram, 3500HD, Crew Cab 4x4, Pickup	3C63R3GL0EG196651	6.7 L, 6 cyl, diesel, A/T, WHITE
108	2014, Ram, 3500HD, Crew Cab 4x4, Pickup	3C63R3GL2EG226443	6.7 L, 6 cyl, diesel, A/T, WHITE
109	2014, Ram, 3500HD, Crew Cab 4x4, Pickup	3C63R3GL5EG220720	6.7 L, 6 cyl, diesel, A/T, WHITE
110	2014, Ram, 5500HD, , Dump Truck (S/A)	3C7WRMBL0EG148508	6.7 L, 6 cyl, diesel, A/T, DEL 11 ft landscaping box, WHITE
111	2014, GMC, 4500, Cube, Van	1GD676CL8E1115764	6.6 L, V8, diesel, A/T, Unicell 16 ft body, shelving, WHITE
112	2014, GMC, 4500, Savana Cube, Van	1GD676CL0E1112227	6.6 L, V8, diesel, A/T, Multivans 16 ft body, shelving, WHITE
113	2014, GMC, 4500, Savana Cube, Van	1GD676CL0E11151643	6.6 L, V8, diesel, A/T, Unicell 16 ft body, shelving, WHITE
114	2014, GMC, 4500, Savana Cube, Van	1GD676CL0E1153263	6.6 L, V8, diesel, A/T, Unicell 16 ft body, shelving, WHITE
116	2014, Ram, 1500, Crew Cab 4x4, Pickup	1C6RR7KTXES334620	5.7 L, V8, A/T, WHITE
117	2014, GMC, 4500, Savana Cube, Van	1GD676CL1E1115699	6.6 L, V8, diesel, A/T, spring susp, 178 in. WB, 16 ft body
118	2014, Ram, 5500HD, , Dump Truck (S/A)	3C7WRMBLXEG300617	6.7 L, 6 cyl, diesel, A/T, DEL 11 ft landscaping box, WHITE
119	2014, Ram, 5500, , Dump Truck (S/A)	3C7WRMBL8EG300616	Cummins 6.7 L, A/T, DEL 11 ft landscaping box, WHITE
120	2014, Jeep, Patriot, North Edition 4x4, Sport Utility Vehicle	1C4NJRAB0ED918287	4 cyl, A/T, WHITE

Receivers Initials

CAN Three Choice Letter GSA_5_17

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 9500 Glenlyon Parkway, Burnaby, British Columbia, Canada,
 V5J 0G6
 Phone: 778.331.5500
 Internet: www.rbauction.com

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121	2014, Chevrolet, 2500, Express Cargo, Van	1GCWGGCAXE1199868	4.8 L, V8, A/T, roof rack, shelving, WHITE
122	2014, Chevrolet, 2500, Express Cargo, Van	1GCWGGCA1E1200535	4.8 L, V8, A/T, ladder rack, WHITE
123	2014, Ram, , Big Horn Crew Cab 4x4, Pickup	1C6RR7LM1E5423516	3.0 L, V6, diesel, A/T, WHITE
124	2015, Hino, 338, S/A, Van Truck	2AYNF8JV3F3S12608	6 cyl, diesel, A/T, Morgan 16 ft body, WHITE
125	2014, Chevrolet, 4500, Express Cube, Van	1GB6G6CL2E1173684	Duramax 6.6 L, V8, diesel, A/T, Unicell 16 ft body, shelving, WHITE
126	2015, Ram, 3500HD, Crew Cab 4x4, Pickup	3C63R3GL3FG556187	6.7 L, 6 cyl, diesel, A/T, WHITE
128	2015, Nissan, NV200, SV Cargo, Van	3N6CM0KN2FK698118	2.0 L, 4 cyl, A/T, WHITE
130	2015, Ram, 1500, Big Horn Crew Cab 4x4, Pickup	1C6RR7LT1F5642940	5.7 L, V8, A/T, WHITE
131	2015, Ram, 1500, Big Horn Crew Cab 4x4, Pickup	1C6RR7LT5F5642939	5.7 L, V8, A/T, WHITE
132	2015, Jeep, Patriot, High Altitude 4x4, Sport Utility Vehicle	1C4NJRA85FD213888	4 cyl, A/T, WHITE
133	2016, Jeep, Patriot, High Altitude 4x4, Sport Utility Vehicle	1C4NJRAB6GD559448	4 cyl, A/T, WHITE
136	2015, Ram, 3500HD, Crew Cab 4x4, Pickup	3C63R3GL0FG612764	6.7 L, 6 cyl, diesel, A/T, WHITE
138	2016, Ram, 1500, Big Horn Crew Cab 4x4, Pickup	1C6RR7LT1G5177951	5.7 L, V8, A/T, WHITE
139	2015, Chevrolet, 1500, Silverado LT Crew Cab 4x4, Pickup	3GCUKREC5FG445289	5.3 L, V8, A/T, BLACK
140	2015, Chevrolet, 1500, Silverado Crew Cab 4x4, Pickup	3GCUKRECKFG423319	5.3 L, V8, A/T, BLACK
144	2013, Komplet, LEM60/40, Crawler, Jaw Crushing Plant	513668	diesel, rear disc folding conv, 20 in. magnet, remote ctrl
148	2016, Jeep, Patriot, High Altitude 4x4, Sport Utility Vehicle	1C4NJRAB8GD655422	4 cyl, A/T, WHITE
149	2016, Jeep, Patriot, High Altitude 4x4, Sport Utility Vehicle	1C4NJRAB4GD655420	4 cyl, A/T, WHITE
150	2016, Jeep, Patriot, High Altitude 4x4, Sport Utility Vehicle	1C4NJRAB4GD721657	4 cyl, A/T, WHITE
153	2013, GMC, 3500, Savanna Cube, Van	1GD374BG4D1162476	6.0 L, V8, A/T, 16 ft body
154	, John Deere, 35G, , Mini Excavator (1 - 4.9 Tons)	1FF0356XAGK278325	Q/C bkt w/hyd thumb, 5 ft 8 in. stick, swing away boom, aux hyd, dozer, A/C cab
155	, Brandt, EX0025-BDHD12, 12 In., Bucket	537438	to fit John Deere 26G, 35G
156	, John Deere, , 34 In. Ditching, Bucket	2028094	
157	2013, Chevrolet, 1500, Silverado Extended Cab 4x4, Pickup	1GCRKPEAXDZ137878	4.8 L, V8, A/T, WHITE

Receivers Initials

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 9500 Glenlyon Parkway, Burnaby, British Columbia, Canada,
 V5J 0C8
 Phone: 778.331.5500
 Internet: www.rbauction.com

160	2016, Ford, F550, XL Super Duty w/A/tec AT37G, Bucket Truck	1FDUF5GT4GEA74379	6.7 L, V8, diesel, A/T, Altec 11 ft body, ctr mtd insulated 37 ft 6 in. 2 sec folding boom, 1 man basket, WHITE
163	2014, Canada Trailers, , 16 Ft T/A, Equipment Trailer	2CPUSF2F2EA021009	spring susp, pintle hitch, 2 ft beavertail
164	, Vermeer, MX125, 16 Gallon, Mud Mixing System	1VRX030U2E2003481	
167	2016, Ram, 5500, , Dump Truck (S/A)	3C7WRMBL0GG177395	Cummins, A/T, 7000 lb ft, 13500 lb rears, DEL 11 ft 4 in. landscaping box, WHITE
170	2016, Ram, 1500, Big Horn Crew Cab 4x4, Pickup	1C6RR7LT9GS161349	5.7 L, V8, A/T, WHITE
171	2017, Ram, 1500, Crew Cab 4x4, Pickup	1C6RR7ST4HS857636	5.7 L, V8, A/T, WHITE
172	2016, Ram, 1500, Crew Cab 4x4, Pickup	3C6RR7KT2GG225109	5.7 L, V8, A/T, WHITE
173	2015, Ram, 5500HD, 4x4, Dump Truck (S/A)	3C7WRNBL2FG697800	6.7 L, 6 cyl, diesel, A/T, DEL 11 ft landscaping box, WHITE
174	2016, Canada Trailer, , 16 Ft T/A, Equipment Trailer	2CPUSF2FXGA024906	pintle hitch, 2 ft beavertail
175	2017, Ram, 1500, Crew Cab 4x4, Pickup	1C6RR7ST2HS857635	5.7 L, V8, A/T, WHITE
176	2017, Ram, 1500, Crew Cab 4x4, Pickup	1C6RR7ST8HS857638	5.7 L, V8, A/T, WHITE
177	2016, Canada Trailer, , 16 Ft T/A, Equipment Trailer	2CPUSF2F1GA024907	ball hitch, 2 ft beavertail
178	2016, Canada Trailer, , 16 Ft T/A, Equipment Trailer	2CPUSF2F3GA024908	ball hitch, 2 ft beavertail
179	2016, Canada Trailer, , 16 Ft T/A, Equipment Trailer	2CPUSF2F6GA025485	ball hitch, 2 ft beavertail
180	2016, Ram, 5500HD, 4x4, Dump Truck (S/A)	3C7WRNBL2GG213190	6.7 L, 6 cyl, diesel, A/T, DEL 11 ft landscaping box, WHITE
181	2016, Ram, 1500, Laramie Crew Cab 4x4, Pickup	1C6RR7NTXGS321087	5.7 L, V8, A/T, WHITE
182	2016, Canada Trailers, , 16 Ft T/A, Equipment Trailer	2CPUSF2F1GA024910	spring susp, ball hitch, 2 ft beavertail
183	2015, Chevrolet, 4500, Express Cube, Van	1GB6G6CL8F1252097	6.6 L, V8, diesel, A/T, Unicell 16 ft body, WHITE
184	2015, Chevrolet, 4500, Express Cube, Van	1GB6G6CLXF1250609	6.6 L, V8, diesel, A/T, Unicell 16 ft body, WHITE
185	2015, Chevrolet, 4500, Express Cube, Van	1GB6G6CL2F1287878	6.6 L, V8, diesel, A/T, Transit 16 ft body, WHITE
186	2015, Ford, F150, Platinum Crew Cab 4x4, Pickup	1FTEW1EF5FFC42764	5.0 L, V8, A/T, BLACK
187	2016, Ram, 5500HD, 4x4, Dump Truck (S/A)	3C7WRNBL4GG213191	6.7 L, 6 cyl, diesel, A/T, DEL 11 ft landscaping box, WHITE

Receivers Initials

CAN Three Choice Letter GSA_5_17

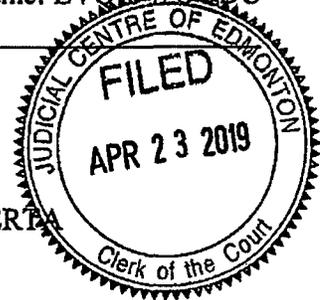
Lien Event Owner Code: L22

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Tab P

Action No.: 1703-13921
E-File Name: EVQ18W00DC
Appeal No.: _____



IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

BETWEEN:

CHRIS ARON WOOD and
MEGA DIESEL HOLDINGS LTD.

Plaintiffs

- and -

MEGA DIESEL EXCAVATING LTD. and
DISTINCT INFRASTRUCTURE GROUP INC.

Defendants

PROCEEDINGS

Edmonton, Alberta
February 15, 2019

Transcript Management Services
Suite 1901-N, 601 – 5th Street SW
Calgary, Alberta T2P 5P7

Phone: (403) 297-7392 Fax: (403) 297-7034

This is EXHIBIT "P" referred to in the
Affidavit of Chris Wood
Sworn before me at Calgary
in the Province of British Columbia this
15 day of October, 2019

A Commissioner for taking Affidavits
in the Province of British Columbia

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Certificate of Transcript	16

1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta
2
3 February 15, 2019 Morning Session
4
5 Master Smart Court of Queen's Bench
6 of Alberta
7
8 G.W. Sanson For Mega Diesel Excavating Ltd. and Distinct
9 Infrastructure Group Inc.
10 S. Tinajero For C. Wood and Mega Diesel Holdings Ltd.
11 T. Selinske Court Clerk
12

13
14 **Discussion**

15
16 MASTER SMART: Okay. That takes me to 24, Wood v. Mega Diesel
17 Excavating.

18
19 MR. SANSON: Good morning, Master. This is my application.
20 Sanson, first initial 'G' for the record. This is my application on behalf of the defendants,
21 Distinct Infrastructure Group and Mega Diesel Excavating Ltd. Or, more accurately, the
22 application is on behalf of iVac Services West Inc., which is the successor by
23 amalgamation to the defendant Mega Diesel Excavating.

24
25 MASTER SMART: All right.

26
27 **Submissions by Mr. Sanson**

28
29 MR. SANSON: This application is seeking to remove the
30 plaintiffs' writ from four vehicles belonging to iVac that were sold recently. I'll try to give
31 you a very brief background. The plaintiffs in this action obtained two judgments, one in
32 this action and one in what I'll just refer to as the related action. These judgments total
33 around \$584,000 plus costs and interest.

34
35 The first judgment was granted in July 2017. A writ was filed and registered at PPR
36 thereafter in September of 2017. Sometime later the plaintiffs amended their registration
37 to include registration against certain vehicles owned by iVac. Those vehicles, however,
38 are subject to a prior general security interest in favour of RBC. That security interest was
39 granted in 2016 and registered at Personal Property Registry in September of 2016, around
40 a year before the writ of enforcement.

41

1
2 MR. SANSON: It's what's shown in my client's sworn evidence
3 and also with respect to what Mr. Stuart Brotman, counsel for RBC, has advised and has
4 responded to my friend accordingly.

5
6 This case -- so what happened -- so there was an agreement between the parties, my client
7 and RBC, I mean.

8
9 MASTER SMART: Were going to apply it on different credit
10 facilities, whatever?

11
12 MR. SANSON: Yes.

13
14 MASTER SMART: All right.

15
16 MR. SANSON: And so as a result of that, they did not direct
17 Ritchie Bros. to pay the proceeds to RBC directly but, rather, allowed or indicated that they
18 wished the proceeds to go to the clients so that the clients could apportion the funds to the
19 facilities as per their agreement. And that's what my friend here is referring to is there was
20 a direction given to Ritchie Bros. that they were not seeking to receive the proceeds.

21
22 And so what I -- my friend is seek -- as he mentioned, he's taking the position that this is a
23 waiver of a security interest, and he's relying on, I believe, section 40 of the *Personal*
24 *Property Security Act*, which he handed me this morning.

25
26 I don't know if you happen to have another copy for -- I'll just hand up this highlighted
27 section that my friend has provided.

28
29 And the issue here is that I don't -- I think it would be a great leap to assume that the
30 direction given to Ritchie Bros. constitutes a subordination of their interest. In this case,
31 section 40 -- well, first of all, I don't think that the direction given was necessarily a
32 subordination agreement or anything that contemplated subordination. But, moreover,
33 section 40 states that:

34
35 ... the subordination is effective ... between the parties and may
36 be enforced by a third party if the third party is the person or one
37 of a class of persons for whose benefit the subordination was
38 intended.

39
40 And I think in this case it's fairly clear on the evidence that this was not intended to benefit
41 a writ holder, and there was no -- and what happened was RBC, without knowledge of any

1 writ, subordinated their interests perhaps only to the client, knowing that the money would
2 come back to them and that I don't think this is something that's captured by section 40 as
3 a subordination in favour of a class of persons when those class of persons were never
4 contemplated. And, arguably, there's no evidence that RBC even had knowledge of the
5 writ, likely would not have structured it this way if they would have known that would
6 have become an issue.

7

8 MASTER SMART: Okay.

9

10 MR. SANSON: And I'll let my friend speak.

11

12 **Submissions by Mr. Tinajero**

13

14 MR. TINAJERO: First of all, I'm going to pass up the affidavit that
15 includes the RBC's waiver.

16

17 MASTER SMART: Right.

18

19 MR. TINAJERO: So the Court is --

20

21 MASTER SMART: Their letter, yeah, or whatever it is.

22

23 MR. TINAJERO: And I will also pass up the affidavit from my
24 friend that --

25

26 MASTER SMART: Okay.

27

28 MR. TINAJERO: -- and I'll also pass up the affidavit that was filed
29 by my friend, outlining the agreement between the RBC and their client.

30

31 MASTER SMART: Okay. So this agreement says, We'll let you sell
32 \$2 million worth of equipment, and you're to pay us \$2 million?

33

34 MR. TINAJERO: You make a voluntary payment after the sale of
35 the vehicles.

36

37 MASTER SMART: M-hm. Right.

38

39 MR. TINAJERO: Our first position is -- to backtrack, our position
40 is (a) the borrowers, the debtors here, they're trying to enforce RBC's interests when the
41 RBC is not even here to contest our client being paid out. They haven't taken a position as

1 to our client's interest. It is the debtors who are trying to say that -- who are trying to direct
2 where the proceeds of the sale get paid to, and that is contrary to the provisions -- and that
3 would be contrary to the provisions of the *Personal Property Security Act*.

4
5 In this case, if anything, this would be a priority dispute between the RBC and our clients.
6 The borrowers have no standing to bring this application. And, further, it's very clear from
7 the evidence that the RBC did waive their entire interest against all those vehicles, and our
8 clients were the next in line, so we are entitled to be paid out.

9
10 The RBC has not contested our position.

11
12 MASTER SMART: Have they been given notice of this application?

13
14 **Submissions by Mr. Sanson**

15
16 MR. SANSON: I have given notice of this application to counsel
17 for RBC, Mr. Brotman.

18
19 MASTER SMART: M-hm.

20
21 MR. SANSON: In Fasken in Ontario. His correspondence can
22 actually be found in that same affidavit of William Nurnberger at tab B, Exhibit B, in which
23 he clarifies to my friend the nature of this agreement. I understand that the wording with
24 respect to the \$2 million doesn't speak to the entirety of what was agreed to. I note that that
25 email is something after the fact confirming that \$2 million is to be applied to the term loan
26 specifically. However, as Mr. Brotman points out to my friend here in his email at Exhibit
27 B, he states: (as read)

28
29 The auction could have potentially contravened one or more
30 covenants in the loan document, so the borrower sought consent
31 from RBC. In the course of those discussions it was agreed that
32 the auction could proceed without triggering a breach and that the
33 net proceeds would be applied against the indebtedness to RBC.

34
35 So it would be fair to say that RBC required that auction proceeds be applied against the
36 indebtedness.

37
38 **Submissions by Mr. Tinajero**

39
40 MR. TINAJERO: And I would say this is an agreement between the
41 RBC and their client that was dealt with outside of the priority process. The RBC waived

1 their security interests to the vehicles, allowing DIG to obtain the proceeds and then make
2 a voluntary payment, not necessarily from those proceeds but make a voluntary payment
3 to the RBC thereafter.
4

5 Further, it is our position that this is an -- if the -- what it appears that DIG and the borrowers
6 wanted to do here: There is a credit facilitated with the RBC, which Mr. Brotman's firm
7 has not been called. And, in fact, any of the proceeds that are applied to a loan can be
8 readvanced to the borrowers. In this case, there's more than ten signatories to the credit
9 agreement. We already have a judgment against two of them. There would be nothing
10 stopping the borrowers, or the debtors, from applying all of the proceeds to the RBC loan
11 and then drawing back on the different entities where we don't have a -- where we don't
12 actually have any recourse about -- to.
13

14 This is an egregious way to try to circumvent paying a creditor of two judgments that
15 amount to \$585,000. At the end of the day, the RBC is not contesting our priority, and in
16 fact, they did waive their interest to the vehicles.
17

18 **Submissions by Mr. Sanson**
19

20 **MR. SANSON:** Just to quickly respond to that, I think it's, you
21 know, perhaps incorrect to say that RBC is not contesting the position when they do seek
22 to receive these funds. And I think Mr. Brotman's position makes that clear that they do
23 intend to receive the net proceeds of sale.
24

25 Further, I think that a security interest can include future advances. It can include revolving
26 credit facilities. It's quite common for those to be secured interests.
27

28 And, further, I think the issue here is it's just simply a matter of one of priorities and whether
29 or not a waiver, in fact, occurred. I don't believe that the document provided to Ritchie
30 Bros. or any other actions by RBC necessarily constitute a waiver for the reasons I've sort
31 of set out, which is that I don't think that was contemplated by the agreement.
32

33 **MASTER SMART:** Well, what they said -- and I suspect this is where
34 counsel is coming from -- was, You can sell it and you can take the money; we'll be looking
35 for a payment. But they don't tie the two together.
36

37 **MR. TINAJERO:** Exactly.
38

39 **MASTER SMART:** So for a moment, at least, the funds are in the
40 hands of, I guess, iVac. And they say at that moment their writ attaches. And they may
41 have made a promise to pay some money out of their bank account, but -- well, I guess, it's

1 not even in their bank account yet, but -- because the net sale proceeds were a million
2 dollars, you said, or some money --
3

4 MR. TINAJERO: Well, based on their evidence the sale proceeds
5 are about 8.2 million, and there's actually \$4 million after paying all their secure creditors,
6 just not us.
7

8 MASTER SMART: Well, secured creditors --
9

10 MR. TINAJERO: Yeah, but --
11

12 MASTER SMART: -- are entitled to -- yeah.
13

14 MR. TINAJERO: -- yeah, and there would be about \$4.2 million
15 left after paying a few creditors, and that is based on the affidavit that I've provided by my
16 friend. And I have it right here if you'd like to take a look at it.
17

18 MASTER SMART: Okay. All right. But Ritchie Bros. held back a
19 million?
20

21 MR. SANSON: Correct.
22

23 MR. TINAJERO: That's correct.
24

25 MASTER SMART: Saying, Okay, well -- and I guess they gave the
26 other three-point-some million to your client?
27

28 MR. SANSON: Sir, that is correct, and (INDISCERNIBLE) have
29 already been applied to enforce the RBC indebtedness.
30

31 MR. TINAJERO: But it was given directly to his client, not to the
32 RBC.
33

34 MASTER SMART: No, I understand.
35

36 MR. TINAJERO: Yeah.
37

38 MASTER SMART: So RBC is aware of the application, and I guess
39 I'll presume implicitly they're giving authority to iVac to bring the application because they
40 want the million dollars.
41

8

1 MR. SANSON: I think that would be fair.
2

3 MASTER SMART: Yeah.
4

5 MR. TINAJERO: Presumably, but there's also no evidence
6 directing that, but, yeah.
7

8 MASTER SMART: Well, I mean, we have to apply some common
9 sense to things from time to time.
10

11 MR. TINAJERO: Yeah.
12

13 MASTER SMART: But, I mean, I don't know if RBC is of the mind
14 that they're at no risk here, but I think there's something to the argument being made. And
15 whether it's a subordination or not, there are these funds which are ostensibly available and
16 available through the release of the funds to your client. So they possess the funds from a
17 sale over which there's no claim of security. There is a waiver, if you will. I don't know if
18 it's a subordination. It may be a waiver.
19

20 MR. TINAJERO: A waiver. It's more like a waiver.
21

22 MASTER SMART: And I'm sure that in their minds that just simply
23 meant -- I don't know why they would prefer the money flow through iVac. That's --- but,
24 whatever. It sounds like they still have a working relationship with them.
25

26 MR. TINAJERO: At the end of the day, the RBC is a big
27 institution, and they have plenty of legal counsel.
28

29 MASTER SMART: Yeah.
30

31 MR. TINAJERO: So, yeah.
32

33 MASTER SMART: Of course, they do. And they're working with a
34 customer --
35

36 MR. TINAJERO: M-hm.
37

38 MASTER SMART: -- saying, Well, you know, whether -- you know,
39 we're comfortable that if you get the money, you're going to pay it to us.
40

41 MR. TINAJERO: M-hm.

- 1
2 **MASTER SMART:** I know it's not what they're saying. I read the
3 language, but that's what they're saying to the customer. So we don't need Ritchie Bros. to
4 cut us the cheque directly; we're pretty satisfied that if it comes to you -- if it comes to you,
5 iVac, then you'll pay us this money.
6
7 The question, then, is: Does that, though, open the door for the writ to attach? And that's
8 what I think you're saying.
9
- 10 **MR. TINAJERO:** That's exactly. Yeah.
11
- 12 **MASTER SMART:** And it's an interesting argument.
13
- 14 **MR. TINAJERO:** And, yeah. And our issue here is the -- like, based
15 on the correspondence there is -- the RBC only required a \$2 million voluntary payment.
16 And we're not calling it a loan. They were saying, You can take the entire proceeds; they're
17 over \$4 million. As long as you give us \$2 million, we'll allow you to take the rest. That's
18 exactly what that email is saying.
19
- 20 **MR. SANSON:** I do wish to clarify. The email does say, Under
21 the explicit condition that there's a voluntary payment. A voluntary -- I mean, if it's an
22 explicit condition, I think it's a funny mincing of words. What actually -- what had in fact
23 happened was a bit of a back and forth in terms of how much would be applied to which
24 facilities.
25
- 26 **MASTER SMART:** M-hm.
27
- 28 **MR. SANSON:** And so eventually they settled on 2 million
29 towards the term loan, which is not a revolving credit. And that's what I think the email
30 perhaps was saying, and in reality the remainder of the proceeds, in accordance with my
31 client's affidavit, were to go to the rest of the RBC indebtedness, including the line of credit.
32
- 33 **MASTER SMART:** Well, I'm uncomfortable deciding this without
34 RBC here.
35
- 36 **MR. TINAJERO:** Okay.
37
- 38 **MASTER SMART:** If they choose not to come, I guess that's up to
39 them, but I'm not sure they had formal notice. I think they're aware of the application, but
40 they haven't been served with notice saying, You should appear, I don't think.
41

10

- 1 MR. SANSON: That is correct.
- 2
- 3 MASTER SMART: Yeah, okay.
- 4
- 5 MR. SANSON: In fact, Mr. Brotman told me he was unable to
6 officially accept service of this application.
- 7
- 8 MASTER SMART: Okay. Well, then, he should find somebody that's
9 in Alberta that can officially accept service for RBC and have someone attend. And they
10 may want to file some additional evidence. I don't know. But at this point in time I think
11 they are at risk. I've not decided that, counsel, but it certainly on the face of it is problematic
12 for them. And, I mean, I'm -- I think we need to know what their position is on this and do
13 they have arguments that they want to make as the secured creditor as to their entitlement,
14 the priority.
- 15
- 16 And I will say this. Any subsequent attempts to enforce their security against the fund will
17 not be received positively by the Court. In other words, they need to deal with it based on
18 what the facts are now. So if, for example, under the GSA -- and I'm sure they have this in
19 assignment of all of the book debts.
- 20
- 21 MR. TINAJERO: There is in the GSA, but the GSA does include a
22 clause that allows as long as a sale is conducted in the ordinary course of business, the RBC
23 can waive any priority there.
- 24
- 25 MASTER SMART: Yeah. Well, and I don't know if this is ordinary
26 course or not. You know what? That may be another problem for them. I don't know.
- 27
- 28 MR. TINAJERO: Yeah.
- 29
- 30 MASTER SMART: But the reality is is that those funds are there
31 now. I've said I wouldn't receive that favourably if there is an assignment of book debts,
32 but I do recall many times acting for secured creditors where unsecureds were -- we did a
33 lot of work to marshal funds, and then we came along and took it with the security.
- 34
- 35 MR. TINAJERO: M-hm.
- 36
- 37 MASTER SMART: It's not what's happened here.
- 38
- 39 MR. TINAJERO: No, that's not.
- 40
- 41 MASTER SMART: But there was many an application made where

- 1 someone did all the work; we came along and snapped up the money, much to the chagrin
2 of the unsecured creditor and their counsel, who was on a contingency.
3
- 4 But that's, you know -- so that's maybe a reality, and that might be an argument that's
5 before -- and as I said, I'm not too fond of that idea. I may not hear this. I think odds are I
6 probably won't, although I don't know how long we should adjourn this for. The million is
7 sitting with Ritchie Bros. It's not going anywhere.
8
- 9 MR. TINAJERO: Well, we do have a garnishee summons that we
10 sent to Ritchie Bros.
11
- 12 MASTER SMART: Right.
13
- 14 MR. TINAJERO: Perhaps it might be best if we put the money into
15 court.
16
- 17 MASTER SMART: Well, how about if we just stay payment and we
18 leave the funds with Ritchie Bros. for now?
19
- 20 MR. TINAJERO: Okay. That's fine.
21
- 22 MASTER SMART: Rather than create that. Okay?
23
- 24 MR. TINAJERO: Yeah, that's fine.
25
- 26 MASTER SMART: Fair enough?
27
- 28 MR. SANSON: Yeah, I would agree with that.
29
- 30 MASTER SMART: Okay. So I know you haven't talked to RBC
31 about when they would be available. What are we thinking in a time frame?
32
- 33 MR. SANSON: In terms of service I think it would -- I would be
34 able to effect service based on -- in addition to be speaking with Mr. Brotman, of course.
35
- 36 MASTER SMART: M-hm.
37
- 38 MR. SANSON: There's an address in the *PPSA* that I would be
39 able to serve.
40
- 41 MASTER SMART: Okay. Well, presumably --

12

- 1
2 MR. SANSON: So I think we should be able to do this fairly
3 quickly.
4
- 5 MASTER SMART: -- they can get a hold of somebody that can
6 accept service to come and deal with this.
7
- 8 MR. TINAJERO: Okay.
9
- 10 MR. SANSON: Yes.
11
- 12 MASTER SMART: If they want to play that game, well, then maybe
13 the Court will decide without their participation. But they're the ones that need to assert the
14 priority. I think that's true.
15
- 16 MR. TINAJERO: M-hm.
17
- 18 MASTER SMART: You're here as a quasi-agent, I think, and it's your
19 desire that the funds be paid there. But there's a lot to the story. And so adjournment?
20
- 21 MR. TINAJERO: I would be available in two weeks. March 1st
22 might give the RBC sufficient time.
23
- 24 MR. SANSON: I'm not available the second week of March but
25 any time within the first week of March I should be available.
26
- 27 MASTER SMART: Well, that's -- it's Friday, March 1st.
28
- 29 MR. SANSON: Sorry. I mean I'm gone, so the 4th to the 8th I
30 would be available.
31
- 32 MASTER SMART: Well, okay. The following week, counsel?
33
- 34 MR. TINAJERO: The 4th would work perfectly for me.
35
- 36 **Decision**
37
- 38 MASTER SMART: Okay. So we'll adjourn the matter to March 4th.
39 In the meantime there'll be a stay on the obligation of Ritchie Bros. to pay the funds into
40 court under the garnishee summons so that they don't get worried about getting into trouble
41 for hanging onto the funds.

13

1
2 MR. TINAJERO: Yeah.
3
4 MASTER SMART: And the application, in my view, should proceed
5 that day. Who knows? Maybe a master is going to want it to go to a special because they
6 want to read the material, but I don't know that. At this point I'm not suggesting that has to
7 happen.
8
9 MR. TINAJERO: Okay.
10
11 MASTER SMART: But it's something that you may want to think
12 about, but we'll hear what the Royal Bank has to say.
13
14 MR. TINAJERO: Okay.
15
16 MASTER SMART: All right? And I can tell you I won't be available
17 to hear it because that morning I'm on a plane to someplace warm. Or at least I hope it's
18 warm.
19
20 MR. SANSON: Okay.
21
22 MASTER SMART: Given the way the weather is in the world, it may
23 not be. But in any event, I -- and I am intrigued by the ultimate resolution.
24
25 MR. TINAJERO: Yeah.
26
27 MASTER SMART: It's an interesting issue that's arisen here. Okay.
28
29 MR. SANSON: Thank you.
30
31 MASTER SMART: Thank you.
32
33 MR. SANSON: Thank you, Master.
34
35 MR. TINAJERO: Thank you very much, Sir.
36
37 MASTER SMART: All right. Madam clerk, we'll give this back.
38
39 MR. SANSON: I think those are all yours.
40
41 MR. TINAJERO: Yeah, those are all mine. Thank you very much.

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MASTER SMART:

Yeah.

THE COURT CLERK:

You're welcome.

PROCEEDINGS ADJOURNED UNTIL MARCH 4, 2019S

1 **Certificate of Record**

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3

I, Tracy Selinske, certify that this recording is a record made of the evidence in the proceedings in the Court of Queen's Bench, held in Courtroom 212, at Edmonton, Alberta, on the 15th day of February, 2019, and that I, Tracy Selinske, was the court official in charge of the sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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I, Catherine FosterFlynn, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Catherine FosterFlynn, Transcriber
Order Number: AL-JO-1002-7307
Dated: March 14, 2019

Tab Q

COURT FILE NUMBER 1703 13921
 COURT COURT OF QUEEN'S BENCH OF ALBERTA
 JUDICIAL CENTRE EDMONTON
 PLAINTIFF CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.
 DEFENDANTS MEGA DIESEL EXCAVATING LTD. and DISTINCT INFRASTRUCTURE GROUP INC.
 DOCUMENT ORDER
 ADDRESS FOR SERVICE AND CONTACT BISHOP & MCKENZIE LLP
 INFORMATION OF PARTY 2300, 10180 - 101 Street
 FILING THIS DOCUMENT Edmonton, Alberta T5J 1V3
 Attention: Graham W. Sanson
 Phone: (780) 426-5550
 Fax: (780) 426-1305
 File No. 105031-011



I hereby certify this to be a true copy of the original.

[Signature]
 for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: March 11, 2019

NAME OF MASTER WHO MADE THIS ORDER: S. L. Schlusser

LOCATION OF HEARING: Edmonton, Alberta

UPON THE APPLICATION of the Defendants; AND UPON having reference to the Affidavits of William Nurnberger sworn December 18, 2018, January 4, 2019, and February 8, 2019; AND UPON having reference to the Affidavit of Chris Aron Wood, sworn February 7, 2019; AND UPON having reference to the Affidavit of Gary Ivany sworn March 1, 2019; AND UPON having heard representations from counsel for the Defendants and the Plaintiffs; AND UPON having heard representations from counsel for the Royal Bank of Canada;

IT IS HEREBY ORDERED THAT:

- The Registrar of the Personal Property Registry is hereby directed to discharge the registration of the Plaintiffs' Writ of Enforcement, bearing the Registration Number 17090137319, from the following equipment (the "Subject Vehicles"): EXHIBIT " Q " referred to in the Affidavit of Chris Wood

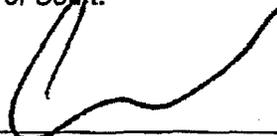
Block	Serial Number
8	5KKPALDRXD PFA9979
9	5KKPALD12EPFP3870
14	5KKPALD10EPFP3871
16	5KKPALD12FPGK2956

Sworn before me at Edmonton
 in the Province of British Columbia this
15 day of October, 2019

[Signature]
 A Commissioner for taking Affidavits
 in the Province of British Columbia

- The monies held by Ritchie Bros. Auctioneers (Canada) Ltd. as proceeds from the sale of the Subject Vehicles shall be paid to the Royal Bank of Canada ("RBC"), to be applied to the secured indebtedness owing to RBC by Mega Diesel Excavating Ltd. or its successor by amalgamation, iVac Services West Inc.

3. The Plaintiffs are ordered to pay costs to the Defendants and to RBC pursuant to Column 3 of Schedule "C" to the *Alberta Rules of Court*.

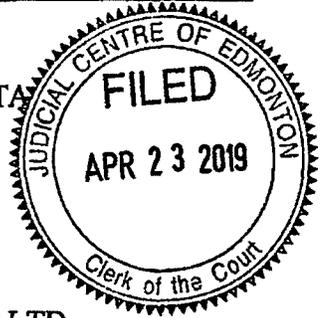
A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal stroke and a short vertical stroke.

Master of the Court of Queen's Bench of Alberta

Action No.: 1703-13921
E-File No.: EVQ19WOODC

Appeal No. _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON



BETWEEN:

CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

Plaintiffs

and

MEGA DIESEL EXCAVATING LTD. and
DISTINCT INFRASTRUCTURE GROUP INC.

Defendants

PROCEEDINGS

Edmonton, Alberta
March 11, 2019

Transcript Management Services
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Calgary, Alberta T2P 5P7
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton,
2 Alberta

3

4

5 March 11, 2019

Morning Session

6

7 Master Schlosser

Court of Queen's Bench
of Alberta

8

9

10 S. Tinajero

For C. Wood and Mega Diesel Holdings Ltd.

11 G. Sanson

For IBAC Services West Inc.

12 H. Roskey

For RBC

13 (No Counsel)

For Mega Diesel Excavating Ltd. and Distinct
Infrastructure Group Inc.

14

15 C. Jones

Court Clerk

16

17

18 **Discussion**

19

20 MASTER SCHLOSSER:

Number 35 Wood and Mega Diesel Excavating.

21

22 MR. SANSON:

Good morning, Master. I wonder if the Court
might prefer to stand this matter down to the end of the list. There are counsel for both --
there is two clients. It might take a little bit longer.

23

24

25

26 MASTER SCHLOSSER:

What do you want to talk about putting this to a
Special?

27

28

29 MR. SANSON:

I wouldn't -- we would very much prefer not to
have this go to a Special and it is all of our hope that we can do this today.

30

31

32 MASTER SCHLOSSER:

We have got dates in April. At any rate, I will

33

34

35

36

37

38

39

40

41

MR. SANSON:

Good morning, Master. I suppose this leaves

us, number 25 on the list.

2

1 MASTER SCHLOSSER: 25, okay.

2

3 MR. SANSON: My name is Sanson, first initial 'G' from Bishop
4 McKenzie, for the applicant. This is my friend's, Mr. Tinajero, is here on behalf of the
5 plaintiff/respondent and my friend, Ms. Roskey is here on behalf of the Royal Bank of
6 Canada.

7

8 MASTER SCHLOSSER: Sorry, which one is this again?

9

10 MR. SANSON: This is number 35.

11

12 MASTER SCHLOSSER: 35, okay.

13

14 MR. SANSON: Sorry, not 25.

15

16 MASTER SCHLOSSER: Yes.

17

18 **Submissions by Mr. Sanson (Application)**

19

20 MR. SANSON: So this is my application to -- to remove the
21 plaintiffs' writs from four vehicles belonging to our client, the defendant IBAC Services
22 West Inc. (phonetic) that were sold at auction back in December. IBAC is not named as
23 a defendant in the style of cause in this action. They are successor by an augmentation to
24 one of the defendants, just for clarity.

25

26 I will try to give you a very brief background. I will try to keep it short.

27

28 The plaintiffs' writ holders, obtained two judgments against the defendants. These
29 judgments total around \$584,000, plus costs and interests. The first judgment, the one in
30 this action was granted in July of 2017. A writ was filed in respect to that judgment and
31 registered at PPR in September of -- September 1st, 2017.

32

33 At the plaintiffs' request, the defendant, IBAC, would give a statutory declaration listing
34 certain vehicles as owned by IBAC and accordingly, the plaintiff amended the
35 registration of its writ at PPR to approve registration against those vehicles.

36

37 Those vehicles, however, are subject to a prior general security interest and payor of RBC
38 and that security interest and all present -- our present personal property, was granted to
39 RBC and registered that security interest at PPR on September 23rd, 2016 --

40

41 MASTER SCHLOSSER: The general security agreement?

3

1

2 MR. SANSON: Yes.

3

4 MASTER SCHLOSSER: So September?

5

6 MR. SANSON: September 23rd, 2016, is its registration date at
7 Personal Property Registry, so approximately a year before the plaintiffs' registered their
8 writ of enforcement.

9

10 MASTER SCHLOSSER: Okay.

11

12 MR. SANSON: The security indebtedness and to RBC is around
13 53 million dollars. So in this case pursuant to the sections of the *Civil Enforcement Act*,
14 obviously security interest was registered at the PPR at the time that the plaintiffs' writ
15 was registered pursuant to Section 35 of the *Civil Enforcement Act*. As security interest
16 has priority over a writ that binds the property if at the time the writ was registered and
17 security interest was already registered with PPR.

18

19 MASTER SCHLOSSER: Okay.

20

21 MR. SANSON: The issue in this is case is that the four vehicles
22 were sold at auction in December of 2018. The proceeds of the sale of those four subject
23 vehicles is around 1 million dollars. We submit that the entire net proceeds are payable
24 to RBC as they have priority and because nothing is up for the writ holder.

25

26 And so what happened here was that the defendants and RBC came to an agreement with
27 RBC as to how the proceeds would be apportioned among the various creditor facilities
28 that make up the RBC security indebtedness. For this reason, RBC, unaware of the writ,
29 directed Ritchie Bros. to pay the money out, the proceeds from the auction to the
30 defendants so that it may be applied to the creditor facilities as agreed. And that's when,
31 during the course of this, the issue of my friend's writ came up, and so now it is what we
32 are doing -- this is essentially an issue with respect to priority and between RBC and the
33 writ holder.

34

35 I can let my friend sort of speak to -- or to the writ holder's position and RBC's position,
36 but as I understand it, basically it amounts to an issue of waiver or subordination of some
37 kind by RBC that the -- we are -- because they directed that the money be paid out to the
38 defendants so that it could be applied to the base credit facilities, but we submit that this
39 isn't an issue of waiver, in large part, because by RBC's evidence, they had no knowledge
40 of this writ. And by directing that, they weren't seeking to affect any sort of waiver.
41 They weren't expecting that the money would be paid to Distinct or IBAC in any sort of

1 way, but rather that it would be applied towards the security indebtedness, pursuant to
2 their general security agreement.

3
4 So we are asking that the writs be removed because they simply don't attach to any
5 interest of the debtors.

6
7 MASTER SCHLOSSER: Okay.

8
9 **Submissions by Mr. Tinajero (Application)**

10
11 MR. TINAJERO: Okay, thank you. Our position is clear. Our
12 position is that the RBC waived its security interest on the vehicles and it cannot after the
13 fact, as a unsecured creditor accept priority over our clients' writ.

14
15 I do have two affidavits that I am --

16
17 MASTER SCHLOSSER: But back up a little bit though. The vehicles
18 were sold; the money was somewhere?

19
20 MR. TINAJERO: Yeah.

21
22 Well, let's back up. When the sale -- and I do have a copy of the -- an email evidence in
23 agreement between the RBC and the defendants. And that email clearly states that if the
24 defendants made a 2-million-dollar voluntary payment after the sale to the RBC, the RBC
25 would consent to a sale. There is nothing there requiring the defendants to pay the entire
26 amount of the quotes to the RBC. All it says is if -- you can sell a vehicle voluntarily.
27 However, we only want 2 million dollars from you.

28
29 Subsequent -- if we look at the -- if we turn back a page in that agreement, the rider -- the
30 representative from the RBC does acknowledge that they sent them a waiver to Ritchie
31 Bros. A waiver being a release of their security interest against the vehicles, which is
32 attached as an exhibit to this affidavit.

33
34 MASTER SCHLOSSER: This was after it was sold?

35
36 MR. TINAJERO: That was -- I think all the vehicles were in the
37 process of being sold.

38
39 MASTER SCHLOSSER: I am sorry?

40
41 MR. TINAJERO: From what I understand it was sent while the

5

- 1 vehicles were in the process of being sold.
2
- 3 MASTER SCHLOSSER: Okay. And did you rely on this in any way?
4
- 5 MR. TINAJERO: No, but it is a waiver. It is not a subordination
6 agreement.
7
- 8 I do have a case from the Court of -- Supreme Court --
9
- 10 MASTER SCHLOSSER: Well, okay, but hold it.
11
- 12 Did they discharge their general security agreement from the registry?
13
- 14 MR. TINAJERO: They did not.
15
- 16 MASTER SCHLOSSER: Okay. So they told Ritchie Bros. that they had
17 no interest in the equipment?
18
- 19 MR. TINAJERO: That's correct.
20
- 21 MASTER SCHLOSSER: And you didn't rely on it?
22
- 23 MR. TINAJERO: Well, our intent -- there is no need for reliance
24 once they waive their security interest. They no longer have a security interest.
25
- 26 MASTER SCHLOSSER: No, but they didn't really waive it because they
27 didn't discharge it.
28
- 29 MR. TINAJERO: But the waived it. They don't need to discharge
30 it and I have -- I do have case law dealing with this matter.
31
- 32 MASTER SCHLOSSER: Okay.
33
- 34 MR. TINAJERO: I have a case from the Supreme Court of
35 Newfoundland and Labrador Trial Division, citing Professor Wood and Professor
36 Cumming. Personal Property Handbook which I have in hand here. In there --
37
- 38 MASTER SCHLOSSER: So the proposition is, is that I am a security
39 holder and if I say to a third party that I don't have an interest in something.
40
- 41 MR. TINAJERO: M-hm.

- 1
2 MASTER SCHLOSSER: And I leave the interest registered against the
3 title of the thing, my saying to the third party is sufficient to give priority to another writ
4 holder?
5
- 6 MR. TINAJERO: Well, their secure -- there is an initial waiver.
7 Like, Supreme Court of Canada has set out the test for waiver, which has two
8 components. First, you have full knowledge of your -- full knowledge of your rights.
9
- 10 MASTER SCHLOSSER: Right.
11
- 12 MR. TINAJERO: And you have the absolute intention to -- I have
13 it written here.
14
- 15 MASTER SCHLOSSER: Okay, but that waiver comes up, it's a classic
16 circumstance where, let's imagine you and I have a contract.
17
- 18 MR. TINAJERO: Yeah.
19
- 20 MASTER SCHLOSSER: It's question of whether or not I am going to
21 waive insistence on a term of that contract between you and me and typically waivers
22 spoken of is a species of estoppel, or a principle of fair dealing. I would say to you that I
23 am not going to insist on that term of the contract, and you rely on it, then you can either
24 say that I must stop from asking that the term be enforced, or you can fairly say that I
25 waived it. But we are not talking about third parties or outsiders, or that kind of thing.
26
- 27 MR. TINAJERO: We are not, but the Section 4 of the *Property*
28 *Security Act* is clear that a third party can enforce a subordination agreement, and I am
29 here, I am quoting Professor Wood and Cummings saying: (as read)
30
- 31 A subordination agreement should be distinguished from
32 abandonment or release of the security interests. A secured party
33 who releases a security interest does not mean a subordinated
34 security interest, the release extinguishes a security interest and the
35 secured party is not thereafter permitted to reassert his security
36 interest in the collateral.
37
- 38 **Submissions by Mr. Sanson (Reply)**
39
- 40 MR. SANSON: Sir, if I may, I think that when we are speaking
41 of our secure -- subordination of interest, I think my friend is relying on speaking of

1 Section 40 of the *Personal Property Security Act* which states specifically that, yes, a
2 subordination agreement may be enforced by a third party, but only if the third part is the
3 person or one of a class of persons for whom the benefit the subordination was intended
4 and in this case it clearly --
5

6 MASTER SCHLOSSER: Well, I mean, if I say something to a third party
7 and there is no involvement, no relationship; I mean, what does that matter?
8

9 MR. SANSON: Certainly.
10

11 MR. TINAJERO: Well --
12

13 MASTER SCHLOSSER: Let's say I go to a cocktail party and say to
14 somebody at the cocktail party, I have no interest in that bulldozer but I don't release my
15 general security agreement.
16

17 **Submissions by Mr. Tinajero (Reply)**
18

19 MR. TINAJERO: Well, I don't think that is analogous to this -- to
20 the fact of this case.
21

22 Let's maybe back up and I explain a bit.
23

24 MASTER SCHLOSSER: No, but there might be a representation to
25 Ritchie Bros.
26

27 MR. TINAJERO: Yes.
28

29 MASTER SCHLOSSER: For a very specific purpose.
30

31 MR. TINAJERO: Yes. That they released their -- they enter into a
32 --
33

34 MASTER SCHLOSSER: No, no. they only say to Ritchie Bros. we have
35 no interest in it.
36

37 MR. TINAJERO: Okay.
38

39 MASTER SCHLOSSER: For Ritchie Bros. purposes, which is don't pay
40 money to us despite the fact that we have our general security agreement registered
41 against us.

- 1
2 MR. TINAJERO: Exactly. They said, We don't want any money
3 from this. They had a second agreement with --
4
5 MASTER SCHLOSSER: No, they do want the money.
6
7 MR. TINAJERO: Well, they said they didn't --
8
9 MASTER SCHLOSSER: But they wanted it in a roundabout way.
10
11 MR. TINAJERO: Oh, they don't because they had a separate
12 agreement with the borrowers where if the borrowers paid them 2 million dollars then the
13 words: would probably be entitled to keep the rest. That's exactly what that email says.
14
15 MASTER SCHLOSSER: Okay, but how much does it go for? Was it half
16 a million or a million?
17
18 MR. TINAJERO: All the proceeds sold. But I believe the
19 (INDISCERNIBLE) have been paid prior to secured interest -- secured prior for about 4
20 million dollars. The RBC has already been paid out 2.5 million dollars. So as far as we
21 are concerned the RBC's -- the other agreement has been satisfied. That -- any other
22 proceeds would have been for the benefit of the -- the RBC would have entitled the
23 borrowers to benefits from those proceeds. They would not have necessarily gone to the
24 RBC.
25
26 MASTER SCHLOSSER: But they are not entitled to more than they are
27 owed.
28
29 MR. TINAJERO: Sorry?
30
31 MASTER SCHLOSSER: They are not entitled to more than they are
32 owed.
33
34 MR. TINAJERO: No, but they had the agreement which the RBC
35 clearly said, they gave us 2 million dollars and then you can do the rest with the proceeds.
36 Whatever you want. It doesn't have to be -- it's money that would be paid to the
37 borrowers. It wouldn't be paid to the -- it would not be -- and if that was the case we
38 would be actually -- that would not be the intention of Property Security Registry where a
39 borrower would be paid ahead of a writ -- a property right as a writ.
40
41 MR. SANSON: With respect, Sir, that -- the representation that

1 there is merely only -- that RBC was merely only looking for 2 million dollars and that
2 was somehow the agreement of the parties, I think, is contradicted by both our clients'
3 affidavits and the RBC's affidavits to state that the agreement was merely a 2 million
4 dollars being applied to the term loan, the remainder of which would be -- the remainder
5 of the proceeds would be applied to other credit facilities and at the RBC.

6

7 MR. TINAJERO: That's what I am --

8

9 MASTER SCHLOSSER: Well, it's kind of a forbearance. I mean weren't
10 they under by, was it 50 million, or was it --

11

12 MR. SANSON: It's about --

13

14 MR. TINAJERO: It's about 55 -- 52, 53 million at the RBC, so we
15 are not contesting that. We are not contesting the fact that the RCB has a TSA out for
16 most of the assets. But what we are contesting is the fact that the RBC specifically
17 waived their interest against these four vehicles. And the RBC, there was a side
18 agreement between the borrowers and the RBC. The agreement has been satisfied and
19 the RBC said that clearly and purposely sent a waiver to the Ritchie Bros. advising that
20 they don't want any proceeds from the sale of the vehicles. Then thereafter Ritchie Bros.
21 contacted our office to ask for a payout statement and they advised that we would be paid
22 out in full,

23

24 Soon after --

25

26 MASTER SCHLOSSER: Yes, but Ritchie Bros. sells something.

27

28 MR. TINAJERO: Yeah.

29

30 MASTER SCHLOSSER: And the purchaser pays the money to Ritchie
31 Bros. It's not Ritchie Bros. money.

32

33 MR. TINAJERO: No.

34

35 MASTER SCHLOSSER: They say, Well, who do we pay?

36

37 MR. TINAJERO: Yeah.

38

39 MASTER SCHLOSSER: And so let's imagine that they say the Royal
40 Bank, it has a general security agreement, we could pay them or we could pay the owner
41 of the property, in which case it would go to the people on the title of it.

10

- 1
2 MR. TINAJERO: No.
3
4 MASTER SCHLOSSER: And payable by the owner to those people.
5
6 MR. TINAJERO: But -- and I guess then we should have
7 mentioned this. We have a garnishee summons on two -- for the two judgments that were
8 served to Ritchie Bros. So any money that will be paid to the borrowers in this case,
9 would tentatively have to be paid into court for the benefit of the writ holders. So that
10 what my friends are trying to do, they are trying to sidestep that issue, the writ and rather
11 than pay the money to the borrowers as was their original agreement, they want it paid
12 directly to the RBC, which is contrary to any of the agreement that they had.
13
14 MASTER SCHLOSSER: But what is the difference though between
15 paying it directly to the RBC and paying it to the debtor, subject to the general security
16 agreement.
17
18 MR. TINAJERO: Well, if they pay it to a debtor, the writ will
19 attach, again, and the money would be garnishee and we go into court for the benefit of
20 correctness.
21
22 MASTER SCHLOSSER: No, but you would still be second though.
23
24 MR. TINAJERO: No, because the RCB --
25
26 MASTER SCHLOSSER: Second to the RBC interest.
27
28 MR. TINAJERO: No because the RBC waived their security
29 interest.
30
31 MASTER SCHLOSSER: Okay. Anything further counsel?
32
33 MR. TINAJERO: Again, I do want to say -- this is the borrower's
34 application, the RBC was not involved on this until Master Smart gave them the
35 opportunity to come into court. They weren't for a previous application, they decided not
36 to come. We were originally advised that the RBC was not contesting our writ, rather
37 that it was -- the borrowers who were contesting our writ, and it was payment of the writ
38 and that's all in affidavit evidence. And further -- and then counsel for the RBC, Mrs.
39 Roskey can confirm that any funds are paid to the borrower -- or to the borrower of the
40 RBC that it can be redrawn as part of the line of credit by the borrowers and apply -- and
41 use for their own purposes.

- 1
2 What our concern is that this whole application, this whole issue is a scheme by the
3 borrowers to not pay our writ. What our concern is, is the money goes to the RBC --
4
- 5 MASTER SCHLOSSER: So the RBC is a co-conspirator here --
6
- 7 MR. TINAJERO: I am not trying to say --
8
- 9 MASTER SCHLOSSER: -- to defraud the writ holders.
10
- 11 MR. TINAJERO: I am not trying to say they are trying to defraud
12 anyone, what I am trying to say the borrowers -- this is part of a general security
13 agreement. There are about 11 signatories. We only have judgments against two of
14 them. So if we allowed the funds to be paid towards RBC line of credit, any of the other
15 9 entities can only withdraw the money for their own purposes avoiding paying of the
16 writ. That is one of the main concerns.
17
- 18 Our issue is the RBC did not consent -- did not oppose this application until -- it has not
19 appeared in Court until today and they were very well aware of the application and it was
20 the borrowers who had contested the payment to the writ holders.
21
- 22 MASTER SCHLOSSER: Okay, but the bottom line is they are here
23 now.
24
- 25 MR. TINAJERO: They are here now.
26
- 27 **Decision (Application)**
28
- 29 MASTER SCHLOSSER: They've been given an opportunity to give
30 evidence and make argument. I agree with them. I don't agree that the facts here support
31 a waiver on the part of RBC to give up its claim to the proceeds of sale of this machinery.
32
- 33 I don't -- in my view, the representation that was made to Ritchie Bros. if is sufficient to
34 have done that, is not something the writ holder is entitled to rely on.
35
- 36 MR. TINAJERO: Sir, with respect. It's not just the representation
37 that was made to Ritchie Bros.
38
- 39 MASTER SCHLOSSER: I am sorry?
40
- 41 MR. TINAJERO: It's not just the representation that was made to

1 Ritchie Bros. The representation was made as part of an agreement between the
2 borrowers and the RBC.
3
4 MASTER SCHLOSSER: Okay. But you are not party to it and it was not
5 made to you, and so I am concluding that --
6
7 MR. TINAJERO: Okay.
8
9 MASTER SCHLOSSER: -- that is not a representation for which you
10 could rely.
11
12 MR. TINAJERO: And fair enough. And I appreciate that.
13 Probably our position is that would be an appeal to a higher court, that would be for my
14 client to decide later on.
15
16 MASTER SCHLOSSER: I am sorry, say that again?
17
18 MR. TINAJERO: Our position would be that would be an appeal -
19 - or if that is your ruling.
20
21 MASTER SCHLOSSER: All right, well --
22
23 MR. TINAJERO: And that's fine enough. That --
24
25 MASTER SCHLOSSER: Very good okay.
26
27 MR. TINAJERO: Yeah, thank you.
28
29 MASTER SCHLOSSER: So who wants to do an order so you can get
30 your appeal started?
31
32 MR. SANSON: Well, I have a form of order I can show to my
33 friend right now, essentially saying nothing more than the registrar is to strike the writs
34 from the four subject vehicles and that the monies held by Richie Bros. are to be paid to
35 RBC to be applied to the RBC secured indebtedness and awarding costs to myself and to
36 the RBC.
37
38 MASTER SCHLOSSER: That's fine.
39
40 Thank you, gentlemen.
41

13

1 MR. SANSON:

Thank you.

2

3 MR. TINAJERO:

Thank you.

4

5 MASTER SCHLOSSER:

Thank you, ma'am.

6

7 MS. ROSKEY:

Thank you.

8

9

10

11 PROCEEDINGS CONCLUDED

12

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1 **Certificate of Record**

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I, Carrie Jones, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench, held in courtroom 213, at Edmonton, Alberta, on the 11th day of March, 2019, and that I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

2

3 I, C. Emblin, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best of
6 my skill and ability, and the foregoing pages are a complete and accurate transcript of the
7 contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

11

12 C. Emblin, Transcriber

13 Order Number: AL-JO-1002-7310

14 Dated: March 15, 2019

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Tab R

Form 28
[Rule 6.14]

COURT FILE NUMBER 1703-13921

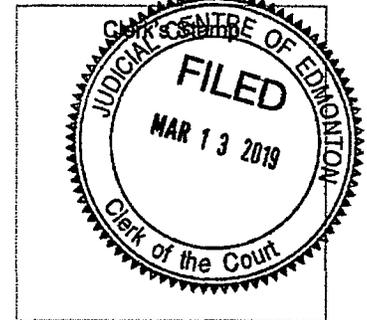
COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFFS CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

DEFENDANTS MEGA DIESEL EXCAVATING LTD. and DISTINCT INFRASTRUCTURE GROUP INC.

DOCUMENT NOTICE OF APPEAL OF MASTER'S JUDGMENT OR ORDER



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BOSECKE & ASSOCIATES
Attn: Sal Tinajero
102, 9333 - 47 ST NW
Edmonton, AB T6B 2R7
Tel: 780-469-0494
Fax: 780-469-4181
File no. 2402818

This is EXHIBIT "R" referred to in the Affidavit of Chris Wood
Sworn before me at Edmonton
in the Province of British Columbia this 15 day of October 2019

[Signature]
A Commissioner for taking Affidavits
in the Province of British Columbia

NOTICE TO RESPONDENTS: APPEAL HEARING

This appeal is made against a judgment or order of the master that was in your favour. You are a respondent.

The appeal will be heard as shown below:

Date: May 30, 2019
Time: 10:00 am
Where: Edmonton Law Courts
Before Whom: Justice of the Court of Queen's Bench

Go to the end of this document to see what else you can do and when you must do it.

The Appellant appeals to the Court of Queen's Bench of Alberta the decision of Master W.S. Schlosser sitting at Edmonton, Alberta, who on March 11, 2019 made the judgment or order in your favour.

The record of proceedings is:

1. The application before the master.
2. The following affidavits and other evidence filed by the parties respecting the application before the master:
 - (a) Affidavit of William Nurnberger, sworn December 18, 2018;
 - (b) Supplemental Affidavit of William Nurnberger, sworn January 4, 2019;
 - (c) Affidavit of Chris Aron Wood, sworn February 7, 2019;
 - (d) Supplemental Affidavit of William Nurnberger, sworn February 8, 2019;
 - (e) Affidavit of Beth Marie Brown, sworn February 14, 2019; and
 - (f) Affidavit of Gary Ivany; sworn on March 1, 2019.
3. Any transcript of the proceedings before the master, unless the Court determines, or the parties agree, that a transcript is not needed.
4. The judgment or order of the master appealed.
5. Written reasons of the master (if any).

Additional evidence will be relied on by the appellant.

Further written argument will be made by the appellant.

The appellant will not rely on its written argument that was before the master (if any). – Not applicable

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the appellant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this appeal, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. You may rely on your original written argument, if any, that was before the master.

Within 20 days after service of any transcript, additional evidence, or further written argument from the appellant, you must file and serve on the appellant any further written argument you wish to make and any additional evidence you intend to rely on. The appellant may, within 10 days after service of your further written argument or additional evidence, file and serve on you a brief reply to any unanticipated additional evidence or further argument you have raised.

Tab S

Form 28
[Rule 6.14]

COURT FILE NUMBER 1703-13921

COURT COURT OF QUEEN'S BENCH OF ALBERTA

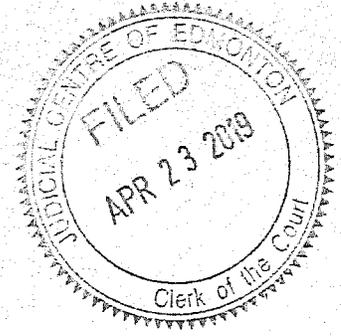
JUDICIAL CENTRE EDMONTON

PLAINTIFFS CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

DEFENDANTS MEGA DIESEL EXCAVATING LTD. and DISTINCT INFRASTRUCTURE GROUP INC.

DOCUMENT BRIEF OF THE APPELANTS, CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD. APPEALING A MASTER'S ORDER

Clerk's Stamp



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT BOSECKE & ASSOCIATES
 Attn: Sal Tinajero
 102, 9333 - 47 ST NW
 Edmonton, AB T6B 2R7
 Tel: 780-469-0494
 Fax: 780-469-4181
 File no. 2402818

This is EXHIBIT "S" referred to in the Affidavit of Chris Wood
 Sworn before me at Calgary
 in the Province of British Columbia this 15 day of October, 2019

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF SOLICITOR FOR MEGA DIESEL EXCAVATING LTD. and DISTING INFRASTRUCTURE GROUP INC. BISHOP & MCKENZIE LLP
 2300, 10180-101 Street
 Edmonton, AB T5J 1V3
 Attention: Graham W. Sanson
 Tel: 780-426-5550
 Fax: 780-426-1305
 File no. 105031-011

[Signature]
 A Commissioner for taking Affidavits in the Province of British Columbia

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF SOLICITOR FOR THE ROYAL BANK OF CANADA FASKEN MARTINEAU DUMOULIN LLP
 Barristers & Solicitors
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IX. CONCLUSION AND RELIEF REQUESTED.....12

LIST OF AUTHORITIES

TAB	NAME OF AUTHORITY
"D"	<i>Bahcheli v Yorkton Securities Inc.</i> 2012 ABCA 166
"E"	<i>Personal Property Security Act</i> , RSA 2000, c P-7, s. 40.
"F"	<i>Chiips Inc. v Skyview Hotels Limited</i> , 1994 ABCA 243
"G"	<i>The Maritime Life Assurance Company v. Saskatchewan River Bungalows Ltd.</i> [1994] 2 SCR 490.
"H"	Alberta Personal Property Security Act Handbook, 4 th Ed. (Carswell: Toronto 1995), Cuming and Wood, at page 380
"I"	<i>In Re Hickman Equipment (1985) Ltd. (In Receivership)</i> , 2005 NLTD 122

OVERVIEW AND SUMMARY OF POSITION

1. This is an appeal of an Order of Master W.S. Schlosser directing that a writ of enforcement registered in the Alberta Personal Property Registry (the "PPR") be discharged against certain equipment and that certain monies held in trust by Ritchie Bros. Auctioneers (Canada) Ltd. ("Ritchie Bros.") be paid to the Royal Bank of Canada (the "RBC").
2. Prior to the sale of the equipment by Ritchie Bros., the Defendants to this action, Distinct Infrastructure Group Inc. ("DiG") and iVac Services West Inc. ("iVac"), being the successor by amalgamation of Mega Diesel Excavating Ltd. ("Excavating"), had granted a General Security Agreement to the RBC against all their present and after acquired personal property.
3. Subsequent to the registration of the RBC's General Security Agreement, the Plaintiffs obtained judgments against the Defendants in amounts totaling not less than \$572,320.81 plus interests and costs.
4. At the time of the sale of the equipment by Ritchie Bros., the RBC agreed to waive its security interest in the equipment in exchange of receiving a voluntary payment of at least \$2 million from the Defendants to this action, which it did receive in full. The Appellants rely on section 40 of the *Personal Property Act*, RSA 2000, c P-7 and argue that they are entitled to enforce the waiver agreement between the RBC and the Defendants.
5. Further, or in the alternative, the Appellants served a garnishee summons on Ritchie Bros. that would have required Ritchie Bros. to pay the total amount of \$583,749.87 into Court for the benefit of the Defendants' judgment creditors.

MATERIALS BEFORE THIS COURT

6. The materials before this Court consist of the following:
 - a. Affidavit of William Nurnberger, sworn on December 18, 2018;
 - b. Affidavit of William Nurnberger, sworn January 4, 2019;
 - c. Affidavit of Chris Aron Wood, sworn February 7, 2019;
 - d. Supplemental Affidavit of William Nurnberger, sworn February 8, 2019;
 - e. Supplemental Affidavit of Beth Marie Brown, sworn February 14, 2019;
 - f. Transcript of proceedings before Master L.A. Smart, heard on February 15, 2019.
 - g. Affidavit of Gary Ivany, sworn March 1, 2019;

- h. Transcript of proceedings before Master W.S. Schlosser, heard on March 11, 2019;
- i. Appeal Brief of Chris Aron Wood and Mega Diesel Excavating Ltd., filed April 23, 2019;
- j. Respondent Brief of Distinct Infrastructure Group Inc. and iVac Services West Inc, to be filed.; and
- k. Respondent Brief of the Royal Bank of Canada, to be filed.

RELEVANT FACTS

Security Interests

7. On September 21, 2016, the Respondents, Distinct Infrastructure Group Inc. (“DiG”) and Mega Diesel Excavating Ltd. (“Excavating”) entered into a General Security Agreement with the Royal Bank of Canada (the “RBC”) where DiG and Excavating granted the RBC a security interest in all their present and future personal property. This General Security Agreement was properly registered with the Alberta Personal Property Registry (the “PPR”).
8. Excavating has since been amalgamated into iVac Services West Inc. (“iVac”).
9. On July 31, 2017, Master L.A. Smart granted a Consent Judgment in the within action to the Appellants, Chris Aron Wood (“Wood”) and Mega Diesel Holdings Ltd. (“Holdings”) in the amount of \$422,398.81. The Appellants registered a Writ of Enforcement in the PPR against 17 of the serial number goods owned by iVac, including the following motor vehicles:

Description	Serial No.
2013, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALDRXDPFA9979
2014, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALD12EPFP3871
2014, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALD10EPFP3870

2014, Western Star, 4900SA, 2066 Gallon Tri Drive, Hydro Vac Truck	5KKPALD12FPGK2956
---	-------------------

(the "Subject Vehicles")

10. In a different court action [Court of Queen's Bench action number 1703-21939], the Appellants sued Distinct Infrastructure Group Inc. ("DiG") for payment on an outstanding debt (the "Second Action"). On September 13, 2018, Master W.S. Schlosser granted an Order for Summary Judgment in the amount of \$149,922.00 plus interest and costs against DiG. The Appellants properly registered a Writ of Enforcement in the PPR with registration no. 18101524102.

September 13, 2018 Order for Summary Judgment by Master Schlosser, TAB A.

Auction and Sale of Equipment

11. On or about December 11, 2018, DiG and iVac directed Ritchie Bros Auctioneers (Canada) Ltd. ("Ritchie Bros") to conduct an auction in Edmonton, Alberta and in Toronto, Ontario (the "Auction") to sell various equipment owned by the Respondents (The "Equipment"), including the Subject Vehicles. The total proceeds from the Auction by Ritchie Bros. totaled \$8,235,711.00. Of these total proceeds, approximately \$4,200,000.00 was paid to prior secured creditors. Priority over the remaining \$4,035,711.00 (the "Net Proceeds") is the main issue of this Appeal.

Para 13 of Affidavit Sworn by William Nurnberger on December 18, 2018.

12. When the Respondents approached the RBC to approve the sale, the parties agreed that in exchange of the RBC approving the sale, DiG would make a voluntary prepayment of the principal in an aggregate amount of at least \$2 million towards the [RBC] Term Loan (the "Agreement"). This payment was to be in addition to any other regularly scheduled payments. As part of the Agreement, the RBC sent what it called a "waiver" to Ritchie Bros.

Exhibit "A" to Affidavit of William Nurnberger, dated February 8, 2019.

13. The waiver that the RBC acknowledged sending to Ritchie Bros. (the "Waiver") expressly states that "We [the RBC] have no interest in the Equipment nor in 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.” The Waiver defines Equipment to include all four Subject Vehicles.

Exhibit “A” to Supplemental Affidavit of Beth Brown, dated February 14, 2019.

Exhibit “G” to the Affidavit of Gary Ivany, dated March 1, 2019.

14. Upon receiving the Waiver, Ritchie Bros. contacted the Appellants’ counsel requesting a payout statement and advised that the Appellants should expect to receive full payment of the amount owing to them.

Exhibit “B” to Affidavit of Chris Aron Wood, dated February 7, 2019.

15. On or about January 9, 2019, a representative from Ritchie Bros. advised the Appellants’ counsel that DiG would be disputing any fund being paid out to the Appellant.

Exhibits “C” and “D” to Affidavit of Chris Aron Wood, dated February 7, 2019.

16. On January 11, 2019, the counsel for the Appellants filed a Garnishee Summons for the Second Action against Ritchie Bros. (the “Garnishee Summons”). Ritchie Bros. was properly served with the Garnishee Summons on January 14, 2019.

Garnishee Summons issued for Court of Queen’s Bench Action No. 1703-21939,
TAB B.

17. When the Appellants’ counsel contacted counsel for the RBC to inquire about its position, Counsel for the RBC confirmed that:

- a. The RBC has knowledge of the auction and sale of the Subject Vehicles;
- b. The RBC did not control the sale and auction of the Subject Vehicles;
- c. The RBC has not made any formal demands for any proceeds from the sale of the Subject Vehicles. Rather, it is Distinct and iVac who voluntarily intend to pay the entire Net Proceeds of the sale of the Subject Vehicles to the RBC; and
- d. The RBC Secured Indebtedness is comprised of a credit facility that would allow Distinct, iVac, or any other Distinct Affiliates to re-draw any amounts applied towards this RBC Secured Indebtedness. Distinct, iVac or any other Distinct Affiliate could re-draw the entire amount of the net sale proceeds of the Subject Vehicles that Distinct and iVac wish to apply to the RBC Secured Indebtedness.

Exhibit "E" to Affidavit of Chris Aron Wood, dated February 7, 2019.

18. On January 21, 2019, Gary Ivany, a representative from the RBC, confirmed with John Nashmi, DiG's Chief Financial Officer, that Ritchie Bros. had deposited funds in excess of \$2 million into DiG's bank accounts and was looking to have these funds paid to the RBC.

Exhibit "F" to Affidavit of Gary Ivany, sworn March 1, 2019.

19. At the time of the original application, Counsel for DiG and iVac confirmed that the RBC has already been paid close to \$3,00,000 by the Defendants and Ritchie Bros. held approximately \$1 million pending resolution of this dispute.

Transcript of proceedings before Master Smart on February 15, 2019, page 7:

ISSUES

20. This is a priority dispute between the Appellants and the RBC with regards to the Net Proceeds of sale of the Subject Vehicles deriving from the Auction. This issue can be resolved by answering the following questions:
- e. Did the RBC waive its security interest to the Subject Vehicles and can the Appellant enforce such waiver?
 - f. What is the effect of the Garnishee Summons?
21. The Appellants take the position that the RBC waived its security interest to the Subject Vehicles and that the Appellants can enforce such waiver. Further, the Garnishee Summons was validly issued and Ritchie Bros. ought to have paid the required amount into Court.

PREVIOUS DECISION

22. This matter was first heard by Master Smart on February 15, 2019. At that initial hearing, Master Smart correctly identified the issue before the court being whether the Agreement between the Respondents and the RBC to have Ritchie Bros. pay the funds to DiG allowed for the Appellants' writ to attach. Master Smart pointed out that as there was no connection between the payment to be made pursuant to the Agreement and the Net Proceeds, there was a risk that the Court would rule in a manner that would negatively affect the RBC. As the RBC chose not to attend that initial application, despite having been informed of the same, Master Smart adjourned the matter and directed counsel for DiG and iVac to send a formal notice of the application to counsel for the RBC. Master Smart went on to warn that

any subsequent attempts [by the RBC] to enforce their security against the funds will not be received positively by the Court.

Transcript of proceedings before Master Smart on February 15, 2019.

23. The matter was then heard by Master Schlosser on March 11, 2019. At that time, Master Schlosser, without reviewing any Affidavits filed on behalf of the Respondents or the RBC, and without hearing any representations from counsel for the RBC, quickly ruled that:

- g. the Appellants could not rely on the Agreement or on the Waiver because the Appellants were not parties to the Agreement; and
- h. The Garnishee Summons was subject to the RBC's security interest.

24. Accordingly, Master Schlosser directed that the entirety of the Net Proceeds be paid directly to the RBC.

Transcript of proceedings before Master Schlosser on March 11, 2019.

Order of Master Schlosser, dated and filed on March 11, 2019, TAB C.

STANDARD OF REVIEW

25. An appeal of a decision of a Master of the Court of Queen's Bench of Alberta is a *de novo* proceeding with no deference owed to the Master's decision, and therefore the standard of review is correctness

Bahcheli v Yorkton Securities Inc. 2012 ABCA 166, TAB D.

ARGUMENT

Issue 1: Waiver of Security Interest by the RBC to the Subject Vehicles and Enforceability

General Overview of this Section

26. Master Schlosser erred in ruling that the RBC did not waive its security interest to the Subject Vehicles, and even if it did, that the Appellants, as third parties, cannot enforce such Waiver.

27. To succeed in portion of the Appeal, the Appellants must demonstrate that the RBC waived its security interest to the Equipment (including the Subject Vehicles) and that the Appellants were part of the class of persons intended to benefit from such waiver. The

statutory framework in which the Appellants rely is derived from section 40 of the *Personal Property Security Act*, RSA 2000, c P-7. (the "PPSA"), which states that:

A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest, and the 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 a class of persons for whose benefit the subordination was intended.

Section 40 of the *Personal Property Security Act*, RSA 2000, c P-7, TAB E.

28. When interpreting this clause, Courts have stated that [s.40] of the PPSA conferred a statutory right on a secured party to waive the priority given him by the PPSA and a corresponding right on the beneficiary of such a waiver...to enforce it. Because of this provision, the PPSA will not prevent a subsequent credit grantor from claiming priority over a prior secured creditor where the latter has agreed to subordinate its claim. The question is whether the alleged subordination clause actually had that effect.

Chiips Inc. v Skyview Hotels Limited, 1994 ABCA 243 at paras 10-11, TAB F.

Waiver of Security Interest

29. Waiver occurs when one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party. The essentials of waiver are two-fold (i) full knowledge of the deficiency and (ii) the unequivocal intention to relinquish the right to rely on it. It is not necessary that the intention be expressed in a formal legal document. It may be expressed in some informal fashion or may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

The Maritime Life Assurance Company v. Saskatchewan River Bungalows Ltd., [1994] 2 SCR 490, TAB G.

30. In this case, the RBC's intentions to waive its security interest are clearly set out in the Agreement and confirmed by the Waiver it sent to Ritche Bros.

31. The Agreement outlined in the email correspondence dated December 19, 2019 between Gary Ivany, the RBC's Representative, and William Nurnberger, the Respondent's representative, states that:

The RBC would consent to the asset disposition [including the Subject Vehicles] on the strict condition that immediately upon such disposition, DiG shall make a voluntary prepayment of principal in an aggregate amount of at least \$2 million towards its Term Loan... "Failure to make such prepayment to the Term Loan...shall result in an Event of Default under the Credit Agreement. [Emphasis Added]

[Exhibit "A" to Affidavit of William Nurnberger, dated February 8, 2019.]

32. There is no necessary connection between the Net Proceeds from sale of the Equipment and the voluntary payment that was to be made by the DiG. In other words, the RBC did not actually request or require payment of any portions from the Net Proceeds; rather, the RBC only requested that the Respondents make a subsequent voluntary payment of \$2 million to pay down its debt to the RBC. It can very reasonably be implied that DiG can make the voluntary payment from any of its resources, and that it can use the entirety of the Net Proceeds for other purposes, such as to maintain its operations or to pay down debts owed to other creditors.

33. This proposition is strengthened by the wording of the Waiver document that the RBC sent to Ritchie Bros. on December 19, 2018. Such Waiver provided the RBC with the following two options for dealing with proceeds of sale in the equipment being offered for sale at the Auction, for which the RBC selected Option 1:

Option 1: "We have no interest in the Equipment nor in 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.

Option 2: We represent that we have a valid security interest in the Equipment and are entitled to the proceeds thereof. You are authorized to sell the Equipment. Our security interest in the Equipment and the proceeds from the sale thereof is hereby released on the condition that we will receive the lesser of...

a) The Net Proceeds generated from the sale of the Equipment. Net Proceeds being gross proceeds of the sale of the Equipment less amounts owing to

- (i) prior ranked secured creditors, if any, and (ii) Ritchie Bros. Auctioneers for commission charged and costs incurred; or
- b) \$ _____ on or about January 7, 2019 with a per diem rate of \$ _____ thereafter (inclusive of all applicable taxes), being the amount that we are owed which is secured by, among other things, the Equipment.

Exhibit "A" to Supplemental Affidavit of Beth Brown, dated February 14, 2019.

Exhibit "G" to the Affidavit of Gary Ivany, dated March 1, 2019.

34. The Agreement and Waiver documents speak for themselves. With full knowledge of its rights and entitlement to over \$4 million of the Net Proceeds, the RBC clearly and unequivocally waived its rights to the Net Proceeds and selected Option 1 in the Waiver. Had the RBC intended to receive any of the Net Proceeds from the Auction sale, it would have clearly selected Option 2. This selection was a clear, conscious and unequivocal selection by the RBC.
35. The only reasonable inference that can be derived from the RBC selecting Option 1 is that the RBC relied on its Agreement with the Respondents and accepted a voluntary payment of at least \$2 million as full satisfaction for consenting to the sale of the equipment at the Auction. Counsel for the RBC confirmed that the RBC had not made any formal demands for the Net Proceeds despite having full knowledge of the sale. From this, it can be reasonably assumed that the RBC clearly intended the Net Proceeds to be used by the Respondents for other purposes, such as continuing its operations and paying other creditors.

Exhibit "E" to Affidavit of Chris Aron Wood, dated February 7, 2019.

36. Further, given that, prior to the original application being heard, the RBC had been voluntarily paid around \$3 million from the Defendants, the Agreement between the RBC and the Respondents was fully satisfied.

Enforcement by Subsequent Creditors

37. For the purposes of this Appeal, it is important to distinguish between a subordination of a security interest and an abandonment, release or waiver of a security interest. A secured party who releases [or waives] a security interest does not merely subordinate his security

interest. The release extinguishes the security interest, and the secured party is not thereafter permitted to assert his security interest in the collateral.

Alberta Personal Property Security Act Handbook, 4th Ed. (Carswell: Toronto 1995), Cuming and Wood, at page 380, TAB H.

In Re Hickman Equipment (1985) Ltd. (In Receivership), 2005 NLTD 122 at para 27, TAB I.

38. While s. 40 of the PPSA is typically used to interpret subordination clauses found within various general security agreements, it can also be applied to the enforcement of a waiver agreement, such as the Agreement and Waiver in this case. As already expressed in this Brief, the RBC agreed to waive its security interest to the Equipment in exchange of receiving a voluntary payment from DiG of at least \$2 million. There was no necessary connection between the Net Proceeds and the voluntary payment laid out in said Agreement.
39. As a waiver fully extinguishes a party's rights to the collateral, the Agreement and Waiver rendered the RBC an unsecured creditor of DiG and iVac in so far as the Net Proceeds are concerned. The RBC's security interest to the Equipment was fully extinguished to the benefit of all subsequent creditors.
40. It cannot be said that the RBC intended DiG or iVac to keep the entirety of the Net Proceeds in priority to the Appellants, who have a valid interest registered in the PPR. Such reasoning would run against the purpose of the PPR, which is the basis for determining priority between different creditors. As such, given that the RBC intended for DiG or iVac to receive the portion of the Net Proceeds that the RBC would have been entitled to had it not been for the Agreement and Waiver, the RBC also intended for the Appellants (as a creditor of DiG and iVac) to be paid in priority to DiG or iVac. Therefore, the Appellants are clearly within the class of persons for whom the RBC's waiver was intended.

Issue 2: Effect of Garnishee Summons

41. Master Schlosser erred in finding that the Garnishee Summons was subject to the RBC's security interest.
42. At the time the Appellants served the Garnishee Summons on Ritchie Bros., the RBC had forwarded its Waiver to Ritchie Bros. and the Appellants were the only remaining creditors of the Respondents with an interest [the two Writs] registered with the PPR.

43. Section 78 of the *Civil Enforcement Act*, states that a garnishee summons attaches to the garnished obligation when the garnishee summons is served on the garnishee, in this case, Ritchie Bros.
44. As was understood by all parties at the time of the Auction, Ritchie Bros. would pay the Net Proceeds to DiG, and, as far as Ritchie Bros. was concerned, the RBC would not receive any funds from the proceeds of sale of any of the Equipment. The only reasonable interpretation of such payment arrangement is that payment of the Net Proceeds to DiG was an obligation by Ritchie Bros. that, on the day of service of the Garnishee Summons, was payable to DiG, bringing this payment arrangement within the definition of "current obligation" that is set out in s. 77(1)(a) of the *Civil Enforcement Act*, RSA 2000, c C-15.
45. Given the above, regardless of any side agreements between the Respondents and the RBC, to satisfy its obligations under the Garnishee Summons, Ritchie Bros. should have paid the amount of \$583,749.87 into Court.

CONCLUSION AND RELIEF REQUESTED

46. Master W.S. Schlosser erred in directing that the Appellant's writ be discharged against the Subject Vehicles and by directing that the entirety of the funds held in trust by Ritchie Bros. be paid to the RBC.
47. At the time of the sale of the equipment by Ritchie Bros., the RBC waived its security interest in the equipment in exchange of receiving a voluntary payment of at least \$2 million from the Defendants to this action, which it received. Relying on section 40 of the PPSA, the Appellants argue that they are entitled to enforce the waiver agreement between the RBC and the Defendants.
48. Further, or in the alternative, the Appellants served a garnishee summons on Ritchie Bros. that would have required Ritchie Bros. to pay the total amount of \$583,749.87 into Court for the benefit of the Appellants, being the Defendants' only judgment creditors with writs registered in the PPR.

49. As such, the Appellants request an Order directing the RBC to pay to the Appellants the entire amount owing under both of their Judgments plus interests and costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23TH DAY OF APRIL, 2019.

BOSECKE & ASSOCIATES

PER

A handwritten signature in black ink, appearing to read "Sal Tinajero", written over a horizontal line.

Sal Tinajero,
Solicitor for the Appellants, Chis Aron Wood
and Mega Diesel Holdings Ltd.

TAB	DESCRIPTION
"A"	September 13, 2018 Order for Summary Judgment by Master Schlosser
"B"	Garnishee Summons issued for Court of Queen's Bench Action No. 1703-21939
"C"	Order of Master Schlosser, dated and filed on March 11, 2019
"D"	<i>Bahcheli v Yorkton Securities Inc.</i> 2012 ABCA 166
"E"	<i>Personal Property Security Act</i> , RSA 2000, c P-7, s. 40.
"F"	<i>Chlips Inc. v Skyview Hotels Limited</i> , 1994 ABCA 243
"G"	<i>The Maritime Life Assurance Company v. Saskatchewan River Bungalows Ltd.</i> [1994] 2 SCR 490.
"H"	Alberta Personal Property Security Act Handbook, 4 th Ed. (Carswell: Toronto 1995), Cuming and Wood, at page 380
"I"	<i>In Re Hickman Equipment (1985) Ltd. (In Receivership)</i> , 2005 NLTD 122

TAB A

COURT FILE NUMBER 1703 21939

COURT COURT OF QUEEN'S BENCH OF ALBERTA

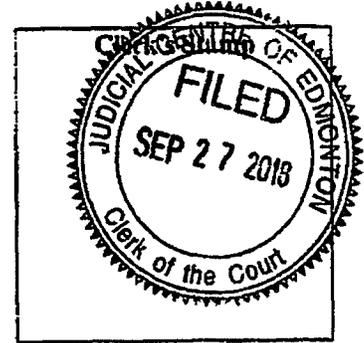
JUDICIAL CENTRE EDMONTON

**PLAINTIFFS CHRIS ARON WOOD and MEGA DIESEL
(Applicants) HOLDINGS LTD.**

**DEFENDANT DISTINCT INFRASTRUCTURE GROUP INC.
(Respondent)**

DOCUMENT ORDER FOR SUMMARY JUDGMENT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
BOSECKE & ASSOCIATES
 Attention: Sal Tinajero
 102, 9333 47 Street
 Edmonton, Alberta, T6B 2R7
 Tel: 780-469-0494
 Fax: 780-469-4181
 File: 2402718



DATE ON WHICH ORDER WAS PRONOUNCED: September 13, 2018

NAME OF MASTER WHO MADE THIS ORDER: W.S. Schlosser

LOCATION OF HEARING: Edmonton, Alberta

UPON THE APPLICATION of the Plaintiffs; AND UPON having read the affidavit of Chris Wood; AND UPON having read the affidavit of Royston Rachpaul; AND UPON having heard representations from counsel for the Plaintiffs and the Defendant;

IT IS HEREBY ORDERED THAT:

1. The Plaintiffs are granted summary judgment.
2. In accordance with paragraph 2.5(a) of the Share Purchase Agreement between the parties (the "SPA"), the Defendant is ordered to pay to the Plaintiffs a Working Capital Adjustment in the amount of \$83,045.00 plus interest pursuant to the *Judgment Interest Act, RSA, 2000 c J-1* from October 29, 2017, the date the cause of action arose.

- 2 -

3. In accordance with paragraph 2.5(b) of the SPA, the Defendant is ordered to pay to the Plaintiffs a Corporate Debt Adjustment in the amount of \$66,877.00 plus interest pursuant to the *Judgment Interest Act, RSA, 2000 c J-1* from October 29, 2017, the date the cause of action arose.
4. The Plaintiffs are awarded costs of this action to be assessed pursuant to Schedule C, Column 2, of the *Alberta Rules of Court, Alta Reg 124/2010*.

"W.S. Schlosser"

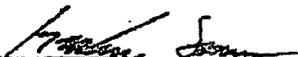
Master of the Court of Queen's Bench of Alberta

APPROVED AS TO FORM AND CONTENTS BY:

BOSECKE & ASSOCIATES

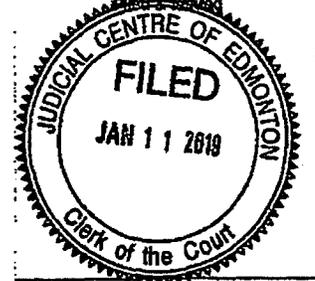
Per: 
Sal Tinajero
Solicitor for the Plaintiffs

BISHOP & MCKENZIE LLP

Per: 
Graham W. Sanson
Solicitor for the Defendant

TAB B

Clerk's Stamp



QB Court File Number 1703 21939

Court Court of Queen's Bench of Alberta

Judicial Centre EDMONTON

CREDITOR CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

c/o BOSECKE & ASSOCIATES,

Address and Postal Code of Creditor 102, 9333 -47 Street, Edmonton, AB, T6B 2R7

Creditor's Telephone/Fax Numbers TEL: 780-469-0494; FAX: 780-469-4181

DEBTOR DISTINCT INFRASTRUCTURE GROUP INC.

Address and Postal Code of Debtor 2300, 10180-101 Street, Edmonton, Alberta

Debtor's Telephone/Fax Numbers _____

GARNISHEE RITCHIE BROS. AUCTIONEERS (CANADA) LTD./LES ENCANS RITCHIE BROS. (CANADA) LTEE

Address and Postal Code of Garnishee 9500 Glenlyon Parkway, Burnaby, British Columbia V5J 0C6

Garnishee's Telephone/Fax Numbers TEL: 1-778-331-5500; FAX: 1-778-331-5501

FILED BY BOSECKE & ASSOCIATES

Address and Postal Code of Filing Party 102, 9333 -47 Street, Edmonton, AB, T6B 2R7

Filing Party's Telephone/Fax Numbers TEL: 780-469-0494; FAX: 780-469-4181

Filing Party's File Number 2402718

Document **Garnishee Summons**

before judgment after judgment

This Garnishee Summons is issued on January 11, 2019 for \$ 583,749.87.

(The Creditor may adjust the amount by serving a Notice on the Garnishee).

The creditor intends to garnish the debtor's

- employment earnings
- deposit accounts
- money owing from other sources

The judgment is for alimony or maintenance.
When employment earnings are garnished for alimony or maintenance, *Maintenance Enforcement Act* employment exemptions apply. Refer to the *Maintenance Enforcement Regulation (AR2/86)* for more information.

- This summons expires
1. in the case of a deposit account, 60 days from the date it was issued, unless it is a joint account, in which case this is a one-time obligation, and
 2. in all other cases, 2 years from the date it was issued, unless it has been renewed.

Supporting Affidavit

QB Court File Number: 1703 21939

1. I am the lawyer for the Creditor.
2. According to the Judgment, a Writ of Enforcement has been registered at the Personal Property Registry.
3. I believe that the proposed Garnishee owes the Debtor money now or will owe the Debtor money in the future.
4. The proposed Garnishee is in Alberta, or does business in Alberta notwithstanding that its payroll office is outside Alberta.

SWORN / AFFIRMED

in Edmonton, Alberta.
 on January, 11, 20 19

Beth Marie Brown
 Commissioner for Oaths / Notary Public
 in and for the Province of Alberta

Commissioner's Name and Commission's
 Expiry Date (please print)
BETH MARIE BROWN
A COMMISSIONER FOR OATHS
IN AND FOR THE PROVINCE OF ALBERTA
MY COMMISSION EXPIRES JULY 4, 2020

Salvador Tinajero
 Signature of Creditor or Agent/Lawyer

Printed Name of Creditor or Agent/Lawyer
SALVADOR TINAJERO
 Occupation Barrister & Solicitor

To the Clerk

The Creditor has a Judgment against the Debtor, and a Writ of Enforcement has been registered at Personal Property Registry as: 18101524102

The amount specified in the Writ of Enforcement	\$154,145.11
of which the present balance owing is	\$154,145.11
plus related writs (according to the attached search results)	\$428,604.76
plus probable costs	\$1,000.00
Total	\$583,749.87

Certificate of Service on the Debtor / Joint Oblige

Garnishee: (Print name of Garnishee) _____

I, (Print name of person who served the Garnishee Summons) _____,

am the Garnishee/Agent for the Garnishee
 Creditor/Agent for the Creditor

I certify that on _____ (Date of service of Garnishee Summons), I served _____ (Name of Debtor/Joint Oblige who was served):

personally
 by ordinary mail

with a true copy of the Garnishee Summons according to the *Civil Enforcement Act*.

NOTE: Only the Garnishee may serve a Garnishee Summons on a Debtor/Joint Oblige by ordinary mail unless otherwise ordered by the Court.

Dated: _____, 20____.

Signature of Person who served the summons

(If there is more than one Debtor/Joint Oblige, please complete an additional Certificate of Service for each Debtor/Joint Oblige who was served.)

- 4 -

Instructions for Garnishee

These instructions will help you to comply with the Garnishee Summons. They are taken from the following pieces of legislation:

Civil Enforcement Act, RSA 2000 cC-15
Civil Enforcement Regulation (AR 276/95)

Make cheques payable to the Government of Alberta and send, along with the required documents, to:

Future payments to the court clerk under this Garnishee Summons should be accompanied by a copy of the first page of this Garnishee Summons and an accounting.

Garnishee summons

(which does not attach employment earnings)

Within 15 days of being served with the garnishee summons in triplicate with a \$25 compensation fee, you must do the following:

1. Serve a copy of the garnishee summons on the debtor (personally or by ordinary mail).
2. Deliver to the court clerk a garnishee's response. See below for what this must contain.
3. Pay to the court clerk the lesser of
 - (a) the amount indicated on the first page of the garnishee summons, or
 - (b) the amount payable by you to the debtor according to your obligation to the debtor,

minus \$10 as a garnishee compensation. Where the garnishee summons seeks to affect a joint entitlement, you must pay to the court clerk, unless a court orders otherwise, an amount equal to the total amount of the fund divided equally amongst all the people with the joint entitlement. A garnishee summons that seeks to attach a joint deposit account only attaches a current obligation as defined in the *Civil Enforcement Act*.

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**Garnishee
summons****(which does
not attach
employment
earnings)
continued**

The garnishee's response must contain as much of the following as is applicable:

1. (a) a Certificate of Service on the Debtor (found within this document) stating that you have delivered a copy of the garnishee summons to the debtor, or
- (b) a statement setting out why you could not serve the garnishee summons on the debtor.

NOTE: Send the original certificate of service to the court clerk.

2. The amount that you owe under your obligation to the debtor.
3. The amount that you are paying to the court clerk.
4. If you don't think that you have an obligation to pay the debtor that can be affected by the garnishee summons, please explain why.
5. If you believe that the obligation that the garnishee summons is trying to affect is (or may be) owed to someone other than the debtor, give the reasons for your belief and the name and address of that other person.
6. If you have already received another garnishee summons regarding the same obligation and that garnishee summons is still in effect, let the court clerk's office know in writing and give the court file number of the other garnishee summons. The court file number is on the front page of the garnishee summons.
7. Where the garnishee summons seeks to affect a joint entitlement, the garnishee's response must contain the name of each person who has the joint obligation with the debtor and either
 - (a) the address of each person who has the joint obligation with the debtor, or
 - (b) a completed certificate of service (found within this document) stating that you have served a copy of this garnishee summons on each person who has the joint obligation with the debtor.

NOTE: If it is a joint account, it is a one-time obligation.

8. Where the garnishee summons has attached a future obligation, that is, there is an amount that you must pay the debtor in the future, the garnishee's response must contain the following, if known:
 - (a) the date or dates on which the future obligation, or any part of it, is expected to become payable;
 - (b) the amount expected to be payable on each date set out above;
 - (c) any conditions that must be met before the future obligation will become payable.

When the future obligation becomes payable, the garnishee's response must set out

- (a) the amount that is now payable, and
- (b) the amount that you are paying to the court clerk.

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Garnishee summons**(which attaches employment earnings)**

Within 15 days of being served with the garnishee summons in triplicate with a \$25 compensation fee, you must do the following:

1. Serve a copy of the garnishee summons on the debtor (personally or by ordinary mail).
2. Deliver to the court clerk a garnishee's response. See below for what this must contain.
3. Within 5 days after the end of the debtor's last pay period for months affected by the garnishee summons, pay to the court clerk the debtor's net pay less
 - (a) the debtor's employment earnings exemption (see employment earnings exemptions listed below), and
 - (b) \$10 as a garnishee compensation.

Net pay means the debtor's total earnings minus any amounts you are required to deduct for income tax, Canada Pension Plan contributions and employment insurance premiums. Any other deductions are taken from the debtor's exemption.

The garnishee's response must contain as much of the following as applicable:

1. Whether or not you employ the debtor.
2. How often you pay the debtor.
3. Either
 - (a) a certificate of service on the debtor (found within this document) stating that you have delivered a copy of the garnishee summons to the debtor, or
 - (b) a statement setting out why you could not serve the garnishee summons on the debtor.

NOTE: Send the original certificate of service to the court clerk.

4. If you have already received another garnishee summons against the debtor's employment earnings and that garnishee summons is still in effect, let the court clerk's office know in writing and give the court file number of the other garnishee summons. The court file number is on the front page of the garnishee summons.

At the end of the debtor's last pay period for each month during which the garnishee summons is in effect, you must deliver to the court clerk a written statement setting out:

1. The debtor's total employment earnings for the pay periods that ended during the month.
2. The amounts deducted from the total earnings to calculate the debtor's net pay for the month.
3. The number of the debtor's dependants.

- 7 -

**Employment
earning
exemptions**

Calculate the debtor's monthly employment earnings exemptions by adding together

- (a) the debtor's minimum exemption, and
- (b) half the amount by which the debtor's net pay exceeds this minimum exemption.

For a debtor with no dependants, the minimum employment earnings exemption is \$800 and the maximum is \$2400. The minimum and maximum employment earnings exemptions increase by \$200 for each dependant.

A dependant is:

1. A person identified as a dependant by Court order.
2. The spouse or adult interdependent partner of the debtor.
3. Any child of the debtor under 18 years of age who lives with the debtor.
4. Any relative of the debtor (or of the debtor's spouse/adult interdependent partner) who lives with the debtor and, because of mental or physical infirmity, depends financially on the debtor.

You are entitled to rely on, and act in accordance with, the debtor's written statement of the number of dependants he or she has.

A worksheet has been created to help you calculate the debtor's employment earnings exemption. This worksheet can be found on the Alberta Courts website at:
<http://www.albertacourts.ab.ca/gb/publication/GarnisheeWorksheet-Form7.pdf>

When employment earnings are garnished for alimony or maintenance, employment exemptions under the *Maintenance Enforcement Act* apply. Refer to the *Maintenance Enforcement Regulation* (AR 2/86) for more information.

If you pay the debtor's salary/wage more often than monthly, you can pay the court clerk at the end of each pay period instead of at the end of each month. In this case, calculate the minimum and maximum employment exemptions for each pay period as follows:

1. Multiply the monthly exemption by the number of days in the pay period.
2. Divide this number by 30.

TAB C

COURT FILE NUMBER 1703 13921
 COURT COURT OF QUEEN'S BENCH OF ALBERTA
 JUDICIAL CENTRE EDMONTON
 PLAINTIFF CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.
 DEFENDANTS MEGA DIESEL EXCAVATING LTD. and DISTINCT INFRASTRUCTURE GROUP INC.
 DOCUMENT ORDER
 ADDRESS FOR SERVICE AND CONTACT BISHOP & MCKENZIE LLP
 INFORMATION OF PARTY FILING THIS DOCUMENT 2300, 10180 - 101 Street
 Edmonton, Alberta T5J 1V3
 Attention: Graham W. Sanson
 Phone: (780) 426-5550
 Fax: (780) 426-1305
 File No. 105031-011



I hereby certify this to be a true copy of the original.

[Signature]
 for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: March 11, 2019

NAME OF MASTER WHO MADE THIS ORDER: S. L. Schlatter

LOCATION OF HEARING: Edmonton, Alberta

UPON THE APPLICATION of the Defendants; AND UPON having reference to the Affidavits of William Numberger sworn December 18, 2018, January 4, 2019, and February 8, 2019; AND UPON having reference to the Affidavit of Chris Aron Wood, sworn February 7, 2019; AND UPON having reference to the Affidavit of Gary Ivany sworn March 1, 2019; AND UPON having heard representations from counsel for the Defendants and the Plaintiffs; AND UPON having heard representations from counsel for the Royal Bank of Canada;

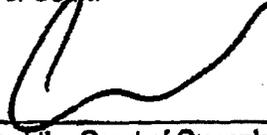
IT IS HEREBY ORDERED THAT:

1. The Registrar of the Personal Property Registry is hereby directed to discharge the registration of the Plaintiffs' Writ of Enforcement, bearing the Registration Number 17090137319, from the following equipment (the "Subject Vehicles"):

Block	Serial Number
8	5KKPALDRXDPPFA9979
9	5KKPALD12EPFP3870
14	5KKPALD10EPFP3871
16	5KKPALD12FPGK2956

2. The monies held by Ritchie Bros. Auctioneers (Canada) Ltd. as proceeds from the sale of the Subject Vehicles shall be paid to the Royal Bank of Canada ("RBC"), to be applied to the secured indebtedness owing to RBC by Mega Diesel Excavating Ltd. or its successor by amalgamation, iVac Services West Inc.

3. The Plaintiffs are ordered to pay costs to the Defendants and to RBC pursuant to Column 3 of Schedule "C" to the *Alberta Rules of Court*.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal stroke and a curved tail.

Master of the Court of Queen's Bench of Alberta

TAB D

In the Court of Appeal of Alberta

Citation: Bahcheli v. Yorkton Securities Inc., 2012 ABCA 166

**Date: 20120531
Docket: 1101-0136-AC
Registry: Calgary**

2012 ABCA 166 (CanLII)

Between:

Tumer Salih Bahcheli

**Appellant
(Plaintiff)**

- and -

Yorkton Securities Inc. and Orion Securities Inc.

**Respondents
(Defendants)**

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Jo'Anne Strekaf**

**Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurred in by The Honourable Madam Justice Constance Hunt
Concurred in by The Honourable Madam Justice Jo'Anne Strekaf**

**Appeal from the Order by
The Honourable Mr. Justice L.D. Wilkins
Dated the 15th day of April, 2011
Filed the 20th day of May, 2011
(Docket: 0401-03126)**

**Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté**

A. Introduction

[1] This is an appeal from 2010 ABQB 824, which affirmed an oral Master's decision of April 30, 2010. The substantive topic is dismissing a suit for non-prosecution under old R 244.1, now R 4.33(1), the "drop-dead" Rule.

[2] I will defer describing the facts until Part C, where their significance will be easier to see.

B. Standard of Review

1. Introduction

[3] The big issue in this judgment is the standard of review on appeal from a master to a judge. Terminology is not completely consistent for the standard of review which was adopted by the Alberta Courts before the new Rules came into force. It is sometimes called non-deferential, and sometimes called an appeal *de novo*. But more commonly the term used is "correctness", and that has become the almost universal term since recent decisions of the Supreme Court of Canada starting with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. I do not intend to distinguish among the three terms. For convenience and familiarity, I will use throughout the term "correctness".

[4] The chambers judge heard this appeal on November 1, 2010, the first day that the new Rules of Court were in force. Though he did not expressly state what the standard of review was on appeal from a Master to a judge, he plainly implied that the standard was deferential. He expressly concluded that the Master had committed no palpable and overriding error, and so affirmed the Master.

[5] Since then, a number of Court of Queen's Bench judges have held that the standard of review on appeal from a Master to a judge is deferential, because of the new Rules. I will not attempt to list all of them, and mention only *Royal Bank of Canada v Place*, 2010 ABQB 733, 504 AR 230 (paras 27-30); *Janvier v 834474 Alberta*, 2010 ABQB 800, 511 AR 76 (paras 13-18); *Turner v DN Developments*, 2011 ABQB 544 (para 11).

[6] Of course a deferential standard would have to exclude questions of law alone. Everyone seems to agree that correctness is the standard for them.

[7] Counsel for the appellant gave us extended argument disagreeing with the deferential standard for other topics. Counsel for the respondents supports a deferential standard, but both counsel encouraged us to clarify the doubts on this subject, and so guide the Bar.

2. Do the Rules Set the Standard of Review?

[8] The place to start is the wording of the new Rules. If they clearly addressed the standard of review on appeal to a judge, that would end the question.

[9] As first enacted, when the chambers judge heard argument, the relevant subrule read as follows:

6.14(3) An appeal from a master's judgment or order is an appeal on the record of proceedings before the master and, if the judge permits, may also be based on new evidence that is significant enough that it could have affected the master's decision.

That subrule was amended July 14, 2011 and now reads as follows:

6.14(3) An appeal from a master's judgment or order is an appeal on the record of proceedings before the master and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

[10] Many Court of Queen's Bench judges have recently taken the subrule, especially the phrase "an appeal on the record" to refer to the standard of review on appeal. (See the cases cited above.) Counsel for the appellant demurs, and suggests that the phrase quoted above is merely about evidence, not about standard of review at all. I agree.

[11] Appeals from Masters were always on the record, in the sense that, absent new evidence adduced for the motion, the judge had to use the evidence which the Master heard. So the new Rule made no real change: see *Gudzinski Estate v Allianz Global Risks US Insurance Co*, 2012 ABCA 5 (para 24).

[12] Judges hear conflicting pieces of evidence and (where the evidence is oral) routinely choose among them on grounds of weight or credibility. But that is not true of Masters, or true only in a much narrower area. One of the reasons that Masters are different is the requirement that superior court judges be appointed by the Governor-General: *Constitution Act*, 1867, s 96. That has always been held to cut down the list of what Masters (or Provincial Court judges) can do. For example, see *Attorney-General for Ontario v Victoria Medical Building* [1960] SCR 32, 45, 21 DLR (2d) 97. It cites with approval an early decision by the Alberta Court of Appeal. Therefore some of the logical puzzles or possible distinctions which would arise from an appeal on the record on conflicting evidence, rarely apply to appeals from Masters.

[13] The *Victoria Medical Building* case also says that a provincial legislative body cannot give to someone only provincially appointed the power of final adjudication on a topic which in 1867 was decided by superior courts. (See pp 42, 43 SCR.)

[14] If a judge hearing such an appeal is strictly confined to “the record”, that means that any facts found must come from the evidence which was before the Master (or concessions made before the Master).

[15] But I can see no logical link between such fixed evidentiary basis, and the standard of review. For example, consider a motion for security for costs. Do a few paragraphs in an affidavit give sufficient evidence that a certain plaintiff is unlikely to pay any judgment for costs? Logic does not bar the judge from exercising afresh his judgment about the weight of that same evidence. That is even more so when the issue before the Master and the judge is not a question of fact in the narrow sense, and instead is a question of practicality or fairness. Or a question of whether some proposition is fairly arguable.

[16] Furthermore, the new Rules never said that an appeal from a Master was always on the record. Rule 6.14(3), quoted above, has always made an exception where the judge finds it proper to admit further evidence. That used to be a comparatively narrow exception; originally the evidence had to be arguably pivotal (to paraphrase). But since the Rule was amended in July 2011, the exception to the subrule is probably wider. In any event, it is now not ambiguous, and is not narrow. Now the proposed new evidence (referred to at the end) need only be “relevant and material” in the opinion of the judge hearing the appeal. The Rules on disclosure (discovery) have used that quoted phrase for a number of years now, and the phrase is interpreted quite broadly. Therefore, the exception to R 6.14(3) is quite wide, making the Rule that the appeal must be “on the record” rather narrow.

[17] There is another important development. It is now settled law that there cannot be deference to the Master’s fact findings or discretion (any need for palpable and overriding error to reverse), when the judge heard new evidence: *Gudzinski v Global Allianz*, *supra* (para 24).

[18] So far, the discussion here shows (I suggest) that the new Rules do not really dictate the standard of review on appeal from a Master. Indeed, by allowing new evidence they make a deferential standard impossible in many cases. At best, the Rules are silent.

3. What the Standard of Review Should Be

[19] That silence does not bar having a judge-made standard of review; it necessitates it. The old Rules stated no standard, but case law laid down a standard of review which held for almost a century. It was a standard of correctness, with no deference: see *United Utility Workers Association v TransAlta Corp*, 2004 ABCA 200, 354 AR 58 (para 20); *Willman v Administrator of Motor Vehicle Claims Act* (1979) 17 AR 608 (para 12) (CA).

[20] In ordinary civil litigation, Masters do not hear witnesses testify before them.

[21] The advantage of seeing and hearing witnesses is not the only basis for appellate deference to the court under appeal. What may be a more important aim of deference is saving time and money. There is no point to retrying matters where the second hearing or judge is no more likely to be right than the first one. See Kerans and Willey, *Standards of Review Employed by Appellate Courts* 18-20 (2d ed 2006); *Housen v Nikolaisen*, *supra* (paras 16-18).

[22] Counsel for the appellant has reproduced for us the relevant part of the Alberta Law Reform Institute's Consultation Memorandum # 12.10 on this topic. The Institute's Memorandum and Committee recommended no change in the standard of review.

[23] They cited striking statistics showing that there were quite a small number of appeals from Masters, and that such appeals formed but a small fraction of the work of chambers judges. An appeal from a Master does not require unusual or expensive procedures, nor generally entail a large amount of new labor. Nor does it face very long waiting lists. (That is doubly so in the fraction of cases where argument will be short enough that a special application is not necessary.)

[24] A motion to a Master is not necessarily final. In theory, maybe counsel should have perfect foresight, and assemble all the evidence which might possibly be relevant, couched in clear and unmistakable language. But no human being is perfect, and sometimes justice lies on the side of letting a party later patch up oversights and ambiguities in his or her first affidavit. Especially if that party will pay costs of the first motion. Furthermore, requiring perfection the first time could well increase the net expense and delay in litigation. After all, (as noted) appeals from Masters are not a large proportion of chambers work. Indeed, for years the Court of Queen's Bench has urged counsel to make applications returnable before a Master whenever possible.

[25] It is plain now that the standard of appeal is correctness when the judge was given evidence which the Master did not have. If the standard were deferential when the evidence was the same, that could tempt lawyers to file additional peripheral or scarcely different affidavits on appeal in order to engineer a different standard of review. That would not help anyone in the long run.

[26] And a deferential standard does not apply where the question is one of law alone.

[27] Even if a deferential standard were generally desirable, there might well have to be another exception to it. The Federal Court of Canada and the courts of Ontario give deference to a Master's decision, unless the topic is one which might be vital to the final issue of the lawsuit (Institute Memorandum, p 22). It would be hard to avoid some such exception to deference. Occasionally one interlocutory decision could torpedo one side's chances in a suit. It scarcely seems fair to bar reversing that absent palpable and overriding error. That is especially true because a further appeal to the Court of Appeal would itself be deferential. (And sometimes such a further appeal would

require leave to appeal.) But such an exception for matters vital to the final result of the suit would have somewhat vague boundaries, and be difficult to apply, especially without an extended hearing. It would consume time and money, and would be needless litigation about litigation.

[28] What would result from all those exceptions? There could be as many as four categories of issue on an appeal from a Master to a judge (including questions of law). The judge appealed to would have to disentangle all four even to get to the standard of review. About that point, arguing an appeal from a Master would become more complex (in some ways) than arguing an appeal to the Court of Appeal. Masters were created long ago in England and Ontario as a quick, easy adjunct to judges, subject to ready review by judges. That review now threatens to become narrow and over-formalized.

[29] So there would be a number of dangers in making the standard of review deferential (or doing so in some circumstances). Counsel for the appellant asked us what was broken which needs fixing? He said that appeals from Masters worked well for 90 years, and I believe that he is correct.

[30] In my view, the standard of review on appeal from a Master to a judge, on all issues, is still correctness.

C. Dismissal for Want of Prosecution

[31] This is a wrongful dismissal suit by a former broker, the appellant. He alleges that one of the motives for his dismissal was his employer's desire to obtain this employee's stable of clients. The respondents plead cause to dismiss, including breach of various in-house, industry, and regulatory rules.

[32] There has been grave delay. Since the appellant issued his statement of claim, he has done nothing whatever in his lawsuit. The Master dismissed the suit under the old five-year "drop-dead" Rule (R 244.1), and the chambers judge applied transitional R 15.4(1) in dismissing the appeal. See the Appendix for the text of the relevant Rules. Furthermore, the five years was not calculated from the issue of the statement of claim; the respondents excluded the time which they took to file their defence and two affidavits of records. The statement of claim, issued in February 2004, alleges that the appellant was dismissed in early March 2002. So the events in question are over a decade old. There has been no affidavit of records by the appellant, nor any questioning (examination for discovery) by anyone.

[33] The appellant's explanation is that he has labored for years in the fields of regulatory and administrative law. And he submits that he has thereby significantly advanced his lawsuit.

[34] In theory, there could be two ways that the administrative litigation might have advanced his Court of Queen's Bench suit. First, maybe he has got rulings which would bind the Court of Queen's Bench. The appellant's factum does not argue that, though it came up briefly during discussion before the Court of Appeal. However, his counsel argued very clearly that the appellant labored

outside his suit to uphold an acquittal or rulings favorable to him, and to prevent it or them being reversed in some manner.

[35] The respondents, the former employers, have not been parties to any of those various tribunal proceedings, nor to the appeals and litigation flowing from them. The respondents have not even been interveners, nor had any status, nor taken part or been present. It is very difficult to see that there could be *res judicata* of any kind, nor any of its other relatives, such as the doctrine barring abuse of process. Therefore, I cannot see how fighting appeals or reversals of his early success (acquittal) would change anything which could bind the Court of Queen's Bench.

[36] The other theoretical benefit of such parallel regulatory litigation might be acquiring evidence which (though not binding) would be relevant and admissible at a Court of Queen's Bench trial. The problem with such a theory here, is that such evidence was obtained, but it occurred before the statement of claim was even issued. In very early February 2004, the appellant was acquitted of the charges of misconduct by his professional organization. Those charges arguably overlap with some of the issues in this lawsuit. The appellant then got the maximum possible benefit. The lawsuit came later, and so the steps said to have advanced the suit occurred before the suit. Time counted from them would not add a permissible day, and the five years ran out.

[37] The appellant took steps before regulatory tribunals, or on appeal from them, after the statement of claim was issued. But they added no new evidence. They were attacks on the jurisdiction of various administrative or professional bodies by the appellant. As described above, the appellant says that he had to do all that to resist reversal of his favorable verdict. If a full hearing with evidence acquitted him of misconduct, the evidence heard then, and that verdict, might be admissible evidence in a Court of Queen's Bench trial. I will assume that without deciding it. But if it is admissible, a later reversal would surely not make that evidence totally inadmissible.

[38] The topic seems to be litigating in other forums to prevent other people from uncovering or collecting evidence (not a binding decision) for a Court of Queen's Bench trial, which evidence would help the respondents. I cannot see how that materially advanced this Court of Queen's Bench lawsuit.

[39] Finally the appellant argues that there was a second investigation and charge by the same disciplinary body, and it occurred after the statement of claim here was issued, and it also led to another acquittal. All that is true, but at best it was a tangent departing from the wrongful dismissal topic. The charge in the second investigation was refusal to cooperate in the first proceeding. So it was procedural, not substantive, and was not about the conduct which led to the appellant's dismissal by the respondents. Whether the appellant was cooperative or uncooperative with other people after the respondents dismissed him, is not an issue in the suit. It is irrelevant.

[40] What is more, at some stage, probably around the beginning of the second professional inquiry, the appellant's previous counsel wrote a letter on his behalf. It objected to having the second investigation occur at all. One objection to that investigation was that it might prejudice the ongoing

wrongful dismissal suit (the present lawsuit). The appellant's stance there appears to me close to the opposite of pursuing regulatory proceedings to secure evidence. It would suppress evidence, if anything.

[41] I have not cited any of the case law about what activities by a plaintiff restart time (five years or two years) running under the drop-dead Rules, even where the activities are in other parallel litigation. Counsel carefully took us through a number of decisions on that topic, some reviewing earlier case law. Subtle distinctions and differences in wording were reviewed, especially where parallel proceedings were in question.

[42] The test under old R 244.1(1) and new R 4.33(1) uses similar wording. (One Rule was in force when the Master decided, and the other may have been in force when the judge decided, subject to transitional R 15.4(1).) One Rule said "thing was done in an action that materially advances the action". The other says "thing done that significantly advanced an action".

[43] In this case, I am convinced that nothing done after the statement of claim was issued was of any benefit whatever in the present lawsuit, let alone materially advancing it. Any benefit from regulatory proceedings came before the statement of claim was issued. In the suit itself, nothing whatever occurred for over five years.

[44] Therefore, it does not matter here precisely how the judge-made tests under those Rules are or were framed. What the appellant did here does not satisfy any test in the Rules or in any case law which we were shown by either counsel. The result is inevitable. The Master and the judge were right to dismiss the suit. They had no choice.

[45] The appeal is dismissed with costs.

[46] It helps the Court if the comprehensive Table of Contents of a book of Extracts lists individual exhibits, not merely the affidavit identifying them.

[47] Again I thank counsel for their careful, thoughtful and helpful written and oral arguments.

Appeal heard on April 4, 2012

Reasons filed at Calgary, Alberta
this 31st day of May, 2012

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Authorized to sign for: Côté J.A.

I concur: _____
Hunt J.A.

I concur: _____
Strekaf J.

2012 ABCA 166 (CanLII)

Appearances:

P.R. Mack, Q.C.

E.J. Butcher

for the Appellant (Plaintiff)

V.A. Engel, Q.C.

for the Respondents (Defendants)

Appendix

Former Rule

244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.

Transitional Rule

15.4(1) Unless subrule (2) applies, the Court, on application, must dismiss the action as against the applicant if

- (a) after the coming into force of this rule, 2 years has elapsed since the last thing done to significantly advance the action, or
- (b) 5 years has elapsed since the last thing done to significantly advance the action,

whichever comes first.

New Rule

4.33(1) If 2 or more years has passed after the last thing done that significantly advanced an action, the Court, on application, must dismiss the action as against the applicant, unless

- (a) the parties to the application expressly agreed to the delay,
- (b) the action has been stayed or adjourned by order, an order has extended the time for doing the next thing in the action, or the delay is provided for in a litigation plan,
- (c) the applicant did not respond to a written proposal by the respondent that the next thing in the action not occur until more than 2 years after the last thing done that significantly advanced the action, or

- (d) an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to the extent that, in the opinion of the Court, warrants the action continuing.

TAB E

statement containing a description of collateral that includes the product or mass, before the identity of the goods is lost in the product or mass,

- (ii) the notice contains a statement that the person giving the notice has acquired or expects to acquire a purchase-money security interest in goods supplied to the debtor as inventory, and
- (iii) the notice is given before the identity of the goods is lost in the product or mass.

(7) A notice referred to in subsection (6)(c) may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears on the financing statement referred to in subsection (6)(c).

(8) This section does not apply to a security interest in an accession to which section 38 applies.

1988 cP-4.05 s39;1990 c31 s28

Subordination of interest

40 A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest, and the 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 a class of persons for whose benefit the subordination was intended.

1988 cP-4.05 s40;1990 c31 s29

Rights of assignee

41(1) In this section, "account debtor" means a person who is obligated under an intangible or chattel paper.

(2) The rights of an assignee of collateral that is either an intangible or chattel paper are subject to

- (a) the terms of the contract between the account debtor and the assignor and any defence or claim arising out of the contract or a closely connected contract, and
- (b) any other defence or claim of the account debtor against the assignor that accrues before the account debtor has knowledge of the assignment,

unless the account debtor has made an enforceable agreement not to assert defences or claims arising out of the contract.

(3) To the extent that an assigned right to payment arising out of the contract has not been earned by performance, and

TAB F

In the Court of Appeal of Alberta

Citation: Chiips Inc. v. Skyview Hotels Limited, 1994 ABCA 243

**Date: 19940715
Docket: 14255
Registry: Calgary**

Between:

Chiips Inc.

Appellant

- and -

**Skyview Hotels Limited, Ernst & Young Inc.,
B.C. Central Credit Union, Banque Laurentienne Du Canada,
Société General (Canada), Roynat Inc., ABN Amro Bank
Canada and The Bank of Tokyo Canada**

Respondents

The Court:

**The Honourable Mr. Justice Harradence
The Honourable Madam Justice Hetherington
The Honourable Mr. Justice Foisy**

**Reasons for Judgment of The Honourable Mr. Justice Foisy
Reasons for Judgment of The Honourable Mr. Justice Harradence
Concurring**

Reasons for Judgment of The Honourable Madam Justice Hetherington Dissenting

**APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE MASON GRANTED
APRIL 7, 1993**

COUNSEL:

P.S. Jull and J.P. McMahon, for the Appellant

A.L. Friend, for the Respondents

**REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE FOISY**

FACTS:

[1] The respondents in this appeal are: Skyview Hotels (in receivership); Ernst & Young Inc. (the receiver); and a group of companies holding five mortgages and debentures (all dated January 31, 1988) against the real and personal property of Skyview.

[2] The mortgages and debentures are in the aggregate principal sum of \$25 million. They contain a fixed charge on lands and fixtures, and a floating charge on all other assets. A representative sample of these instruments is reproduced at p. 32 of the Appeal Book. The mortgages and debentures were registered in the Corporate Registry on February 29, 1988. As a result of the enactment of the *Personal Property Security Act* R.S.A. 1990, c.P-4.05 (hereinafter *P.P.S.A.*), these interests were re-registered in the Personal Property Registry on June 23, 1992. Per s. 75(3) of the *P.P.S.A.* these interests were perfected and maintained their February 29, 1988 registration date.

[3] The appellant, Chips Inc., was a supplier of for the refurnishing of six floors of the Skyline Plaza Hotel pursuant to a conditional sales agreement dated November 14, 1991. Skyview paid for the goods using 16 post-dated cheques, each in the amount of \$38,197.01, to be used as a security deposit toward the contract. The appellant shipped a number of loads of furniture between December of 1991 and March of 1992.

[4] On May 14, 1992, a Receivership Order was granted as a result of a default by Skyview under the mortgages and debentures. Ernst & Young was appointed Receiver and Manager. The appellant received notice of this Order on May 19, 1992 and gave notice to the Receiver on May 21, 1992 when Skyview failed to pay for the goods supplied by the appellant. The amount outstanding at that date was \$257,163.58.

[5] On June 5, 1992 the appellant filed a financing statement under the *P.P.S.A.* with respect to its conditional sales agreement. One last load of furniture was shipped after the registration of the financing statement; that shipment was received on July 14, 1992. The respondents were not aware of the fact that the appellant had not perfected its security interest prior to the receivership order.

[6] At the initial priority dispute which was heard by Master Alberstat on January 28, 1993, Chiips argued that s. 40 of the *P.P.S.A.* gave it priority due to certain purported subordination clauses in the mortgages and debentures. The response to this was that the debenture holders' re-registration gave them priority as perfection dated back to February 29,

1988. Master Alberstat determined that the debenture holders had priority to all but the last shipment (the fact that Chiips had registered its security interest prior to the last shipment resulted in "super priority" because the charge was in the nature of a purchase money security interest per s.34 of the *P.P.S.A.*). On April 7, 1993, an appeal to the Justice was dismissed with costs.

[7] Pursuant to the Order of Justice Moshansky granted on July 30, 1993, the Hotel has been sold by the Receiver, and a portion of the proceeds, \$312,589.00, has been set aside pending the determination of this appeal. The issue in this appeal is the priority between the holder of a fixed and floating charge debenture and the vendor under what is essentially a conditional sales contract.

[8] The appellants submit that the Chambers Judge erred in failing to give effect to the subordination provisions and failing to give effect to s. 40 of the *P.P.S.A.*. The respondents submit that the provisions in question do not have the effect of subordinating the claim of the debenture holders and thus s. 40 has no application here.

ANALYSIS:

A. Subordination Clauses as Contemplated by the *P.P.S.A.*:

[9] Section 40 of the *P.P.S.A.* specifically provides for the use of subordination clauses in security agreements. The section reads as follows:

40. A secured party may, in a security agreement or otherwise, subordinate his security interest to any other interest, and the 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 a class of persons for whose benefit the subordination was intended.

[10] This provision of the *Act* is very important as it allows debtors to carry on their businesses effectively. The significance of the section lies in the fact that, under the *P.P.S.A.* regime, it is relatively simple for a secured creditor to take and perfect a very broadly based security interest (Cuming & Wood, *Alberta Personal Property Security Act Handbook*, 2d ed. (Toronto: Carswell, 1993) at p. 301). Because the debtor has to be given some ability to carry on business (eg. acquire goods on credit), the *Act* allows a secured creditor to subordinate its interest to other creditors with whom the debtor must deal on an ongoing basis. The reasoning behind the enactment of s. 40 was succinctly stated by Philp J. in *Royal Bank v. Gabriel of Canada Ltd.* (1992), 3 P.P.S.A.C. (2d) p. 305 at p. 309 (Ont G.D.):

... s. 38 of the P.P.S.A. conferred a statutory right on a secured party to waive the priority given him by the P.P.S.A. and a corresponding right on the beneficiary of such a waiver ... to enforce it.

[11] Because of the provision for subordination clauses, the Act will not prevent a subsequent credit grantor from claiming priority over a prior secured creditor where the latter has agreed to subordinate its claim. The question is whether the alleged subordination clause actually had that effect.

B. What is the Effect of Clauses 4.05 and 6.01(c) of the Debentures?:

[12] The Appellant argues that the debentures contained subordination clauses which validly gave Chiips priority over the debenture holders pursuant to s. 40. There are two clauses in the debenture agreements which the Appellants says amount to subordination clauses, they read as follows:

4.05 Possession, Use and Release of Mortgaged Property

Until the Security becomes enforceable, the Company may dispose of or deal with the subject matter of the floating charge provided for in Section 4.01(b) hereof in the ordinary course of its business and for the purpose of carrying on the same; provided that the Company shall not, without prior written consent of the holder, create, assume or have outstanding, except to the Holder, any mortgage, charge or other encumbrance on 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...

(AB p.38)

6.01 The Company covenants and agrees with the Holder that, so long as this Debenture is outstanding, the Company shall not:

...

- (c) create or permit any mortgage, charge, lien or other encumbrance on 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 other than this Debenture and the Series of Mortgages and Debentures referred to in Section 8.01(n) hereof which are intended to rank in priority as 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 or the giving of mortgages or liens in connection with the acquisition or purchase of such property or the acquiring of property subject to any mortgage, lien or encumbrance thereon existing at the time of such acquisition; 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; ...

(AB pp.42-43)

[13] In order to determine whether the above clauses amount to subordination on the part of the debenture holders as contemplated by s.40, it is useful to refer to two Ontario decisions. The decisions in question are helpful yet not determinative; in both cases the Court analyses clauses to determine whether an interest is subordinated, but both clauses are different from the clauses in the case at bar.

[14] In *Euroclean Canada Inc. v. Forest Glade Investments Ltd.* (1985), 16 D.L.R. (4th) p. 289 (Ont. C.A.) (the Supreme Court of Canada refused leave to appeal on June 3, 1985) the Court was asked to determine priorities between a debenture holder and a subsequent conditional seller who had failed to register his interest. The debenture contained the following clause which the Court found had the effect of giving priority to the conditional seller (at p. 297):

(e) Not Encumber - The Corporation shall not, without the consent in writing of the Holder, create any mortgage, hypothec, charge, lien or other encumbrance upon the mortgaged property or any part thereof ranking or purporting to rank in priority to or in pari passu with the charge created by this Debenture, except that the Corporation may give mortgages or liens in connection with the acquisition of property after the date hereof or may acquire property subject to any mortgage, lien or other encumbrance thereon existing at the time of such acquisition and any such mortgage, lien or other encumbrance shall rank in priority to the charge hereby created.

[emphasis added]

Houlden J. A., at p. 299, decided that the conditional sale by Euroclean gained priority over the debenture as a result of the above clause:

... By cl. (e), Brazier was permitted to give mortgages or liens in connection with the acquisition of property... The purchase of the laundry equipment from Euroclean clearly comes within this wording; and if property is acquired in this way, the subordination clause provides that the mortgage, lien or other encumbrance is to rank in priority to the charge created by the debenture.

and at p. 302:

... Euroclean, by reason of s. 39, is, in my opinion, entitled to enforce the provisions of cl. (e) against Mady and, consequently, is entitled to priority over Mady's security interest.

[15] The respondents in the case at bar argue that s. 40 makes it clear that the wording of any purported subordination clause is critical in assessing the rights of the parties. The decision of *Euroclean* is used to support this position as the clause in that case makes it abundantly clear that purchase money charges "shall" rank in priority to the debenture. The respondent puts forward the case of *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) p. 267 (C.A.), in support of its argument that case law indicates that nothing short of a clause like the one in *Euroclean* will act to validly subordinate the prior creditor's claim.

[16] The priority dispute in *Sperry* was between a bank holding a general security interest with an equipment dealer and a manufacturer/supplier of farm equipment who had a prior registered security interest with the dealer. Both of the creditor's registrations lapsed and the bank claimed that it had priority because their security interest re-attached before the supplier had renewed its financing statement. The bank's security agreement contains the following clauses (at pp. 269-70):

1. As a general and continuing collateral security for payment of all existing and future indebtedness and liability of the undersigned [Allinson] to Canadian Imperial Bank of Commerce (the "Bank") wheresoever and howsoever incurred and any ultimate unpaid balance thereof, *the undersigned hereby charges in favour of and grants to the Bank a security interest in the undertaking of the undersigned is now or may hereafter become the owner* and which, insofar as the same consists of tangible property, is now or may hereafter be in the place or places designated in paragraph 14 hereof; and the undersigned agrees with the Bank as hereinafter set out.

...

4. *Ownership of Collateral*

The undersigned represents and warrants that, except for the security interest created hereby and except for purchase money obligations, the undersigned is, or with respect to Collateral acquired after the date hereof will be, the owner of Collateral free from any mortgage, lien, charge, security interest or encumbrance. "Purchase money obligations" means any mortgage, lien or other encumbrance upon property assumed or given back as part of the purchase price of such property, or arising by operation of law or any extension or renewal or replacement thereof upon the same property, if the principle amount of the indebtedness secured thereby is not increased.

[17] Though the result was in favour of the equipment supplier on other grounds, the Court, per Morden J.A., at p. 274, held that the above clauses in the Bank's general security agreement fell far short of showing an agreement by the bank to subordinate its security interest to that of the supplier. The learned Appeal Justice supported this finding using the specific wording in the subordination clause found in *Euroclean*.

[18] Looking at these two cases as outlined above, we are not in much better a position for determining whether the clauses in the case at bar amount to a valid subordination of the debenture holders' interests to the conditional seller. The subordination clause in *Euroclean* was included in the security agreement for the express purpose of putting the interest of a purchase money security holder ahead of the interests of the debenture holders. The Court found this to be the intention based on the clear and unambiguous wording of cl. (e). Conversely, the Court in *Sperry* found that the clauses fell far short of the clear and unambiguous wording of the clause in *Euroclean*, and were therefore not read as having the effect of subordinating the Bank's interest to that of the supplier.

[19] Given the above two decisions, we know two things: first, where a general security holder specifically states that a subsequent security holder "shall rank in priority to the charge hereby created", that subsequent holder will be entitled to enforce the provisions of that agreement per s. 40 of the *P.P.S.A.* Second, clauses in security agreements which fall far short of that type of express wording (for example the impugned clauses in *Sperry* did not even mention the word priority) will not be enforceable under s. 40.

[20] These decisions represent opposite ends of a spectrum: at one end we have a clause directing exactly who will be given priority, and at the other, a clause which mentions nothing about priority. Consequently we are left with very little direction as to what should result in cases where the alleged subordination clauses fall somewhere in between, as in the case at bar. We therefore look to other authority, which, though not directly deciding the point, address it nonetheless. There are a number of cases which are of assistance in this regard, they are outlined below.

[21] The discussions of the courts in following two cases lead to a positive inference by this Court that the alleged subordination clause in the case at bar acts to validly give priority to Chiips.

[22] The case of *Canadian Imperial Bank of Commerce v. International Harvester Credit Corporation of Canada* (1986), 6 P.P.S.A.C. p. 273 (Ont. C.A.) involved a debtor who had entered into a fixed and floating charge debenture with C.I.B.C. Later, the debtor entered into a conditional sales agreement for nine trucks. Both security interests were registered, but the bank's registration preceded the vendor's. At trial the vendor was given priority over the trucks because there were subordination clauses in the bank's security agreement. The clauses were virtually identical to the clauses in this case, they read as follows (at pp. 274-275):

2.1 As security for the due payment of all moneys payable hereunder, the Corporation as beneficial owner hereby:

(a) grants, assigns, conveys, mortgages and charges as and by way of a first fixed and specific mortgage and charge to and in favour of the Bank, its successors and assigns all machinery, equipment, plant, vehicles, goods and chattels now owned by the Corporation and described or referred to in Schedule A hereto and all other machinery, equipment, plant, vehicles, goods and chattels, hereafter acquired by the Corporation; and

(b) 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 including, without limitation, its franchises.

In this debenture, the mortgages and charges hereby constituted are called the "Security" and the subject matter of the Security is called the "Charged Premises"

2.2 Until the security becomes enforceable, the Corporation may dispose of or deal with the subject matter of the floating charge in the ordinary course of its business and for the purpose of carrying on the same provided that the Corporation 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 principle amount of the indebtedness secured thereby is not increased, or any inchoate liens for taxes or assessments by public authorities.

[emphasis added]

[23] The underlined portion of clause 2.2 above is the same as clause 4.05 in the case at bar. At trial the learned judge held that by reason of ss. 2.1 and 2.2 of the debenture, the Bank had subordinated its security interest to the seller (4 P.P.S.A.C. p. 329 at p. 336). The Appellate Court allowed the Bank's appeal based on the fact that the trucks in question were

the subject of the fixed charge as stated specifically in Schedule A of the debenture agreement; the subordination clause only applied to the floating charge. In overturning the lower court's decision, Brooke J.A. states the following (at p. 276):

... In my opinion, the subordination provision in the debenture does not apply to the nine trucks as they form part of the fixed charge. I think the subordination clause is limited to the floating charge which, it is conceded, did not apply to the trucks. While the drafting of the clauses leaves much to be desired, I think it makes provision only as to the manner of the floating charge until it becomes enforceable. For that period of time it provides that Prospect can deal with the subject matter of the floating charge in the ordinary course of its business provided that it cannot encumber any part of that property except where necessary to finance the purchase of its property and then only to the extent provided for in the clause.

[24] The second case, a recent decision of the Alberta Court of Queen's Bench, is ***Transamerica Commercial Finance Corporation, Canada v. Imperial T.V. & Stereo Centre Ltd.*** (October 12, 1993), Edmonton No. 9303-12285 (Q.B.). That case involved a determination of priority between the holder of a floating charge debenture and the holder of a purchase money security instrument. The subordination clause was outlined by Nash J. as follows (at p. 2):

... Imperial, by the terms of the debenture, agreed not to assume any other charges against the assets of the company, without the prior written consent of the Credit Union, that would have priority over the Credit Union's debenture unless, *inter alia*;

The same be given to or in favour of the bankers of [Imperial] on the security the accounts receivable or the inventory of [Imperial] to secure current loans required for the usual purposes of the business of [Imperial] and whether given pursuant to the provisions of the ***Bank Act*** or otherwise.

[emphasis added]

[25] The Court accepted the decision of the Court of Appeal in Ontario in ***Euroclean*** and applied it in giving effect to subordination clauses where applicable. However, the subordination clause outlined above only applied where the party giving new credit was a bank; Transamerica was held not to be a bank. The following finding is made in relation to that point (at p. 10):

When the subordination clause is given its plain and ordinary meaning, I am satisfied that the parties to the Debenture intended that "bankers" not mere "creditors" or "lenders" were to be entitled to enforce the subordination clause and rank above or equal to the credit union.

[26] It would therefore appear, from the above cases that the Ontario Court of Appeal and the Alberta Court of Queen's bench accept that subordination clauses can be enforced against the prior security holder if the collateral in question is subject to that subordination (*International Harvester*) and if the subsequent creditor is of the kind contemplated in the subordination clause (*Transamerica*).

[27] Applying these cases here, it is my view that the clauses in the debenture are subordination clauses, the only questions remaining are whether the furniture was subject to the subordination, and whether Chiips was the kind of creditor that was contemplated by the clause. The furniture is certainly the subject of the floating charge rather than the fixed charge as indicated by clause 4.01 which outlines the security taken by the debenture holders. Further, the subordination clauses in the debenture agreement are silent with respect to who the subsequent creditor might be; if the debenture holders had intended to limit the granting of priority to a particular group of creditors, they should have outlined this limitation in the agreement. As no such limitation exists it is open for this Court to find that the subordination clause may be enforceable by Chiips as against the debenture holders.

[28] 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. p. 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 security from the debtor.

[29] 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 (see *Savin Canada Inc. v. Protech Office Electronics Ltd.* (1984), 8 D.L.R. (4th) p. 225 (B.C.C.A.)); 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.

[30] It is interesting to note that it is possible under the Act to prove a subordination in fact without the existence of a specific subordination agreement (see *Greyvest Leasing Inc. v. Canadian Imperial Bank of Commerce* (October 28, 1993), Toronto No. C11119 (Ont. C.A.), and *Royal Bank of Canada v. Tenneco Canada Inc.* (1990), 72 O.R. (2d) p. 60 (Ont. H.C.J.)). I do not need to discuss this possibility here because the subordination clauses themselves are enough to give Chiips priority over the debenture holders with respect to the furniture supplied.

[31] Having found that the clauses in the case at bar amount to a valid subordination of the debenture holders' interests, it is now necessary to decide two issues: whether the lack of registration on the part of Chiips affects the subordination agreement, and whether the fact that Chiips was not a party to the debenture agreements has any affect on the enforceability of the subordination clauses.

C. Does Section 40 Require Registration?:

[32] This issue was examined very carefully in *Euroclean* with the majority of the Court holding that registration is not necessary in the enforcement of a subordination agreement. Houlden J. referred to an academic comment by Ziegel (9 C.B.L.J. p. 367) which was a case comment on the lower court decision. In that article at p. 372, Ziegel made the following criticism of the Trial Judge's findings:

Fitzpatrick J. went on to hold however that cl. (e) also conferred no priority on Euroclean's security interest unless it had been perfected in time. This is a much more debatable conclusion. The learned judge said:

I find that there was nothing in the provision or elsewhere which rebutted the presumption that the parties intended Mady's security interest to attach, nor does the provision give priority to Euroclean's security interest. The fact that Brazier was permitted by the debenture it gave to Mady to take the equipment from Euroclean, subject to a security interest which would have ranked ahead of Mady's had it been registered in time, does not give any priority to Euroclean's security interest when it was not registered in time.

There are several difficulties about this passage. First, it reads into cl. (e) a requirement of registration not to be found in it. Had there been such a requirement cl. (e) would have conferred no benefit on Euroclean since Euroclean would have been entitled to priority in any event pursuant to s. 34(3) of the O.P.P.S.A.. Second, the

court's reasoning ignores the purpose of cl. (e). ... cl. (e) is intended to confer priority on purchase money security interests ("PMSI"). That being the case, what difference does it make to the debenture holder whether or not the purchase money security interest has been perfected? Lack of perfection does not prejudice him since he has agreed to the PMSI-holder's priority in advance.

[33] The Appellate Court agreed with Ziegel's analysis of the trial judgement. The Court specifically finds, at p. 300, that the failure to make timely registration does not affect the claimant's right to enforce a subordination clause. This finding of the Ontario Court of Appeal was adopted by Nash J. in *Transamerica* at p. 8.

[34] The situation in the case at bar is very similar to the facts in *Euroclean*: there was no requirement in the subordination clauses that the subsequent interest had to be registered in order to claim priority. Had there been such a requirement, Chiips would not have had to rely on the subordination agreements as it would have had "super priority" as a PMSI-holder under s. 34 of the *P.P.S.A.* Accordingly, enforcement of a subordination agreement does not require that the subsequent creditor register his interest

D. Does Enforcement of a Subordination Clause Require that the Claimant be a Party to the original Agreement?:

[35] At common law (see *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. p. 228), Chiips, because it was is not a party to the debenture agreement might not be able to enforce the clause. I say "might" because the position at common law is not clear. Section 40 of the *P.P.S.A.* removes any doubt regarding the common law with respect to privity:

40. A secured party may, in a security agreement or otherwise, subordinate his security interest to any other interest, and the 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 a class of persons for whose benefit the subordination was intended.

[emphasis added]

[36] The cases considering s. 40 have similarly come to the conclusion that the section allows third parties to enforce subordination agreements (see *Euroclean*, and *Royal Bank v. Gabriel*). The effect of the enactment of s. 40 is clearly explained by Houlden J.A. in *Euroclean* at pp. 301-302:

... In ray opinion, s. 39 is intended to confer a statutory right on a secured party to waive the priority given him by the *P.P.S.A.* and to confer a corresponding right on the beneficiary of such a waiver to enforce it, even though he is not a party to the agreement which created it or has no knowledge of its existence.

[emphasis added]

[37] This reasoning was adopted and applied by Philp J. in *Royal Bank v. Gabriel* at p. 309. There is no other reasonable interpretation of s.40 but that in order to enforce a subordination agreement, the subsequent creditor need not be a party to the contract.

[38] This Court's finding that there is no registration requirement or privity requirement for PMSI-holders to enforce subordination clauses is completely in line with the rules of statutory interpretation. The principle is stated clearly in *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Center Ltd.*, [1973] S.C.R. p. 596 at p. 603:

It is of course trite law that no legislation whether it be by statute or bylaw should be interpreted to leave parts thereof mere surplusage or meaningless...

[39] To hold that either registration or privity is required would have the effect of rendering s. 40 meaningless. If registration is required, there is no need for s. 40 whether the PMSI-holder is a party to the agreement or not because "super priority" would already have been achieved via s. 34. If privity is required, there is no need for s. 40; as stated by Houlden J. in *Euroclean* at p. 301, it would be "bootless" as it would have the effect of adding nothing to the common law.

E. Conclusion:

[40] For the above reasons, the appeal by Chiips should be allowed. As PMSI-holders Chiips is entitled to enforce the subordination clause and claim priority over the furnishings supplied. The funds which have been set aside pursuant to the Order of Moshansky J., should be released to the Appellant.

JUDGMENT DATED AT CALGARY, Alberta

this 15 day of JULY A.D., 1994

CONCURRING REASONS FOR JUDGMENT

OF THE HONOURABLE MR. JUSTICE HARRADENCE

[41] I have had the advantage of reading the judgments of Foisy J.A. and Hetherington J.A. I agree with the conclusions reached by Foisy J.A. and the reasons he has given. With respect, I would, however, add the following comments.

[42] In light of the wording of s.40 of the P.P.S.A., it is most important to look at the terms of the purported subordination clause in deciding whether it is indeed a valid subordination clause. Section 40 reads as follows:

40 A secured party may, in a security agreement or otherwise, subordinate his security interest to any other interest, and the 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 a class of persons for whose benefit the subordination was intended.

[43] Two cases provide the benchmark against which subordination clauses must be measured and in so doing provide guidance in this area. *Euroclean Canada Inc. v. Forest Glade Investments Ltd. et al.* (1985), 16 D.L.R. (4th) 289 (Ont.C.A.) [leave to appeal to the Supreme Court of Canada refused (1985) 16 D.L.R. (4th) 289] and *Sperry Inc. v. Canadian Imperial Bank of Commerce et al.* (1985), 50 O.R. (2d) 267 (Ont. C.A.) set the standard for interpretation of subordination clauses.

[44] In *Euroclean*, the court considered s. 39 of the Ontario *Personal Property Security Act* (R.S.O. 1980, c.375) to determine priority between a debenture holder and a subsequent conditional seller. The subordination clause in *Euroclean* reads as follows (at p. 297):

(e) Not Encumber- The Corporation shall not, without the consent in writing of the Holder, create any mortgage, hypothec, charge, lien or other encumbrance upon the mortgaged property or any part thereof ranking or purporting to rank in priority to or in pari passu with the charge created by this Debenture, except that the Corporation may give mortgages or liens in connection with the acquisition of property after the date hereof or may acquire property subject to any mortgage, lien or other encumbrance thereon existing at the time of such acquisition and any such mortgage, lien or other encumbrance shall rank in priority to the charge hereby created.

[45] *Euroclean* sets a very high standard for subordination clauses. The wording of the *Euroclean* clause contains a very specific waiver of priority. The clause explicitly sets out that purchase money charges "shall" rank in priority.

[46] This clause can be contrasted to the clause set out in *Sperry*. In *Sperry*, the court was asked to consider the following clause in a general security agreement (at p. 270):

4. Ownership of Collateral

The undersigned represents and warrants that, except for the security interest created hereby and except for purchase money obligations, the undersigned is, or with respect to Collateral acquired after the date hereof will be, the owner of Collateral free from any mortgage, lien, charge, security interest or encumbrance. "Purchase money obligations" means any mortgage, lien or other encumbrance upon property assumed or given back as part of the purchase price of such property, or arising by operation of law or any

extension or renewal or replacement thereof upon the same property, if the principle amount of the indebtedness secured thereby is not increased.

[47] Counsel for *Sperry* argued this clause was a valid subordination clause which gave them priority over the bank. The court, however, disagreed and stated (at p.274):

As may be gathered from my interpretation of paras. 1 and 4 of the general security agreement I think that the document falls far short of showing an agreement by the bank to subordinate its security interest to that of *Sperry*.

[48] It is understandable that the court found that this clause "falls far short" of an agreement to subordinate the bank's interest. This clause is very vague and does not at any point mention the terms "rank" or "priority".

[49] From the above cases, the parameters are clear. An explicit and specific waiver clearly gives rise to a valid subordination clause. A vague and non-specific clause is not to be construed as a subordination clause. The question that arises is simply where on the continuum do the purported subordination clauses in the case at bar lie?

[50] The clauses which the appellant relies on read as follows:

4.05 Possession, Use and Release of Mortgaged Property

Until the Security becomes enforceable, the Company may dispose of or deal with the subject matter of the floating charge provided for in Section 4.01(b) hereof in the ordinary course of its business and for the purpose of carrying on the same; 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 on 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..."

6.01 The Company covenants and agrees with the Holder that, so long as this Debenture is outstanding, 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 other than this Debenture and the Series of Mortgages and Debentures referred to in Section 8.01(n), hereof which are intended to rank in priority as *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 or the giving of mortgages or liens in connection with the acquisition or purchase of such property or the acquiring of property subject to any mortgage, lien or encumbrance thereon existing at the time of such acquisition; 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;...

(Emphasis added)

[51] The respondent argues these clauses do not specifically give priority to the appellant and therefore no effect should be given to them. The respondent argues that because the wording does not meet the high standard set by *Euroclean*, these clauses do not constitute valid subordination clauses. The clauses, it is argued, merely permit Skyview to give security for purchase money.

[52] These clauses are not as specific as those clauses found in *Euroclean*, but they clearly go much further than those found in *Sperry*. Nowhere in *Sperry* do the words "rank" or "priority" appear. The clauses now being considered include the terms "ranking", "priority" and "purporting to rank". In construing the language of the clauses, it is apparent that the debenture holders have at least impliedly granted priority. Both clauses 4.05 and 6.01 set a general rule that there shall be no charges created that rank or purport to rank in priority. The clauses then go on to create an exception. The present situation is one that is contemplated by this exception. By setting out a rule that nothing shall rank in priority and then drafting an exception, the debenture holders were acknowledging that in this situation, they will subordinate their claim. For example clause 6.01 sets out that an encumbrance shall not be created that ranks in priority. It then creates an exception using the following language:

...provided, however, that this covenant shall not apply to, or 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....

[53] The exception set out is exactly the situation that has arisen in the present case. The debenture holders by using this language are not only permitting Skyview to create such

charges, they are clearly acknowledging that these charges rank ahead in priority. With respect, any other interpretation would render the exception devoid of any practical meaning.

[54] The cases cited by counsel for both the appellant and respondents, other than *Euroclean* and *Sperry*, add little to this analysis. However, *C.I.B.C. v. International Harvester* (1986), 6 P.P.S.A.C. 273 (Ont.C.A.) provides some insight into interpreting a clause of this nature. The subordination clause being considered in *C.I.B.C. v. International Harvester* is identical to clause 4.05 in the debentures. The trial judge gave effect to the subordination clause but was overturned by the Court of Appeal on the grounds that the subordination clause did not affect fixed charge security. Brooke J.A. of the Court of Appeal stated (at p.276):

... I think the subordination clause is limited to the floating charge....

[55] Neither court did an analysis of the subordination clause, however, both courts accepted this clause to be a subordination clause. It was not an issue at the trial or Court of Appeal level whether this clause was indeed a valid subordination clause. Nor did the bank, the drafters of this clause, ever challenge this as an invalid subordination clause. The Ontario Court of Appeal in reversing the lower court's decision at all times referred to this clause as a subordination clause. When one considers that in the present case only a floating charge is at issue, the logical conclusion is that the subordination clause found in this debenture should be declared valid.

[56] In construing these clauses it is also very important to look at commercial reality. These clauses are included to allow Skyview to carry on its business. Without such clauses, it would be impossible to enter into contracts with suppliers. Suppliers will not ship goods on credit to a company if their security interest is not given priority. An interpretation that rejects these particular clauses as valid subordination clauses does not give business efficacy to the document and completely ignores the commercial reality of transactions of this nature. One must look to the intention of the debenture holders at the time of drafting. The question to be asked is: what did the debenture holders intend when they included this clause? The debenture holders, in including these clauses clearly intended the subordination of their interests in certain situations. It is doubtful they intended that a third party roust register under the *P.P.S.A.* to get priority because this debenture was drafted two years prior to the *P.P.S.A.* coming into effect. It is recognized that the appellant could have obtained "super priority" merely by registering a financing statement in timely fashion. This they did not do, save for

the last shipment. Does this mean they should not be able to rely on the subordination clause to obtain priority? Surely not. The debenture holders contemplated and acquiesced to the subordination of their interests to suppliers of Skyview. Commercial reality requires this contemplation be given effect. Even though the appellant did not obtain "super priority", as they could have, by timely registration, this does not prevent them from relying on the subordination clause in the debenture.

CONCLUSION

[57] In summary, s.40 of the *P.P.S.A.* specifies that a subordination clause is given effect according to its terms. As pointed out, the terms of this clause are not as specific as those in *Euroclean*. The terms are however much more specific and clear than those in *Sperry*. This clause, by its terms, contemplates the subordination of the debenture holder's interests. It, at the very least, impliedly allows suppliers, such as the appellant Chips, to rank ahead of the debenture holders in regards to the goods supplied. Again, commercial reality requires that documents of this nature be given effect. For these reasons, the appeal should be allowed and the funds set aside should be released to the appellant.

JUDGMENT DATED at Calgary,
Alberta, this 15th day of
July, 1994.

DISSENTING REASONS FOR JUDGMENT OF

THE HONOURABLE MADAM JUSTICE HETHERINGTON

[58] The respondents B.C. Central Credit Union, Banque Laurentienne du Canada, Societe General (Canada), Roynat Inc., ABN AMRO Bank Canada and The Bank of Tokyo Canada hold five debentures issued by the respondent, Skyview Hotels Limited. The wording of the debentures is identical. Under the debentures Skyview gave these respondents, as holders of the debentures, floating charges on all of its property, present and future, except that which was subject to fixed charges under the debentures. These floating charges were to secure payment of the sums of money referred to in the debentures, as well as performance of the obligations of Skyview under the debentures.

[59] Subsequently the appellant, Chiips Inc., supplied goods to Skyview pursuant to an agreement which provided that the ownership of the goods would remain with Chiips until they were paid for in full.

[60] Skyview defaulted under the debentures. The debenture holders then applied to a master of the Court of Queen's Bench for an order appointing the respondent Ernst & Young Inc. receiver and manager of all of the existing and future assets of Skyview. The master granted this order.

[61] Skyview also failed to pay Chiips in full for the goods supplied under the agreement referred to above.

[62] Later the assets of Skyview were sold. The judge of the Court of Queen's Bench who approved this sale ordered that Ernst retain the sum of \$312,589.00, such sum to "stand in the stead of the goods claimed by Chiips, that is, the goods which it had supplied to Skyview.

[63] Chiips contends that its security interest in the money held by Ernst in place of these goods, has priority. It relies on what it says are subordination clauses in the debentures. The debenture holders claim that their security interests in this money have priority. These competing claims must be reconciled in accordance with the provisions of the *Personal Property Security Act*, S.A. 1988, c. P-4.05.

[64] The chronology of the events described above and others is important in this case. I will set it out below:

1988

January 31 Skyview issued debentures.

February 29 Debentures registered at Corporate Registry under the *Business Corporations Act*, R.S.A. 1980, c. B-15.

1990

October 1 *Personal Property Security Act* came into force.

October 1 Security interests of debenture holders deemed to have been registered and perfected under the *Personal Property Security Act* (s. 75(3)).

1991

November 14 Chiips entered into agreement in writing to supply goods to Skyview.

December First load of goods sent by Chiips to Skyview.

1992

January to March Many loads of goods sent by Chiips to Skyview.

May 14 Ernst appointed receiver and manager of assets of Skyview.

June 5 Chiips perfected its purchase-money security interest in goods supplied under its agreement with Skyview by registering a financing statement at the Personal Property Registry, in accordance with s. 25 of the *Personal Property Security Act*.

June 23 Registration of security interests of debenture holders continued by filing of financial statements at Personal Property Registry under s. 23(1) and s. 25 of the *Personal Property Security Act*.

July 14 Skyview received final shipment of goods from Chiips.

1993

January 28 Chiips applied to master of Court of Queen's Bench for determination of priority.

April 7 Chiips appealed from order of master to judge of Court of Queen's Bench.

July 30 Sale of assets of Skyview approved.

On the 28th of January, 1993, Chiips applied to the master for an order

- determining that it had priority and was entitled to the goods which it had supplied to Skyview, and
- for permission to enforce its security by repossessing and removing the goods from the premises of Skyview.

The master found that Chiips had security and priority only in relation to the goods which Skyview received on the 14th of July, 1992. He gave Chiips permission to enforce this security by repossessing and removing these goods from the premises of Skyview. Chiips appealed from this order to a judge, who dismissed the appeal. It appealed again to this court.

[65] There is no doubt that the *Personal Property Security Act* applies to the transactions in question in this case. Section 3(1) of the *Act* says:

"3(1) Subject to section 4, this Act applies to

- (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
- (b) without limiting the generality of clause (a), a ... conditional sale, floating charge, ... where they secure payment or performance of an obligation."

Section 4 is not relevant.

[66] Both Chiips and the debenture holders had security interests in the goods which Chiips supplied to Skyview, according to the definition of a security interest in s. 1(1)(qq) of the *Act*. Their interests secured payment, and in the case of the debenture holders, performance of obligations. In addition, the sale of the goods by Chiips to Skyview was a conditional sale, and the respondent debenture holders had a floating charge on these goods. Therefore, under both ss. (a) and ss. (b) of s. 3(1), the dealings of Chiips and the debenture holders in relation to the goods supplied by Chiips to Skyview come under the *Act*.

[67] It is true that the *Personal Property Security Act* did not come into force until the 1st of October, 1990, and Skyview issued the debentures on the 31st of January, 1988. However, s. 74(2)(a) and (b) of the *Act* say that it applies to every security agreement and every security interest not validly terminated in accordance with the prior law before October 1, 1990. The debentures are security agreements according to the definition of a security agreement in s. 1(1) (pp) of the *Act*. It is not suggested that they were validly terminated before October 1, 1990.

[68] The question is -- which security interest or interests, that of Chiips or that of the debenture holders, has priority under the *Act*?

[69] The security interest of Chiips is a purchase-money security interest as that phrase is defined in s. 1(1)(ii). To the extent that Chiips met the requirements of s. 34(2) when it perfected its purchase-money security interest by registering a financing statement, it has priority over any other security interest in the money standing in the stead of the goods. The relevant parts of s. 34(2) read as follows:

"(2) A purchase-money security interest in

(a) collateral or, subject to section 28, its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

...

has priority over any other security interest in the same collateral given by the same debtor."

[70] Chiips supplied many loads of goods to Skyview before the end of March, 1992. However, it did not register a financing statement until June 5, 1992. In doing so it perfected its purchase-money security interest, but not within the time stipulated in s. 34(2). It cannot, therefore claim priority under s. 34(2) in relation to goods supplied before the end of March, 1992.

[71] Chiips supplied one load of goods to Skyview after it registered its financing statement. That load was delivered on the 14th of July, 1992. The master found that Chiips had priority in relation to these goods. The judge did not vary this finding, and the debenture holders have not appealed from it. It appears, therefore, that it is not disputed that Chiips' security interest in the money held by Ernst has priority to the extent of the value of this shipment.

[72] So far as the bulk of the goods supplied by Chiips to Skyview is concerned, Chiips cannot claim priority under s. 34(2). It is necessary, therefore, to see what other sections of the *Act* apply.

[73] Section 35(1) of the *Act* contains residual priority rules. The relevant parts of it read as follows:

"35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between perfected security interests in the same collateral is determined by the order of occurrence of the following:

(i) the registration of a financing statement, without regard to the date of attachment of the security,

..., or

(iii) perfection under section ... 75,

whichever is earlier,

...."

[74] Under s. 75(3) the security interests of the debenture holders were deemed to have been registered and perfected when the *Act* came into force on the 1st of October, 1990. The debenture holders filed financial statements on the 23rd of June, 1992, before the registered and perfected status of the security interests ceased to be effective under s. 75(3). The security interests were therefore continuously perfected (ss. 23(1), 25 and 75(3)). Chiips did not perfect its security interest until it registered a financial statement on the 5th of June, 1992. The debenture holders appear, therefore, to have priority pursuant to s. 35(1) of the *Act*.

[75] Counsel for Chiips argued, however, that each of the debentures contained clauses which in effect subordinated the security interest of the debenture holder to that of Chiips. It is not clear that at common law Chiips could rely on these clauses, because it is not a party to the contracts in which they are found, that is, the debentures. Authority for the proposition that it can not is found in *Greenwood Shopping Plaza Ltd. v. Beattie et al.*, [1980] 2 S.C.R. 228, and in *Euroclean Canada Inc. v. Forest Glade Investments Ltd. et al.* (1985), 16 D.L.R. (4th) 289 (Ont. C.A.), (leave to appeal to S.C.C. refused (1985), 16 D.L.R. (4th) 289n) at 300. *Savin Canada Inc. v. Protech Office Electronics Ltd. et al.* (1984), 8 D.L.R. (4th) 225 (B.C.C.A.), a contest between the holders of two different debentures, would appear to be authority to the contrary. However, the right of one debenture holder to rely on clauses in a debenture held by another was not discussed in the judgment, nor was the *Greenwood* case referred to.

[76] In any event, priority in this case must be determined, not under the common law, but under the *Personal Property Security Act* Section 40 of the *Act* reads as follows:

"40 A secured party may, in a security agreement or otherwise, subordinate his security interest to any other interest, and the 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 a class of persons for whose benefit the subordination is intended."

[77] In *Euroclean* the court considered (at 299-302) the corresponding section in the *Personal Property Security Act* (R.S.O. 1980, c. 375) then in effect in Ontario, that is s. 39. That section read as follows:

"39. A secured party may, in the security agreement or otherwise, subordinate his security interest to any other security interest."

[78] In *Euroclean* Mr. Justice Houlden, writing for the court, concluded at 301, 302:

"In my opinion, s. 39 is intended to confer a statutory right on a secured party to waive the priority given him by the P.P.S.A. and to confer a corresponding right on the beneficiary of such a waiver to enforce it, even though he is not a party to the agreement which created it or has no knowledge of its existence."

[79] The effect of s. 40 of the *Alberta Act* is the same as that of s. 39 of the *Ontario Act* referred to above. Two questions must then be answered. First, did the debenture holders waive the priority given to them by the *Alberta Act*? Second, is Chiips the person or one of a class of persons for whose benefit the waiver was intended?

[80] The clauses on which counsel for Chiips relied are the following (AB 38 and 42, 43):

"4.05 Possession, Use and Release of Mortgaged Property

... 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 on any part of the Mortgaged Property ranking or purporting to rank or capable of being enforced in priority to or in 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 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

...."

"6.01 The Company covenants and agrees with the Holder that, so long as this Debenture is outstanding, 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 other than this Debenture and the Series of Mortgages and Debentures referred to in Section 8.01(n) hereof which are intended

to rank in priority as *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 or the giving of mortgages or liens in connection with the acquisition or purchase of such property ...

...."

[81] Clearly these clauses do not contain an explicit waiver of priority. They are, for example, quite different from the clause in question in *Euroclean*. It read as follows (at 297):

"(e) Not Encumber – The Corporation shall not, without the consent in writing of the Holder, create any mortgage, hypothec, charge, lien or other encumbrance upon the mortgaged property or any part thereof ranking or purporting to rank in priority to or *pari passu* with the charge created by this Debenture, except that the Corporation may give mortgages or liens in connection with the acquisition of property after the date hereof or may acquire property subject to any mortgage, lien or other encumbrance thereon existing at the time of such acquisition and any such mortgage, lien or other encumbrance shall rank in priority to the charge hereby created."

(Emphasis added)

[82] It is not surprising that the court in *Euroclean* found this to be a subordination clause (at 299). The part of it which is underlined above contains a clear and explicit waiver of priority. There is no such explicit waiver in the clauses in question in this case.

[83] Do these clauses give rise to an implied waiver of priority by the debenture holders? In my view they do not.

[84] In each debenture the exception in clause 4.05(a) and the proviso in clause 6.01(c)(i) are permissive. They permit Skyview to assume or to give security for purchase money, which security ranks or is capable of being enforced in priority to or *pari passu* with, among other things, the floating charge. If it were not for this exception and proviso, the assuming or giving of such security by Skyview would constitute a breach of the covenants made by it in these clauses, and an event of default under the debenture. There is nothing in the clauses to suggest any intention on the part of the debenture holders to go further than to permit the assuming or giving of such security. Nor was anything further required to permit Skyview to carry on business.

[85] There is nothing in these clauses to suggest that security for purchase money will rank or be capable of being enforced in the manner described because of any waiver on the part of the debenture holders. Nor is there anything to suggest that where security for

purchase money does not rank or is not capable of being enforced in priority to or *pari passu* with, among other things, the floating charge, which is the case here, the debenture holder waives any of its rights. I do not see how any waiver of priority can be implied in these clauses.

[86] Beyond that, the priority with which we are concerned is priority under the ***Personal Property Security Act***. Skyview issued the debentures in which the clauses in question are found on the 31 st of January, 1988. The ***Personal Property Security Act*** was not assented to until the 6th of July, 1988. It did not come into force until the 1st of October, 1990. No doubt on the 31st of January, 1988, the debenture holders could have waived any right to priority which they might have in the future. However, they did not do so explicitly, and I do not think that such a waiver can be implied from the clauses quoted above.

[87] Since in my view the debenture holders did not waive any priority given to them by the ***Act***, it is not necessary for me to consider whether Chiips is the person or one of a class of persons for whose benefit the waiver was intended.

[88] I will deal briefly with the cases relied on by counsel. Counsel for Chiips referred us to the ***Euroclean*** case, which I have already discussed, and to ***Canadian Imperial Bank of Commerce v. International Harvester Credit Corporation of Canada Ltd.*** (1986), 6 P.P.S.A.C. 273 (Ont. C.A.). In that case the trial court ((1985), 4 P.P.S.A.C. 329 (Ont. S.C.)) and the court of appeal were required to consider a clause which was almost identical to clause 4.05 quoted above. It appears that both at trial and on appeal it was assumed that it was a subordination clause. The trial judge found that it applied to the trucks in question even though they formed part of the fixed charge. The court of appeal disagreed. It was of the view that the clause only applied to the floating charge, and did not therefore apply to the trucks. In these circumstances the court of appeal did not need to decide whether the clause was in fact a subordination clause, and did not discuss this question.

[89] Counsel for Chiips also referred us to ***Transamerica Commercial Finance Corporation, Canada v. Imperial T.V. & Stereo Centre Ltd. et al.*** (1993), 146 A.R. 30 (Alta. Q.B.). In that case Madam Justice Nash was required to interpret a clause which she described as follows (at 33):

"Imperial, by the terms of the Debenture, agreed not to assume any other charges against the assets of the company, without the prior written consent of the Credit Union, that would have priority over the Credit Union's debenture unless, *inter alia*;

'The same be given to or in favour of the bankers of [Imperial] on the security of the accounts receivable or the inventory of [Imperial] to secure current loans required for the usual purposes of the business of [Imperial] and whether given pursuant to the provisions of the *Bank Act* or otherwise.' (The Subordination Clause)"

Madam Justice Nash found this to be a subordination clause (at 35). In doing so she relied on *Euroclean*. She found that the above clause was similar to the clause under consideration in that case. With respect, I do not agree. The clause in question in *Euroclean* contained an explicit waiver of priority. The one quoted above does not.

[90] Counsel for the debenture holder referred us to *Sperry Inc. v. Canadian Imperial Bank of Commerce et al.* (1985), 50 O.R. (2d) 267 (C.A.). In that case the court was required to interpret the following clause in a general security agreement (at 270):

"4. Ownership of Collateral

The undersigned represents and warrants that, except for the security interest created hereby and except for purchase money obligations, the undersigned is, or with respect to Collateral acquired after the date hereof will be, the owner of the Collateral free from any mortgage, lien, charge, security interest or encumbrance. 'Purchase money obligations' means any mortgage, lien or other encumbrance upon property assumed or given back as part of the purchase price of such property, or arising by operation of law or any extension or renewal or replacement thereof upon the same property, if the principal amount of the indebtedness secured thereby is not increased."

(Emphasis added by Ontario court)

In that case Mr. Justice Morden, writing for the court, referred to extrinsic evidence on which the trial judge had relied, and concluded (at 274):

"Sperry also submitted that the evidence disclosed an agreement by the bank to subordinate its security interest to that of Sperry. An agreement of this kind is recognized by s. 39 of the Act. As may be gathered from my interpretation of paras. 1 and 4 of the general security agreement I think that the document falls far short of showing an agreement by the bank to subordinate its security interest to that of Sperry. Contrast the terms in the debenture in *Euroclean*"

I agree with counsel for the debenture holders that this case is analogous to the one before us.

[91] After considering these cases, and for the reasons set out above, it is my view that the debenture holders did not, in the clauses in the debentures on which Chiips relies, waive their priority under the *Personal Property Security Act*. They did not subordinate their security interests to any other security interest. Under s. 35(1) of the *Act*, therefore, their

security interests in the money held by Ernst in place of the goods supplied by Chiips to Skyview, has priority.

[92] I would therefore dismiss the appeal.

DATED at CALGARY, Alberta,
this 15th day of JULY,
1994.

TAB G

**The Maritime Life Assurance
Company Appellant**

v.

**Saskatchewan River Bungalows Ltd. and
Connie Doreen Fikowski Respondents**

INDEXED AS: SASKATCHEWAN RIVER BUNGALOWS LTD. v.
MARITIME LIFE ASSURANCE CO.

File No.: 23194.

1994: March 14; 1994: June 23.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory,
McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA

*Insurance — Policy lapse — Waiver — Insurance
premium remaining unpaid after grace period expired —
Insurer requesting immediate payment of premium —
Whether insurer waived right to compel timely payment
under policy — If so, whether waiver still in effect when
payment tendered.*

*Insurance — Relief against forfeiture — Waiver —
Insurance premium remaining unpaid after grace period
expired — Insurer requesting immediate payment of pre-
mium — Whether insurer waived right to compel timely
payment under policy — If not, whether relief against
forfeiture should be granted under s. 10 of Judicature
Act, R.S.A. 1980, c. J-1.*

In 1978, Maritime issued an insurance policy on the
life of MF to the respondent Saskatchewan River Bun-
galows Ltd. ("SRB"). In 1984, ownership of the policy
was transferred to the respondent Fikowski ("CF"), who
became the beneficiary. SRB remained responsible for
paying the annual premiums. On July 24, 1984, SRB
mailed a cheque to pay the annual premium due on July
26, but this cheque was never received by Maritime, nor
was it deducted from SRB's bank account. After the
grace period expired on August 26, Maritime sent a late
payment offer to SRB agreeing to accept payment of the
July premium if it was postmarked or received by Sep-
tember 8, but SRB did not respond to this offer. In Nov-
ember Maritime wrote a letter advising CF that the pre-
mium due on July 26, 1984 remained unpaid and stating
that "this policy is now technically out of force, and we

**La Maritime, Compagnie d'assurance-
vie Appelante**

c.

**Saskatchewan River Bungalows Ltd. et
Connie Doreen Fikowski Intimées**

RÉPERTORIÉ: SASKATCHEWAN RIVER BUNGALOWS LTD. c.
LA MARITIME, COMPAGNIE D'ASSURANCE-VIE

N^o du greffe: 23194.

1994: 14 mars; 1994: 23 juin.

Présents: Les juges La Forest, L'Heureux-Dubé,
Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

*Assurance — Déchéance de police — Renonciation
— Prime d'assurance demeurant impayée à l'expiration
du délai de grâce — Assureur demandant le paiement
immédiat de la prime — L'assureur a-t-il renoncé au
droit d'exiger le paiement dans le délai prévu par la
police? — Dans l'affirmative, la renonciation s'appli-
que-t-elle toujours lorsque le paiement a été offert?*

*Assurance — Levée de déchéance — Renonciation —
Prime d'assurance demeurant impayée à l'expiration du
délai de grâce — Assureur demandant le paiement
immédiat de la prime — L'assureur a-t-il renoncé au
droit d'exiger le paiement dans le délai prévu par la
police? — Dans la négative, y a-t-il lieu de lever la
déchéance aux termes de l'art. 10 de la Judicature Act,
R.S.A. 1980, ch. J-1?*

En 1978, La Maritime a établi une police d'assurance
sur la tête de MF en faveur de l'intimée Saskatchewan
River Bungalows Ltd. («SRB»). En 1984, la propriété
de la police a été transférée à l'intimée Fikowski («CF»)
qui en est alors devenue la bénéficiaire, SRB conservant
l'obligation de payer les primes annuelles. Le 24 juillet
1984, SRB a mis à la poste un chèque pour payer la
prime annuelle échéant le 26 juillet, mais La Maritime
n'a jamais reçu ce chèque qui n'a pas non plus été
débité du compte bancaire de SRB. Après l'expiration
du délai de grâce le 26 août, La Maritime a envoyé une
offre de paiement tardif à SRB. Elle y offrait d'accepter
le paiement de la prime de juillet à la condition qu'il
porte une date d'oblitération qui ne soit pas postérieure
au 8 septembre ou qu'il soit remis à cette même date.
SRB n'a toutefois pas répondu à cette offre. En novem-

will require immediate payment of \$1,361 to pay the July 1984-85 premium". Finally, in February 1985 Maritime sent a notice of policy lapse to the respondents. The application for reinstatement appended to the notice required evidence of insurability. Since SRB closed its hotel business and picked up the corporate mail infrequently during the winter season, it did not become aware of the late payment offer, the November letter or the lapse notice until April 1985. It then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused. MF was by then terminally ill and uninsurable. He died in August. Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The trial judge dismissed the respondents' claim for benefits under the policy and refused to grant them relief against forfeiture. A majority of the Court of Appeal allowed the respondents' appeal. The issues here are whether Maritime waived its right to compel timely payment in accordance with the terms of the policy, and, if there was no waiver, whether the respondents are entitled to relief against forfeiture under s. 10 of the *Judicature Act*.

Held: The appeal should be allowed.

The respondents are not entitled to any of the benefits under the policy. The demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy. The waiver was not still in effect, however, when SRB tendered payment of the missing premium in July 1985. Waiver can be retracted if reasonable notice is given to the party in whose favour it operates. A notice requirement should not be imposed, however, where there is no reliance on the waiver. Here, the respondents were not aware of Maritime's waiver until they received the November letter in April 1985 and therefore did not rely on it. The statement that "this policy has lapsed" contained in the February lapse notice accordingly took effect on its terms. In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. Even if a reasonable notice requirement were imposed, it would thus be adequately met by the respon-

bre, La Maritime a, par lettre, avisé CF que la prime échue le 26 juillet 1984 était toujours en souffrance. Cette lettre indiquait que «cette police est maintenant formellement sans effet et nous exigerons le paiement immédiat de 1 361 \$ pour acquitter la prime de juillet 1984-1985». Enfin, en février 1985, La Maritime a envoyé aux intimées un avis de déchéance de la police. La demande de remise en vigueur jointe à cet avis exigeait une preuve d'assurabilité. Étant donné qu'elle avait fermé son hôtel et qu'elle recueillait peu souvent le courrier de l'entreprise pendant la saison hivernale, SRB n'a pu prendre connaissance de l'offre de paiement tardif, de la lettre de novembre et de l'avis de déchéance qu'en avril 1985. Elle s'est alors mise à la recherche du chèque perdu. Ce n'est qu'en juillet 1985 que SRB a envoyé à La Maritime un chèque de remplacement et un chèque pour la prime de 1985. Tous deux ont été refusés. MF était alors en phase terminale et non assurable. Il est décédé en août. La Maritime a rejeté la demande d'indemnité de SRB aux termes de la police pour le motif que celle-ci n'était plus en vigueur. Le juge de première instance a rejeté la demande d'indemnité des intimées aux termes de la police et a refusé de lever la déchéance. La Cour d'appel à la majorité a accueilli l'appel des intimées. Le pourvoi soulève les questions suivantes: La Maritime a-t-elle renoncé à son droit d'exiger un paiement en temps opportun conformément aux modalités de la police et, s'il n'y a pas eu renonciation, les intimées ont-elles droit à la levée de la déchéance aux termes de l'art. 10 de la *Judicature Act*?

Arrêt: Le pourvoi est accueilli.

Les intimées n'ont droit à aucune prestation aux termes de la police. La demande de paiement dans la lettre de novembre était une expression claire et sans équivoque de l'intention de La Maritime de maintenir la couverture moyennant le paiement de la prime de juillet et, à ce titre, constituait une renonciation au délai imparti pour payer la prime prévue dans la police. La renonciation ne s'appliquait toutefois plus lorsque SRB a offert le paiement de la prime échue en juillet 1985. On peut résilier une renonciation si un avis raisonnable est donné à la partie en faveur de laquelle elle joue. Une exigence d'avis ne devrait toutefois pas être imposée lorsqu'on ne s'est pas fié à la renonciation. En l'espèce, les intimées n'ont pris connaissance de la renonciation de La Maritime que lorsqu'elles ont reçu, en avril 1985, la lettre de novembre et elles ne se sont donc pas fiées à cette renonciation. La déclaration portant que «cette police est tombée en déchéance», contenue dans l'avis de déchéance de février, avait plein effet. Quoi qu'il en soit, lorsque les intimées ont ouvert leur courrier en avril 1985, elles ont évidemment pris connaissance de

dents' failure to tender a replacement cheque until July 1985, three months later. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case.

Relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach. The reasonable conduct requirement is not met in this case. The respondents knew, at all relevant times, that MF was terminally ill and uninsurable, but they nonetheless chose to have their correspondence from Maritime sent to a post office mail box over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. As the respondents are barred by their conduct from recovering, it is not necessary to determine whether the court's general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act* or whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context.

Cases Cited

Referred to: *Holwell Securities Ltd. v. Hughes*, [1974] 1 All E.R. 161; *W. J. Alan & Co. v. El Nasr Export and Import Co.*, [1972] 2 Q.B. 189; *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 584; *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259; *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61; *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231; *Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144; *Anguish v. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376, leave to appeal refused, [1988] 2 S.C.R. vii; *McGeachie v. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), aff'd (1893), 23 S.C.R. 148; *Northern Life Assurance Co. of Canada v. Reier-*

l'intention de La Maritime de résilier sa renonciation. Même si une exigence d'avis raisonnable était imposée, l'omission des intimées d'offrir un chèque de remplacement avant juillet 1985, soit trois mois plus tard, y satisfait adéquatément. La Maritime n'était pas tenue d'accepter le chèque de remplacement et la police est tombée en déchéance. Elle n'était tenue de remettre la police en vigueur que si les intimées fournissaient une preuve d'assurabilité, ce qui était impossible en l'espèce.

La levée de la déchéance est une réparation d'*equity* et est purement discrétionnaire. Dans l'exercice de son pouvoir discrétionnaire, la cour doit tenir compte du comportement du requérant, de la gravité des manquements et de l'écart entre la valeur du bien frappé de déchéance et le tort causé par le manquement. On ne satisfait pas à l'exigence de la conduite raisonnable en l'espèce. Les intimées savaient, à toutes les époques pertinentes, que MF était en phase terminale et non assurable. Elles ont néanmoins choisi de faire suivre les lettres de La Maritime dans une boîte postale, à un bureau de poste, pendant l'hiver et de ne recueillir leur courrier qu'irrégulièrement. Lorsqu'en avril 1985 elles ont appris que le paiement de la prime était échu depuis neuf mois, les intimées n'ont offert aucun chèque de remplacement, mais ont plutôt attendu trois mois, jusqu'en juillet 1985. Puisqu'en raison de leur comportement les intimées n'ont pas droit à un recouvrement, il n'est pas nécessaire de déterminer si le pouvoir général qu'a la cour de lever la déchéance, en vertu de l'art. 10 de la *Judicature Act*, s'applique aux contrats régis par l'*Insurance Act*, ou si la levée de la déchéance peut généralement faire fonction de réparation avant sinistre dans le contexte des assurances.

Jurisprudence

Arrêts mentionnés: *Holwell Securities Ltd. c. Hughes*, [1974] 1 All E.R. 161; *W. J. Alan & Co. c. El Nasr Export and Import Co.*, [1972] 2 Q.B. 189; *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 584; *Mitchell and Jewell Ltd. c. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259; *Marchischuk c. Dominion Industrial Supplies Ltd.*, [1991] 2 R.C.S. 61; *Federal Business Development Bank c. Steinbock Development Corp.* (1983), 42 A.R. 231; *Duplisea c. T. Eaton Life Assurance Co.*, [1980] 1 R.C.S. 144; *Anguish c. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376, autorisation de pourvoi refusée, [1988] 2 R.C.S. vii; *McGeachie c. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), conf. par (1893), 23 R.C.S. 148; *Northern Life Assurance Co. of*

son, [1977] 1 S.C.R. 390; *Hartley v. Hymans*, [1920] 3 K.B. 475; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616; *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused, [1978] 2 S.C.R. vii; *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691; *Liscumb v. Provenzano* (1985), 51 O.R. (2d) 129 (H.C.J.), aff'd 55 O.R. (2d) 404 (C.A.); *Stenhouse v. General Casualty Insurance Co. of Paris*, [1934] 3 W.W.R. 564; *Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co. of Canada* (1977), 2 A.R. 63; *Johnston v. Dominion of Canada Guarantee and Accident Insurance Co.* (1908), 17 O.L.R. 462.

Statutes and Regulations Cited

Insurance Act, R.S.A. 1980, c. I-5, ss. 201, 205, 211.
Judicature Act, R.S.A. 1980, c. J-1, s. 10.

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APPEAL from a judgment of the Alberta Court of Appeal (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶1-2895, reversing a decision of the Court of Queen's Bench dismissing the respondents' action against the appellant. Appeal allowed.

James D. McCartney and Brian E. Leroy, for the appellant.

James S. Peacock, for the respondents.

The judgment of the Court was delivered by

MAJOR J. —

I. Facts

On July 26, 1978, the appellant Maritime Life Assurance Company ("Maritime") issued an insurance policy on the life of Michael Fikowski Sr. to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Connie Fikowski, at which time she became the beneficiary.

Canada c. Reiersen, [1977] 1 R.C.S. 390; *Hartley c. Hymans*, [1920] 3 K.B. 475; *Charles Rickards Ltd. c. Oppenheim*, [1950] 1 K.B. 616; *Guillaume c. Stirton* (1978), 88 D.L.R. (3d) 191 (C.A. Sask.), autorisation de pourvoi refusée, [1978] 2 R.C.S. vii; *Shiloh Spinners Ltd. c. Harding*, [1973] A.C. 691; *Liscumb c. Provenzano* (1985), 51 O.R. (2d) 129 (H.C.J.), conf. par 55 O.R. (2d) 404 (C.A.); *Stenhouse c. General Casualty Insurance Co. of Paris*, [1934] 3 W.W.R. 564; *Swan Hills Emporium & Lumber Co. c. Royal General Insurance Co. of Canada* (1977), 2 A.R. 63; *Johnston c. Dominion of Canada Guarantee and Accident Insurance Co.* (1908), 17 O.L.R. 462.

Lois et règlements cités

Insurance Act, R.S.A. 1980, ch. I-5, art. 201, 205, 211.
Judicature Act, R.S.A. 1980, ch. J-1, art. 10.

Doctrine citée

Snell, Edmund Henry Turner. *Snell's Equity*, 29th ed. London: Sweet & Maxwell, 1990.
Waddams, S. M. *The Law of Contracts*, 3rd ed. Toronto: Canada Law Book, 1993.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶1-2895, qui a infirmé la décision de la Cour du Banc de la Reine de rejeter l'action des intimées contre l'appelante. Pourvoi accueilli.

James D. McCartney et Brian E. Leroy, pour l'appelante.

James S. Peacock, pour les intimées.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR —

I. Les faits

Le 26 juillet 1978, l'appelante La Maritime, Compagnie d'assurance-vie, («La Maritime») a établi une police d'assurance sur la tête de Michael Fikowski, père, en faveur de l'intimée Saskatchewan River Bungalows Ltd. («SRB»). En 1984, la propriété de la police a été transférée à l'intimée Connie Fikowski qui en est alors devenue la bénéficiaire.

SRB retained the responsibility of paying the annual premiums under the policy.

The policy issued to the respondents was a term policy, renewable every five years. The policy expiry date was the insured's 70th birthday — July 26, 2000. However, prior to July 26, 1988, the policyholder had an option to convert the policy to a new life or endowment policy. The policy contained the following conditions relating to premium payment:

2. PREMIUM PAYMENT PROVISIONS

(1) General

The agreements made by the Company and contained in this contract are conditional upon payment of the premiums as they become due.

Each premium is payable on or before its due date at the Head Office of the Company.

(2) Grace Period

After the first premium has been paid, a grace period of thirty-one days following its due date is allowed for the payment of each subsequent premium. During the grace period, this policy continues in effect.

(3) Non-payment of Premiums

If any premium remains unpaid at the end of the grace period, this policy automatically lapses (terminates because of non-payment of premiums).

Under certain conditions, this policy may be reinstated, as described below.

(4) Reinstatement

This policy may be reinstated within 3 years of the date of the lapse upon written application to the Company subject to the following conditions:

- a) evidence that satisfies the Company of the life insured's good health and insurability must be submitted; and
- b) all unpaid premiums plus interest, at a rate to be determined by the Company, must be paid to the Company.

Over the years, SRB paid the annual policy premium irregularly. In 1979, the policy lapsed after SRB failed to pay the annual premium within the 31-day grace period. The policy was subsequently

ficiaire, SRB conservant l'obligation de payer les primes annuelles aux termes de la police.

La police en question était temporaire et renouvelable tous les cinq ans. Elle devait expirer au 70^e anniversaire de naissance de l'assuré, soit le 26 juillet de l'an 2000. Toutefois, le preneur pouvait, avant le 26 juillet 1988, convertir la police en une nouvelle assurance sur la vie ou assurance mixte. Les modalités suivantes de la police régissaient le paiement de la prime:

[TRADUCTION]

2. PAIEMENT DE LA PRIME

(1) Dispositions générales

Les ententes conclues par la compagnie et prévues dans la présente police sont conditionnelles au paiement des primes à leur échéance.

Chaque prime est payable au plus tard à la date d'échéance au siège social de la compagnie.

(2) Délai de grâce

Une fois la première prime payée, un délai de grâce de trente et un jours suivant la date d'échéance est alloué pour le paiement de chaque prime subséquente. La police demeure en vigueur pendant le délai de grâce.

(3) Non-paiement des primes

Si une prime demeure impayée à la fin du délai de grâce, la police tombe automatiquement en déchéance (elle est résiliée pour non-paiement de la prime).

La police peut être remise en vigueur à certaines conditions, conformément à la clause suivante.

(4) Remise en vigueur

La police peut être remise en vigueur dans les trois ans de la date de déchéance sur présentation d'une demande écrite à la compagnie et à la condition

- a) de soumettre à la compagnie une preuve qui la convainc de la bonne santé et de l'assurabilité de l'assuré;
- b) de payer à la compagnie toutes les primes en souffrance plus l'intérêt, à un taux déterminé par celle-ci.

Au fil des ans, SRB a payé la prime annuelle irrégulièrement. En 1979, la police est tombée en déchéance après que SRB eut omis de payer la prime annuelle dans le délai de grâce de 31 jours.

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reinstated in accordance with the reinstatement provision (clause 2(4)) of the policy. In 1981, SRB again failed to make payment within the grace period. On this occasion, Maritime accepted late payment and did not require evidence of insurability or an application for reinstatement.

On July 24, 1984, SRB mailed a cheque for \$1,316 to pay the annual premium due on July 26, 1984. On August 13, 1984, SRB received a premium due notice from Maritime, requesting payment of \$1,361. It sent Maritime a cheque for \$45 — the difference between the July 24 cheque and the amount demanded in the payment due notice. This second cheque was received by Maritime on August 22, 1984. The first cheque, in the amount of \$1,316, was never received by Maritime, nor was it deducted from SRB's bank account.

Subsequent to the expiry of the grace period on August 26, 1984, Maritime sent a late payment offer to SRB. In this offer, Maritime agreed to accept late payment of the July premium if it was "postmarked or, if not mailed, received in the Head Office at Halifax, N.S." on or before September 8, 1984. The offer also contained an explicit reserve of Maritime's right to require evidence of insurability. SRB did not respond to the late payment offer.

On November 28, 1984, Maritime wrote a letter ("the November letter") advising the respondent Connie Fikowski that the premium due on July 26, 1984 remained unpaid. This letter contained the following statement:

Unfortunately this policy is now technically out of force, and we will require immediate payment of \$1,361.00 to pay the July 1984-85 premium.

Finally, on February 2, 1985, Maritime sent a notice of policy lapse to the respondents. This notice was originally sent to an incorrect address in Vancouver, but was eventually forwarded to SRB. It read, in part:

La police a par la suite été remise en vigueur conformément à la disposition pertinente de celle-ci (clause 2(4)). En 1981, SRB a de nouveau omis d'effectuer le paiement dans le délai de grâce. La Maritime a alors accepté le paiement tardif, sans exiger de preuve d'assurabilité ni de demande de remise en vigueur.

Le 24 juillet 1984, SRB a mis à la poste un chèque de 1 316 \$ pour payer la prime annuelle échéant le 26 juillet 1984. Le 13 août 1984, SRB a reçu de La Maritime un avis d'échéance de prime exigeant le paiement de 1 361 \$. Elle a envoyé à La Maritime un chèque de 45 \$, soit la différence entre le montant du chèque du 24 juillet et celui exigé dans l'avis d'échéance de prime. La Maritime a reçu ce second chèque le 22 août 1984. Elle n'a jamais reçu le premier chèque de 1 316 \$, qui n'a pas non plus été débité du compte bancaire de SRB.

Après l'expiration du délai de grâce le 26 août 1984, La Maritime a envoyé une offre de paiement tardif à SRB. Elle y offrait d'accepter le paiement tardif de la prime de juillet à la condition qu'il «porte [...] une date d'oblitération qui ne soit pas postérieure» au 8 septembre 1984 «ou, s'il n'est pas posté, [qu'il soit] remis au siège social à Halifax (N.-É.)» à cette même date. La Maritime se réservait aussi explicitement le droit d'exiger une preuve d'assurabilité. SRB n'a pas répondu à l'offre de paiement tardif.

Le 28 novembre 1984, La Maritime a, par lettre («lettre de novembre»), avisé l'intimée Connie Fikowski que la prime échue le 26 juillet 1984 était toujours en souffrance. Cette lettre indiquait notamment:

[TRADUCTION] Malheureusement, cette police est maintenant formellement sans effet et nous exigerons le paiement immédiat de 1 361 \$ pour acquitter la prime de juillet 1984-1985.

Enfin, le 2 février 1985, La Maritime a envoyé aux intimées un avis de déchéance de la police. Cet avis a d'abord été envoyé à une adresse erronée à Vancouver, puis finalement à SRB. Il se lisait en partie comme suit:

According to our records this policy has lapsed for non-payment of the premium due on the date shown. The policy is no longer in force and no benefits are payable. Because your insurance affords valuable protection and represents a worthwhile investment we invite you to apply for reinstatement of the policy.

The Application for Reinstatement appended to the lapse notice required evidence of insurability.

SRB closed its hotel business at Lake Louise, Alberta for the winter season around the middle of November 1984. SRB picked up the corporate mail on an infrequent basis throughout the winter. As a result, SRB did not become aware of the late payment offer, the November letter or the lapse notice until April 1985. They then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused.

On July 9, 1985, SRB's insurance agent informed Maritime that Michael Fikowski Sr. was terminally ill and uninsurable. On August 10, 1985, Michael Fikowski Sr. died. On October 11, 1985, Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The respondents then commenced the present action, claiming a right to benefits under the policy or, alternatively, relief against forfeiture.

II. Judgments Below

A. Alberta Court of Queen's Bench

Deyell J. rejected the plaintiffs' claim and refused to grant them relief against forfeiture. He made no specific finding as to whether a cheque was actually mailed to Maritime by SRB in July 1984, but emphasized that Maritime did not receive payment and advised SRB accordingly. Deyell J. reasoned that the respondents had to "live with the results" of their decision to have their corporate mail sent to Lake Louise throughout the year. As well, he considered that SRB was obliged to do more than search for a cancelled cheque

[TRANSLATION] D'après nos dossiers, cette police est tombée en déchéance pour non-paiement de la prime échue à la date indiquée. La police n'est plus en vigueur et aucune prestation n'est payable. Comme votre assurance offre une excellente protection et représente un investissement très valable, nous vous invitons à en demander la remise en vigueur.

La demande de remise en vigueur jointe à l'avis de déchéance exigeait une preuve d'assurabilité.

SRB a fermé son hôtel du Lac Louise (Alberta) pour la saison hivernale vers la mi-novembre 1984. Pendant l'hiver, SRB a recueilli peu souvent le courrier de l'entreprise. Aussi, n'a-t-elle pu prendre connaissance de l'offre de paiement tardif, de la lettre de novembre et de l'avis de déchéance qu'en avril 1985. Elle s'est alors mise à la recherche du chèque perdu. Ce n'est qu'en juillet 1985 que SRB a envoyé à La Maritime un chèque de remplacement et un chèque pour la prime de 1985. Tous deux ont été refusés.

Le 9 juillet 1985, l'agent d'assurance de SRB a informé La Maritime que Michael Fikowski, père, était en phase terminale et non assurable. Le 10 août 1985, Michael Fikowski, père, est décédé. Le 11 octobre suivant, La Maritime a rejeté la demande d'indemnité de SRB aux termes de la police pour le motif que celle-ci n'était plus en vigueur. Les intimées ont alors intenté la présente action, réclamant le droit aux prestations en vertu de la police ou, subsidiairement, la levée de la déchéance.

II. Juridictions inférieures

A. Cour du Banc de la Reine de l'Alberta

Le juge Deyell a rejeté la prétention des demanderesse et a refusé de lever la déchéance. Il ne s'est pas prononcé spécifiquement sur la question de savoir si, en juillet 1984, SRB a effectivement mis à la poste un chèque destiné à La Maritime, mais il a souligné que cette dernière n'avait pas reçu paiement et qu'elle en avait avisé SRB. Le juge Deyell a estimé que les intimées devaient [TRANSLATION] «subir les conséquences» de leur décision de faire suivre le courrier de l'entreprise au Lac Louise tout au long de l'année. Il a en outre

when they learned of the policy lapse in April of 1985. Deyell J. further ruled that Connie Fikowski was bound by SRB's actions.

B. Alberta Court of Appeal

A majority of the Alberta Court of Appeal allowed the respondents' appeal: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶1-2895. The majority held that the postal acceptance rule did not apply, since an express term of the policy required that premiums be paid, not posted, by the due date: *Holwell Securities Ltd. v. Hughes*, [1974] 1 All E.R. 161. However, both Harradence and Hetherington J.A. considered that, because it encouraged policyholders to mail premium payments, Maritime was barred from demanding strict compliance with the time requirements for payment under the policy. Harradence J.A. cast this ruling in terms of estoppel, while Hetherington J.A. relied on waiver. Both agreed that, until the respondents were notified that the 1984 cheque had not been received and were given a reasonable period during which to effect payment, Maritime could not terminate the policy for non-payment.

Hetherington J.A. considered that none of Maritime's acts, including the late payment offer, the November letter and the lapse notice, gave the respondents reasonable notice that Maritime intended to rely on the lapsing provision of the policy. The February lapse notice was premature because it stated that "this policy has lapsed", without giving reasonable notice to the respondents. As such, Maritime's right to rely on the lapsing provision of the policy was never reinstated. She concluded that the policy was still in force in August 1985.

Harradence J.A. found that the respondents could have made payment within a reasonable

considéré que SRB devait faire davantage que chercher le chèque annulé lorsqu'elle a appris la déchéance de la police en avril 1985. Il a enfin conclu que Connie Fikowski était liée par les actes de SRB.

B. Cour d'appel de l'Alberta

La Cour d'appel de l'Alberta à la majorité a accueilli l'appel des intimées: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶1-2895. La cour à la majorité a conclu que la règle de l'acceptation par voie postale ne s'appliquait pas puisque la police requerrait expressément que les primes soient payées, et non postées, au plus tard à la date d'échéance: *Holwell Securities Ltd. c. Hughes*, [1974] 1 All E.R. 161. Toutefois, les juges Harradence et Hetherington ont tous deux considéré que, parce qu'elle incitait les preneurs à poster le paiement des primes, La Maritime ne pouvait exiger un respect rigoureux des exigences en matière de délai de paiement figurant dans la police. Le juge Harradence a fondé sa décision sur le principe de l'irrecevabilité, alors que le juge Hetherington a invoqué la renonciation. Tous deux ont convenu que, tant qu'on n'avait pas avisé les intimées que le chèque de 1984 n'avait pas été reçu et qu'on ne leur avait pas accordé une période raisonnable pour effectuer le paiement, La Maritime ne pouvait résilier la police pour non-paiement de la prime.

De l'avis de Madame le juge Hetherington, aucun des actes de La Maritime, dont l'offre de paiement tardif, la lettre de novembre et l'avis de déchéance, n'a donné aux intimées un avis raisonnable que La Maritime avait l'intention d'invoquer la déchéance prévue dans la police. L'avis de déchéance de février était prématuré car il affirmait que [TRADUCTION] «la présente police est tombée en déchéance», sans donner aucun avis raisonnable aux intimées. Comme tel, le droit de La Maritime de se prévaloir de la disposition relative à la déchéance n'a jamais été rétabli. Le juge a conclu que la police était toujours en vigueur en août 1985.

Le juge Harradence a conclu que les intimées auraient pu faire le paiement dans un délai raison-

period after they received actual notice of the overdue premium in April 1985. However, the respondents failed to pay within this period. Their three-month delay in providing a replacement cheque was unreasonable, and the policy lapsed. However, Harradence J.A. concluded that it was an appropriate case to relieve against forfeiture under s. 10 of the *Judicature Act*, R.S.A. 1980, c. J-1.

In dissent, McClung J.A. stated that Maritime did not waive its right to rely on the lapsing provision of the policy by encouraging policyholders to use the mail. He found that while Maritime had waived its position in the November letter, the eventual payment of the missing premium in July 1985 did not comply with the request for "immediate payment" in the November letter. As a result, there was no waiver. In addition, he concluded that the Court had no jurisdiction to relieve against forfeiture since the field was occupied by a statutory scheme (the *Insurance Act*, R.S.A. 1980, c. I-5).

III. Issues

This appeal raises two issues:

- (1) Did Maritime waive its right to compel timely payment in accordance with the terms of the policy?
- (2) If there was no waiver, are the respondents entitled to relief against forfeiture under the *Judicature Act*, R.S.A. 1980, c. J-1, s. 10?

IV. Analysis

A. Waiver

Maritime's position is that the policy issued to the respondents lapsed after the expiry of the grace period for payment of the 1984 premium. Fikowski Sr.'s death occurred when the policy was not in force and the respondents had no right to benefits under it.

nable après qu'elles eurent effectivement reçu un avis de la prime en souffrance en avril 1985. Or, elles ont omis de payer pendant ce délai. Le délai de trois mois qui s'est écoulé avant qu'elles n'offrent un chèque de remplacement était déraisonnable et la police est tombée en déchéance. Le juge Harradence a toutefois conclu qu'il ne convenait pas, en l'espèce, de lever la déchéance aux termes de l'art. 10 de la *Judicature Act*, R.S.A. 1980, ch. J-1.

Dissident, le juge McClung a déclaré que La Maritime n'avait pas renoncé à son droit de se prévaloir de la disposition relative à la déchéance prévue dans la police en incitant les preneurs à utiliser le courrier. Il a conclu que, bien que La Maritime ait renoncé à sa position dans la lettre de novembre, le paiement subséquent de la prime échue en juillet 1985 ne satisfaisait pas à la demande de «paiement immédiat» formulée dans la lettre de novembre. Il n'y a donc pas eu renonciation. En outre, a-t-il conclu, la cour n'avait pas compétence pour lever la déchéance, le domaine étant soumis à un régime législatif (l'*Insurance Act*, R.S.A. 1980, ch. I-5).

III. Questions en litige

Le pourvoi soulève deux questions:

- (1) La Maritime a-t-elle renoncé à son droit d'exiger un paiement en temps opportun conformément aux modalités de la police?
- (2) S'il n'y a pas eu renonciation, les intimées ont-elles droit à la levée de la déchéance aux termes de l'art. 10 de la *Judicature Act*, R.S.A. 1980, ch. J-1?

IV. Analyse

A. Renonciation

La Maritime soutient que la police délivrée aux intimées est tombée en déchéance à l'expiration du délai de grâce applicable pour payer la prime de 1984. Le décès de Fikowski, père, étant survenu au moment où la police n'était pas en vigueur, les intimées n'ont droit à aucune prestation aux termes de celle-ci.

The respondents' position is that Maritime, through its conduct, waived its right to compel timely payment under the policy. The respondents further submit that none of Maritime's acts were sufficient to retract its waiver of time and that the policy was still in force at the time of death.

Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see e.g. *W. J. Alan & Co. v. El Nasr Export and Import Co.*, [1972] 2 Q.B. 189 (C.A.), and *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S. M. Waddams, *The Law of Contracts* (3rd ed. 1993), at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished. As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.

Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it.

Les intimées soutiennent pour leur part que, par sa conduite, La Maritime a renoncé à son droit d'exiger le paiement dans le délai prévu par la police. Elles font également valoir qu'aucun des actes de La Maritime n'était suffisant pour emporter rétractation de sa renonciation au délai et que la police était toujours en vigueur au moment du décès.

Bien que les parties aient fondé leurs prétentions sur la renonciation, le juge Harradence a étudié la théorie de l'irrecevabilité fondée sur une promesse ou en *equity*. La jurisprudence récente indique que la renonciation et l'irrecevabilité fondée sur une promesse sont étroitement liées: voir, p. ex., *W. J. Alan & Co. c. El Nasr Export and Import Co.*, [1972] 2 Q.B. 189 (C.A.), et *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 584 (C. div. Ont.), à la p. 587. Le célèbre auteur Waddams laisse entendre que les deux théories reposent sur le principe qu'une partie ne devrait pouvoir revenir sur son choix lorsqu'il serait injuste pour l'autre partie qu'elle le fasse: S. M. Waddams, *The Law of Contracts* (3^e éd. 1993), au par. 606. Il n'est pas nécessaire, pour les fins du présent pourvoi, de déterminer si ou comment l'irrecevabilité fondée sur une promesse doit être distinguée de la renonciation. Les parties ayant choisi de formuler leurs arguments sous l'angle de la renonciation, il suffit de traiter de ce principe.

Il y a renonciation lorsqu'une partie à un contrat ou à une instance agit de façon à ne pas se prévaloir d'un droit ou d'un vice dont elle connaît l'existence en ce qui concerne l'exécution d'une obligation par l'autre partie: *Mitchell and Jewell Ltd. c. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (C.S. Alb., Sect. app.); *Marchischuk c. Dominion Industrial Supplies Ltd.*, [1991] 2 R.C.S. 61 (renonciation à un délai de prescription). Les éléments de la renonciation ont été décrits dans l'arrêt *Federal Business Development Bank c. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cité par les deux parties au présent pourvoi (le juge Laycraft au nom de la cour, à la p. 236):

[TRADUCTION] Les éléments essentiels de la renonciation sont donc la parfaite connaissance du vice qui peut être invoqué et l'intention claire de ne pas se prévaloir

That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that by encouraging policyholders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the \$45 partial payment, and in accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

It is not necessary to address each of the factors identified by the respondents, for it seems clear that the November letter, taken alone, constituted a waiver of Maritime's right to receive timely payment under the policy. The November letter contained the following statement:

Unfortunately this policy is now technically out of force, and we will require immediate payment of \$1,361.00 to pay the July 1984-85 premium.

As late as November 28, 1984, Maritime was willing to continue coverage under the policy upon payment of the July 1984 premium. The November

du droit de l'invoquer. Cette intention peut être exprimée dans un acte juridique formel, elle peut être exprimée d'une manière informelle ou être inférée du comportement. Quelle que soit la manière dont elle est exprimée, cependant, c'est l'intention consciente de renoncer à ce droit qui doit être établie.

On ne conclura donc à la renonciation que si la preuve démontre que la partie qui renonce avait (1) parfaitement connaissance des droits en cause et (2) l'intention claire et consciente d'y renoncer. Le recours à un critère aussi strict est justifié vu l'absence de contrepartie de la part de la partie en faveur de laquelle joue la renonciation. Une interprétation trop large de la renonciation minerait l'exigence de contrepartie contractuelle.

Puisqu'il ne fait guère de doute que La Maritime connaissait parfaitement ses droits aux termes de la police des intimées, la question de la renonciation porte entièrement sur les intentions de La Maritime. Les intimées ont relevé plusieurs facteurs qui, à leur avis, permettent de conclure que La Maritime a [TRADUCTION] «clairement et sans équivoque» voulu renoncer à son droit au paiement à échéance. En particulier, les intimées soutiennent qu'en incitant les preneurs à payer par la poste, en exigeant le paiement de la prime de 1984 après l'expiration du délai de grâce de la police, en retardant l'envoi de l'avis de déchéance de février, en ne retournant pas le paiement partiel de 45 \$ et en acceptant le paiement tardif en 1981, La Maritime a renoncé à son droit d'exiger le paiement conformément aux modalités de la police.

Il n'est pas nécessaire d'examiner chacun des facteurs décrits par les intimées, car il semble clair que par la seule lettre de novembre, La Maritime a renoncé à son droit de recevoir le paiement à échéance aux termes de la police. La lettre de novembre contenait la déclaration suivante:

[TRADUCTION] Malheureusement, cette police est maintenant formellement sans effet et nous exigerons le paiement immédiat de 1 361 \$ pour acquitter la prime de juillet 1984-1985.

Le 28 novembre 1984, La Maritime était toujours disposée à maintenir la couverture aux termes de la police moyennant le paiement de la

letter makes no mention of evidence of insurability, nor does it speak of reinstatement. As such, it constitutes clear evidence of Maritime's intention to waive its right to compel timely payment. In this regard, little weight should be given to the assertion that the policy was "technically out of force", for the qualifier "technical" removes all meaning from the expression "out of force". In any event, this assertion does not detract from the clarity of Maritime's demand for payment.

The appellant submits that, whereas the right to compel timely payment is clearly waived where premium payments are received and deposited by an insurance company after the expiry of the policy grace period (*Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144; *Anguish v. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376 (C.A.), leave to appeal refused, [1988] 2 S.C.R. vii), a mere demand for payment beyond the grace period is insufficient. Support for that proposition is found in *McGeachie v. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), aff'd (1893), 23 S.C.R. 148, and in *Northern Life Assurance Co. of Canada v. Reierson*, [1977] 1 S.C.R. 390. In both cases, this Court concluded that a demand for payment was equivocal or insufficient to give rise to a waiver. However, in some circumstances a demand for payment may constitute waiver. The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

The demand for payment in the present appeal provides stronger evidence of waiver than did the demands in either *McGeachie* or *Reierson*. The demand for payment by the appellant in its November letter was made well beyond the expiry of the grace period. As well, payment in the present case was tendered prior to the occurrence of the event insured against. Any doubt about whether

prime de juillet 1984. La lettre de novembre ne fait état ni d'une preuve d'assurabilité ni d'une remise en vigueur. Comme telle, elle constitue une preuve claire de l'intention de La Maritime de renoncer à son droit d'exiger le paiement à échéance. À cet égard, on doit accorder peu d'importance à l'affirmation que la police était «formellement sans effet» car le qualificatif «formel» retire tout son sens à l'expression «sans effet». Quoi qu'il en soit, cette affirmation n'enlève rien à la clarté de la demande de paiement de La Maritime.

L'appelante fait valoir qu'alors qu'une compagnie d'assurances renonce manifestement à son droit d'exiger le paiement à échéance lorsqu'elle reçoit et dépose les paiements de prime après l'expiration du délai de grâce de la police (*Duplisea c. T. Eaton Life Assurance Co.*, [1980] 1 R.C.S. 144; *Anguish c. Maritime Life Assurance Co.* (1987), 51 Alta L.R. (2d) 376 (C.A.), autorisation de pourvoi refusée, [1988] 2 R.C.S. vii), une simple demande de paiement une fois le délai de grâce expiré ne suffit pas pour maintenir la police en vigueur. Les arrêts *McGeachie c. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), conf. par (1893), 23 R.C.S. 148, et *Northern Life Assurance Co. of Canada v. Reierson*, [1977] 1 R.C.S. 390, appuient cette proposition. Dans les deux cas, notre Cour a conclu que la demande de paiement était équivoque ou insuffisante pour qu'il y ait renonciation. Toutefois, dans certaines circonstances, une demande de paiement peut constituer une renonciation. La nature des renonciations ne se prête pas à la formulation d'une règle rigide pour déterminer ce qui peut ou ne peut pas constituer une renonciation. Dans chaque cas, il s'agit d'abord et avant tout de savoir si une partie a exprimé à l'autre l'intention claire de renoncer à un droit.

Dans l'affaire qui nous occupe, la demande de paiement offre une preuve de renonciation plus convaincante que ne l'ont fait les demandes dans les affaires *McGeachie* et *Reierson*. La demande de paiement par l'appelante dans sa lettre de novembre a été faite bien après l'expiration du délai de grâce. De même, le paiement en l'espèce a été offert avant la survenance du risque assuré.

Maritime intended to waive the time requirements of the policy was resolved by the testimony of its legal advisor, who indicated that, having received the \$45 partial payment, Maritime was still awaiting payment of the July 1984 premium in January 1985. It was for this reason that the lapse notice was not sent until February 2, 1985. In these circumstances, the demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy.

As the November letter constituted waiver, the question is then whether the waiver was still in effect when SRB tendered payment of the missing premium in July 1985.

Waiver can be retracted if reasonable notice is given to the party in whose favour it operates: *Hartley v. Hymans*, [1920] 3 K.B. 475; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616; *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused, [1978] 2 S.C.R. vii. As Waddams notes, the "reasonable notice" requirement has the effect of protecting reliance by the person in whose favour waiver operates: *The Law of Contracts*, *supra*, at paras. 604 and 606. It follows that a notice requirement should not be imposed where reliance is not an issue: *ibid.* at para. 606. In the present appeal, the respondents were not aware of Maritime's waiver until they received the November letter, along with the lapse notice and late payment offer, in April 1985. It follows that they did not rely on Maritime's waiver. In such circumstances, Maritime was not required to give any notice of its intention to lapse the policy. The statement that "this policy has lapsed", contained in the February lapse notice, took effect on its terms.

Tout doute quant à l'intention de La Maritime de renoncer aux délais prescrits dans la police a été dissipé par le témoignage de son conseiller juridique qui a indiqué que, puisqu'elle avait reçu le paiement partiel de 45 \$, La Maritime attendait encore, en janvier 1985, le paiement de la prime de juillet 1984. C'est pour cette raison que l'avis de déchéance n'a été envoyé que le 2 février 1985. Dans ces circonstances, la demande de paiement dans la lettre de novembre était une expression claire et sans équivoque de l'intention de La Maritime de maintenir la couverture moyennant le paiement de la prime de juillet et, à ce titre, constituait une renonciation au délai imparti pour payer la prime prévue dans la police.

Comme la lettre de novembre constituait une renonciation, la question est donc de savoir si cette renonciation s'appliquait toujours lorsque SRB a offert le paiement de la prime échue en juillet 1985.

On peut résilier une renonciation si un avis raisonnable est donné à la partie en faveur de laquelle elle joue: *Hartley c. Hymans*, [1920] 3 K.B. 475; *Charles Rickards Ltd. c. Oppenheim*, [1950] 1 K.B. 616; *Guillaume c. Stirton* (1978), 88 D.L.R. (3d) 191 (C.A. Sask.), autorisation de pourvoi refusée, [1978] 2 R.C.S. vii. Comme le signale Waddams, l'exigence de l'«avis raisonnable» a pour effet de préserver le recours à la renonciation par la personne en faveur de qui elle joue: *The Law of Contracts*, *op. cit.* aux par. 604 et 606. Il s'ensuit qu'une exigence d'avis ne devrait pas être imposée lorsqu'on ne prétend pas s'être fié à la renonciation: *ibid.*, au par. 606. Dans le présent pourvoi, les intimées n'ont pris connaissance de la renonciation de La Maritime que lorsqu'elles ont reçu, en avril 1985, la lettre de novembre de même que l'avis de déchéance et l'offre de paiement tardif. Elles ne se sont donc pas fiées à la renonciation de La Maritime. Dans ce cas, La Maritime n'était pas tenue de donner quelque avis que ce soit de son intention de mettre fin à la police. La déclaration portant que «cette police est tombée en déchéance», contenue dans l'avis de déchéance de février, avait plein effet.

In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. An informal communication of a party's intention to insist on strict compliance with the terms of a contract is sufficient notice: see e.g. *Guillaume v. Stirton*, *supra*. The respondents did not tender a replacement cheque until July 1985, three months after they became aware of Maritime's intentions. As such, even if a reasonable notice requirement were imposed, it would be adequately met by the respondents' failure to act between April and July.

Maritime's waiver, as contained in the November letter, was no longer in effect when the respondents sought to make payment in July 1985. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case. Therefore, the respondents are not entitled to any of the benefits under the policy.

B. Relief Against Forfeiture

The second issue on appeal is the Court's equitable jurisdiction to relieve against forfeiture. The respondents submit that the general power to grant relief, contained in s. 10 of the *Judicature Act*, should be exercised in this case. The appellant contends that the *Judicature Act* does not apply since the field is occupied by a statutory scheme (the *Insurance Act*). It further submits that the respondents' loss was not a forfeiture and argues that, in any event, this is not an appropriate case for granting relief.

Section 10 of the *Judicature Act* reads:

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

Quoi qu'il en soit, lorsque les intimées ont ouvert leur courrier en avril 1985, elles ont évidemment pris connaissance de l'intention de La Maritime de résilier sa renonciation. Une communication informelle de l'intention d'une partie d'exiger le respect rigoureux des modalités d'un contrat constitue un avis suffisant: voir, p. ex., *Guillaume c. Stirton*, précité. Les intimées n'ont offert un chèque de remplacement qu'en juillet 1985, soit trois mois après avoir pris connaissance des intentions de La Maritime. C'est pourquoi, même si une exigence d'avis raisonnable était imposée, l'omission des intimées d'agir entre avril et juillet y satisferait adéquatement.

La renonciation de La Maritime, contenue dans la lettre de novembre, ne s'appliquait plus lorsque les intimées ont tenté de faire le paiement en juillet 1985. La Maritime n'était pas tenue d'accepter le chèque de remplacement et la police est tombée en déchéance. La Maritime n'était tenue de remettre la police en vigueur que si les intimées fournissaient une preuve d'assurabilité, ce qui était impossible en l'espèce. Par conséquent, les intimées n'ont droit à aucune prestation aux termes de la police.

B. Levée de la déchéance

La seconde question en litige dans le pourvoi est la compétence en *equity* de la cour pour lever la déchéance. Les intimées soutiennent que le recours au pouvoir général d'accorder une réparation prévu à l'art. 10 de la *Judicature Act* est justifié en l'espèce. L'appelante soutient que la *Judicature Act* ne s'applique pas puisque le domaine est soumis à un régime législatif (*l'Insurance Act*). Elle fait également valoir que la perte subie par les intimées ne pouvait faire l'objet de déchéance et que, quoi qu'il en soit, il ne convient pas en l'espèce d'accorder une réparation.

L'article 10 de la *Judicature Act* est ainsi rédigé:

[TRADUCTION] 10 Sous réserve du droit général d'appel, la cour a le pouvoir de lever toutes les pénalités et les déchéances et, ce faisant, d'imposer toute modalité qu'elle estime opportune quant aux dépens, frais, dommages-intérêts, indemnité et toute autre question.

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The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.); *Snell's Equity* (29th ed. 1990), at pp. 541-42.

The Ontario High Court in *Liscumb v. Provenzano* (1985), 51 O.R. (2d) 129, aff'd 55 O.R. (2d) 404 (C.A.), relying on the *Shiloh* decision, summarized the governing principles as follows (at p. 137, per McKinlay J.):

I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

The first element of the test set out in *Liscumb* — the reasonable conduct requirement — is not met in this case. The respondents knew, at all relevant times, that Fikowski Sr. was terminally ill and uninsurable. Nonetheless, they chose to have their correspondence from Maritime sent to Lake Louise over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. The trial judge, who was in a position to assess the respondents' conduct, concluded that it was not reasonable. He wrote:

The corporation chose to have a mail box at the Post Office at Lake Louise to receive its corporate mail on a 12 month basis and having made that decision I think they must live with the results. If you only pick-up your mail every two weeks then you are going to be late in getting notices that may be of some importance. Ultimately when the advice that the policy had lapsed was received in late April or early May of 1985 Mr. Michael Fikowski and Mr. J. D. Thomas started a search for a

Le pouvoir de lever la déchéance est une réparation d'*equity* et est purement discrétionnaire. Dans l'exercice de son pouvoir discrétionnaire, la cour doit tenir compte du comportement du requérant, de la gravité des manquements et de l'écart entre la valeur du bien frappé de déchéance et le tort causé par le manquement: *Shiloh Spinners Ltd. c. Harding*, [1973] A.C. 691 (H.L.); *Snell's Equity* (29^e éd. 1990), aux pp. 541 et 542.

Dans la décision *Liscumb c. Provenzano* (1985), 51 O.R. (2d) 129, conf. par 55 O.R. (2d) 404 (C.A.), la Haute Cour de l'Ontario, s'appuyant sur la décision *Shiloh*, résume ainsi les principes directeurs (à la p. 137, motifs du juge McKinlay):

[TRADUCTION] J'estime qu'il faut examiner les questions suivantes pour déterminer s'il y a lieu, en l'espèce, de lever la déchéance: premièrement, la conduite du demandeur était-elle raisonnable dans les circonstances? Deuxièmement, l'objet du droit frappé de déchéance était-il essentiellement de garantir le paiement d'une somme? Et troisièmement, l'écart entre la valeur du bien frappé de déchéance et le tort causé au vendeur par le manquement était-il important?

Le premier volet du critère énoncé dans *Liscumb* — l'exigence de la conduite raisonnable — n'est pas respecté en l'espèce. Les intimées savaient, à toutes les époques pertinentes, que Fikowski, père, était en phase terminale et non assurable. Elles ont néanmoins choisi de faire suivre les lettres de La Maritime au Lac Louise pendant l'hiver et de ne recueillir leur courrier qu'irrégulièrement. Lorsqu'en avril 1985 elles ont appris que le paiement de la prime était échu depuis neuf mois, les intimées n'ont offert aucun chèque de remplacement, mais ont plutôt attendu trois mois, jusqu'en juillet 1985. Le juge de première instance, qui était en mesure d'apprécier le comportement des intimées, a conclu qu'il n'était pas raisonnable. Il écrit:

[TRADUCTION] La société a choisi de recevoir son courrier dans une boîte postale, au bureau de poste du Lac Louise, douze mois par année et j'estime qu'elle doit en subir les conséquences. Si l'on ne cueille le courrier qu'à toutes les deux semaines, on recevra en retard des avis qui peuvent avoir une certaine importance. Finalement, lorsque l'avis que la police était tombée en déchéance a été reçu à la fin d'avril ou au début de mai 1985, MM. Michael Fikowski et J. D. Thomas

cancelled cheque. Under the circumstances in this day and age of long distance telephones and all the communications that are available I think that they had an obligation to their company to take additional procedures in regard to this matter. They were advised that payment had not been made. There were procedures to have the policy reinstated. If they were going to do anything about it, it had to be done quickly. It wasn't until July 25th, if memory serves me correctly, met [sic] the replacement cheque was sent out, that is three months after they ultimately received the notice.

I therefore find that the plaintiff's case fails and that they are not entitled to relieve against forfeiture.

As the failure to satisfy the first test in *Liscumb* determines the outcome of this appeal, it is unnecessary to comment on the second and third tests outlined in the case.

As the respondents are barred by their conduct from recovering, it is not necessary to determine whether our general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act*. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited (*Insurance Act*, ss. 201, 205 and 211) does not preclude application of the *Judicature Act* to contracts of life insurance. The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.

Several of the authorities cited by the appellant involved forfeitures made under statutory insurance conditions, which is not the case here: *Stenhouse v. General Casualty Insurance Co. of Paris*, [1934] 3 W.W.R. 564 (Alta. S.C.A.D.); *Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co. of Canada* (1977), 2 A.R. 63 (S.C.A.D.). The case of *Johnston v. Dominion of Canada Guarantee and Accident Insurance Co.* (1908), 17 O.L.R. 462 (C.A.) treated the insurance legislation

ont commencé à chercher le chèque annulé. Avec tous les moyens de communications téléphoniques interurbaines et autres qui existent de nos jours, je crois qu'ils étaient tenus envers leur compagnie de prendre des mesures supplémentaires à cet égard. Ils ont été avisés que le paiement n'avait pas été effectué. Il existait des procédures pour la remise en vigueur de la police. S'ils souhaitaient agir, il leur incombait de le faire rapidement. Si je me souviens bien, ce n'est que le 25 juillet que le chèque de remplacement a été envoyé, soit trois mois après avoir finalement reçu l'avis.

Je conclus, par conséquent, que les prétentions de la demanderesse échouent et qu'elle n'a pas droit à la levée de la déchéance.

Comme l'omission de satisfaire au premier critère de *Liscumb* détermine l'issue du présent pourvoi, il n'est pas nécessaire de commenter les deuxième et troisième critères exposés dans cette affaire.

Puisqu'en raison de leur comportement les intimées n'ont pas droit à un recouvrement, il n'est pas nécessaire de déterminer si notre pouvoir général de lever la déchéance, en vertu de l'art. 10 de la *Judicature Act*, s'applique aux contrats régis par l'*Insurance Act*. Toutefois, je ferais remarquer que l'existence d'un pouvoir d'origine législative d'accorder une réparation, lorsque d'autres formes d'assurance sont frappées de déchéance (*Insurance Act*, art. 201, 205 et 211), n'empêche pas l'application de la *Judicature Act* aux contrats d'assurance-vie. L'*Insurance Act* ne «codifie» pas l'ensemble du droit des assurances; elle ne fait qu'imposer des normes minimales à l'industrie. La prétention de l'appelante portant que le «domaine» de la réparation d'*equity* est couvert par l'*Insurance Act* doit donc être rejetée.

Plusieurs des décisions citées par l'appelante mettent en cause des déchéances aux termes de conditions obligatoires en matière d'assurance, ce qui n'est pas le cas en l'espèce: *Stenhouse c. General Casualty Insurance Co. of Paris*, [1934] 3 W.W.R. 564 (C.S. Alb., Sect. app.); *Swan Hills Emporium & Lumber Co. c. Royal General Insurance Co. of Canada* (1977), 2 A.R. 63 (C.S., Sect. app.). Dans l'arrêt *Johnston c. Dominion of Canada Guarantee and Accident Insurance Co.*

at issue as a statutory code, and for this reason is no longer good law.

It is also unnecessary to determine whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context. Clearly, the holder of a term life policy has no vested right to benefits until the loss insured against — death of the insured — has occurred. However, a modern understanding of the doctrine of relief would likely expand the notion of forfeiture to include less tangible losses, such as the loss of an option to convert a term policy into one under which benefits would be certain, or the loss of one's insurability. This question remains open.

C. Conclusion

For the foregoing reasons, I would allow the appeal with costs, set aside the judgment of the Alberta Court of Appeal and restore the judgment at trial.

Appeal allowed with costs.

Solicitors for the appellant: MacKimmie Matthews, Calgary.

Solicitors for the respondents: Code Hunter, Calgary.

(1908), 17 O.L.R. 462 (C.A.), la cour a considéré la législation en matière d'assurance concernée comme un code législatif; cet arrêt ne doit donc plus être suivi.

^a Il n'est également pas nécessaire de déterminer si la levée de la déchéance peut généralement faire fonction de réparation avant sinistre dans le contexte des assurances. Manifestement, le titulaire d'une police d'assurance-vie temporaire n'a aucun droit acquis aux prestations jusqu'à ce que le risque visé par l'assurance — le décès de l'assuré — se réalise. Toutefois, une compréhension moderne de la théorie de la réparation élargirait vraisemblablement la notion de déchéance pour y inclure des pertes moins tangibles, comme la perte d'une option de convertir une police temporaire en une police en vertu de laquelle les prestations seraient ^b certaines, ou la perte de l'assurabilité de quel- ^c qu'un. La question demeure ouverte. ^d

C. Conclusion

^e Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi avec dépens, d'infirmer l'arrêt de la Cour d'appel de l'Alberta et de rétablir le jugement rendu au procès.

^f *Pourvoi accueilli avec dépens.*

Procureurs de l'appelante: MacKimmie Matthews, Calgary.

Procureurs des intimées: Code Hunter, Calgary.

TAB H

074925

Alberta Personal Property Security Act Handbook

Fourth Edition

Ronald C.C. Cuming, Q.C.
Professor of Law
University of Saskatchewan

Roderick J. Wood
Professor of Law
University of Alberta

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of debt securities.¹ A subordination agreement is not affected by the bankruptcy of the debtor unless otherwise indicated in the subordination agreement.^{1a}

¶40[2] Kinds of Subordination Agreements

There are two basic kinds of subordination agreements. The first is an agreement executed directly between the subordinating creditor and the benefiting creditor. The second kind of subordination agreement is one that is executed between the subordinating party and the debtor. The subordination provision is usually found in the security agreement. The provision permits the debtor to grant certain kinds of security interests in priority to the security interest created by the security agreement. The benefiting creditor is not a party to the contract. Section 40 recognizes the effectiveness of both kinds of subordination agreements. Section 40 is more than just a declaration of the common law: it recognizes the efficacy of an undertaking to subordinate a security interest to another security interest even though the beneficiary of the subordination is not in a contractual relationship with the subordinating creditor.² At common law, a person who is not a party to a subordination agreement cannot take the benefit of it.

A subordination or postponement agreement does not by virtue of the subordination or postponement alone create a security interest.³ However, in some situations a subordination agreement may amount to a security agreement. The agreement should be characterized as a security agreement if it provides for a lien, trust or some other indication that a security interest has been created in favour of the benefiting creditor. This goes beyond a mere postponement or subordination. A security interest is taken in the subordinating creditor's security interest and is given to secure the common debtor's obligation to the benefiting creditor. If this is the case, the benefiting creditor will be required to perfect her security interest by reg-

¹ See P.R. Wood, *The Law of Subordinated Debt* (1990), at 6-8.

^{1a} *Bank of Montreal v. Dynex Petroleum Ltd.* (1997), 12 P.P.S.A.C. (2d) 183 (Alta. Q.B.).

² See *Euroclean Canada Inc. v. Forest Glade Investments Ltd.* (1985), 16 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused 16 D.L.R. (4th) 289n (S.C.C.); *Chiips Inc. v. Skyview Hotels Ltd.* (1994), 21 Alta. L.R. (3d) 225 (Alta. C.A.), per Foisy J.A., leave to appeal refused, 30 C.B.R. (3d) 214 (note), 119 D.L.R. (4th) vi (note), 26 Alta. L.R. (3d) 1 (note), [1995] 3 W.W.R. lxiv (note), (sub nom. *Chiips Inc. v. Skyview Hotels Ltd. (Receivership)*) 188 N.R. 395 (note), 178 A.R. 79 (note), 110 W.A.C. 79 (note) (S.C.C.)

Section 40(2) of the Saskatchewan Act contains an express legislative provision to this effect.

istering a financing statement in which the subordinating creditor is named as debtor. Failure to do so would result in the benefiting creditor being subordinated to the interests of the unsecured creditors or bankruptcy trustee of the subordinating creditor or to a transferee of the subordinating creditor's interest. Registration of a financing statement relating to the subordination agreement under section 45(6) will not amount to registration of the benefiting creditor's security interest. For further discussion of subordination agreements, see ¶3[5].

A subordination agreement should be distinguished from an abandonment or release of a security interest. A secured party who releases a security interest does not merely subordinate his security interest. The release extinguishes the security interest, and the secured party is not thereafter permitted to assert his security interest in the collateral.⁴

Although a subordination provision will usually appear in a written contract, it is also possible that it may be contained in an oral agreement.⁵ It is rather more doubtful whether a subordination agreement can be established on the basis of a course of conduct.⁶ Courts will tend to apply the section cautiously and require that the subordination occur with full knowledge of the circumstances and an unequivocal intention to relinquish rights.⁷

¶40[3] Subordination and Priorities

The lack of perfection of the benefiting creditor's security interest does not affect the validity of the subordination.⁸ This point was made in *Euroclean Canada Inc. v. Forest Glade Investments Ltd.*⁹ The security agreement between the subordinating creditor and the debtor contained a clause permitting the debtor to give mortgages and liens in connection with the acquisition of property (in essence, purchase-money security interests) and providing that any such mortgage or lien ranked in priority to the security interest created under the security agreement. The debtor

4 See, e.g., *In re Bar C Cross Farms & Ranches, Inc.*, 1 U.C.C. Rep. 2d 256 (D. Colo. (Bankr.) 1985).

5 *Royal Bank v. Tenneco Canada Inc.* (1990), 9 P.P.S.A.C. 254 (Ont. H.C.); *Furnanek v. Community Futures Development Corp. of Howe Sound* (June 26, 1998), Doc. Vancouver CA023389 (B.C. C.A.).

6 See the *obiter* comments of Jackson J.A. in *Flexi-Coil Ltd. v. Kindersley District Credit Union Ltd.* (1993), 5 P.P.S.A.C. (2d) 192 at 196 (Sask. C.A.).

7 *Sin Life Assurance Co. of Canada v. Royal Bank* (1995), 10 P.P.S.A.C. (2d) 246 (Ont. Gen. Div. [Commercial List]).

8 *Euroclean Canada Inc. v. Forest Glade Investments Ltd.*, *supra*, note 2; *Chiips Inc. v. Skyview Hotels Ltd.*, *supra*, note 2.

9 *Supra*, note 2.

TAB I

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Mr. Justice Robert M. Hall
Date of Document:	20050722
Application to which document being filed relates:	Applications of Royal Bank of Canada ("RBC"), Cedarapids Inc. ("Cedarapids"), CIBC and General Motors Acceptance Corporation of Canada Limited ("GMAC") pursuant to paragraph 21 of the Claims Plan and s. 68 of the PPSA for the determination of priority and entitlement to the proceeds from the sale of assets of Hickman Equipment (1985) Limited ("HEL") Sub-Files 7:27 and 7:51
Statement of Purpose of Filing:	Reasons for Judgment
Court Sub-File Number:	9:11

2005 NLTD 122 (CanLII)

CITATION: *In Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2005NLTD122

DATE: 2005 07 22

DOCKET: 2002 01T 0352

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

IN THE MATTER OF a Court ordered Receivership of Hickman Equipment (1985) Limited ("Hickman Equipment") pursuant to Rule 25 of the *Rules of the Supreme Court, 1986*, under the *Judicature Act*, RSNL 1990, c. J-4, as amended

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

Before: The Honourable Mr. Justice Robert M. Hall

Appearances:

Gregory Smith and Regan O'Dea for Royal Bank of Canada and Cedarapids Inc.
 Thomas R. Kendell, Q.C. for General Motors Acceptance Corporation
 Geoffrey Spencer for Canadian Imperial Bank of Commerce

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

Dates of Hearing: March 31, 2005, April 1, 2005 and April 4, 2005

Authorities Considered:

Hickman Equipment (1985) Ltd. (Re) [2003] N.J. No. 87; **Hickman Equipment 1985 Ltd. Re** [2004] N.J. No. 286; **Euroclean Canada v. Forestglade Inv. (1985)**, 16 D.L.R. (4th) 289 at 301-302 (Ont. C.A.); **Re Chipps and Skyview Hotels Ltd. (Alta. C.A.) (1994)**, 116 D.L.R. (4th) 385; **Farm Credit Canada v. Valley Beef Producers Co-operative Ltd. (2003)**, 230 Sask R. 167; **N'Amerix Logistix Inc. (Re) (2001)**, 57 O.R. (3rd) 248; **Re Woodroffes (Musical Instruments) Ltd. [1985]** 2 All E.R. 908; **Furlong v. Avalon Bookkeeping Services Ltd. (2004)**, 239 Nfld. & P.E.I.R. 197 (NLCA); **Hogue v. Montreal Trust Co. (1997)**, 162 N.S.R. (2d) 321.A.); leave to appeal to SCC refused (1998), 167 N.S.R. (2d) 400n; **Danyluk v. Ainsworth Technologies Inc. (2001)**, 201 DLR (4th) 193 at par. 18 (S.C.C.);

Statutes Considered:

Personal Property Security Act, S.N.L. 1998;

Texts Considered:

Alberta Personal Property Security Handbook, 4th Ed. (Carswell:Toronto 1995), Cuming and Wood; R. M. Good in **Legal Problems of Credit and Security**, 2d. (London: Sweet & Maxwell, 1988); **Blacks Law Dictionary** (B.A. Garner Black's Law Dictionary (8th) St. Paul, MN - Thomson West 2004; Donald J. Laing, **The Doctrine of Res Judicata in Canada** (Second Edition) Butterworths 2004;

REASONS FOR JUDGMENT

Hall, J.

Background.

[1] By a Receiving Order made on the 13th day of March, 2002, pursuant to the provisions of the *Bankruptcy and Insolvency Act* (“BIA”) and filed with the Supreme Court of Newfoundland and Labrador in Bankruptcy on the 14th March, 2002, Hickman Equipment (1985) Limited (“HEL”) was adjudged bankrupt and PricewaterhouseCoopers Inc. (“PWC”) was appointed Trustee of the bankrupt estate (the “Trustee”). By a further Order of the Court granted on the 13th of March, 2002, and filed with the Court on the 14th of March, 2002, it was ordered that PWC be appointed Receiver (“Receiver”) of HEL (the “Receivership Order”). The Receivership Order gave PWC the overall mandate of developing a plan and procedural structure for the liquidation of the assets of HEL, as defined in paragraph 6 of the Receivership Order, and also a plan for the determination of the rights of all creditors and claimants. In that regard, a Claims Plan was approved by this Court by an Order dated May 14, 2002, and filed May 17, 2002 (the “Claims Plan”). Paragraph 14 of the Claims Plan required the Trustee to issue a Final Determination either allowing a claim as a valid secured claim under s. 135(4) of the BIA, or disallowing it as a valid secured claim. Paragraph 15 of the Claims Plan provided that claims disallowed by the Trustee under this process were afforded a 30-day right of appeal under the BIA. The Trustee was not required under the Claims Plan to make findings as to the priorities between the security interests in the assets of HEL as claimed by competing secured creditors.

[2] Royal Bank of Canada (“RBC”) presented its security interest claim to the Trustee and the Trustee issued its Final Determination of the RBC Claim and allowed the RBC Claim as a valid secured claim. Cedarapids Inc. (“Cedarapids”) presented its security interest claim to the Trustee, and the Trustee issued its Final Determination of the Cedarapids Claim and allowed the Cedarapids Claim as a valid secured claim. Canadian Imperial Bank of Commerce (“CIBC”) presented its security interest claim to the Trustee and the Trustee issued its Final Determination of the CIBC Claim and allowed the CIBC Claim in part as a valid secured claim. General Motors Acceptance Corporation (“GMAC”) presented its security interest claim to the Trustee and the Trustee issued its Final Determination of the GMAC Claim and

allowed the GMAC Claim as a valid interest claim.

[3] The Trustee, in the Final Determinations of the CIBC Claim, the GMAC Claim, the RBC Claim and the Cedarapids Claim, made the following determinations, which have not been appealed to this Court:

- (a) The CIBC security interests in the RBC Collateral and the Cedarapids Collateral were created by two security agreements, namely:
 - (i) A Debenture dated January 7, 1998 and Supplemental Debentures dated February 19, 1990; April 17, 1997; August 7, 1997 and July 9, 1998 (collectively the "Debenture and Supplemental Debentures");
 - (ii) A General Security Agreement dated January 25, 2000 (the "GSA").
- (b) The GMAC security interest in the RBC Collateral and the Cedarapids Collateral was created by a Security Agreement (Leasing) between GMAC and HEL dated July 25, 2000.
- (c) The RBC security interest in the RBC Collateral was created by secured transactions between RBC and HEL in the form of equipment leases dated March 14, 2001, April 4, 2001 and May 3, 2001.
- (d) The Cedarapids security interest in the Cedarapids collateral was created by a Domestic Distributors Agreement entered into between Cedarapids and HEL on July 10, 2001.
- (e) The perfection dates for determining the priority of the CIBC security interest created by the Debenture and Supplemental Debentures are January 29, 1985 (the Debenture), February 22, 1990 (First Supplemental Debenture), April 30, 1997 (Second Supplemental Debenture) August 29, 1997 (Third Supplemental Debenture) and July 15, 1998 (Fourth Supplemental Debenture).
- (f) The perfection date for determining the priority of the GMAC security

interest is December 13, 1999.

- (g) The perfection date for determining the priority of the CIBC security interest created by the GSA is January 25, 2000.
- (h) The perfection dates for determining the priority of the RBC security interest are March 14, 2001; April 2, 2001; and May 3, 2001 depending on the particular RBC Collateral.
- (i) The perfection date for determining the priority of the Cedarapids security interest is January 24, 2002.

[4] By Order of the Court dated May 14, 2002, the Trustee commenced and completed liquidation of substantially all the assets of HEL by auction.

[5] The following RSC units were sold at the auction (the "RBC Collateral"):

Unit No.	Make	Serial #	Proceeds
1	JD 450LC Excavator	FF0450X090600	\$ 240,000.00
2	JD 310SG Backhoe	T0310SG897094	\$ 76,000.00
3	JD 310SG Backhoe	T0310SG896594	\$ 75,000.00
4	JD 310SG Backhoe	T0310SG896618	\$ 76,000.00
5	JD 160LC Excavator	P00160X041654	\$ 110,000.00
6	JD 644H Loader	DW644HX580105	\$ 160,000.00
7	JD 160LC Excavator	P00160X041653	\$ 115,000.00
8	JD 200LC Excavator	FF0200X501803	\$ 140,000.00
9	JD TC62H Loader	DWTC62H579824	\$ 142,500.00
TOTAL			\$1,134,500.00

[6] The following Cedarapids' units were sold at auction (the Cedarapids'

Collateral”):

Unit No.	Make	Serial	
1	MVP 450 Rollercone	R10162	\$ 290,000.00
2	C380Plant	50104	\$ 360,000.00
3	1328 Screening/WashPlant	49395	\$ 225,000.00
4	CR461 Paver	51059	\$ 255,000.00
5	6 x 20 Screen Plant	50340	\$ 260,000.00
6	(The Cedarapids' Claim to Unit # 6 was withdrawn at the hearing of this matter)		
7	3042 Jaw Plant	50310	\$ 325,000.00
TOTAL			\$1,867,500.00 (Revised Amount \$1,715,000.00)

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[7] Paragraph 20 of the Claims Plan provided that the order of priority of claims to the proceeds arising from the sale of the assets of HEL be determined using the priority rules established by the *Personal Property Security Act*, S.N.L. 1998, c. P-7.1 (the “PPSA”) and other applicable law. Paragraph 21 of the Claims Plan provided that issues of priority and entitlement to collateral between secured claimants may, upon application, be brought before this Court for determination, pursuant to the provisions of s. 68 of the PPSA.

[8] Each of RBC and Cedarapids applied to the Court pursuant to the Claims Plan and s. 68 of the PPSA for (i) a determination of the priority entitlement of each of RBC and Cedarapids vis-à-vis other claimants, to the proceeds of the sale of the RBC Collateral and the Cedarapids Collateral respectively, and (ii) an Order that the Trustee pay the proceeds from the sale thereof to RBC and Cedarapids respectively. Each of CIBC and GMAC filed an objection to the priority claims of RBC and Cedarapids.

[9] RBC claims priority and entitlement to the proceeds arising from the sale of RBC Unit Nos. 1-9 (\$1,134,500.00) by virtue of the Subordination Agreement between CIBC and HEL contained in paragraph 2.2 of the Debenture. Alternatively, RBC claims priority and entitlement to the proceeds arising from the sale of the RBC Unit Nos. 2-9(\$884,500.00) by virtue of Subordination Agreements between CIBC and RBC contained in Priority Agreements dated April 3, 2001 and May 2, 2001 (the "Priority Agreements").

[10] Cedarapids claims priority and entitlement to the proceeds arising from the sale of Cedarapids Unit Nos. 1-6 and Unit No. 7 (\$1,715,000.00) by virtue of the General Subordination Agreement between CIBC and HEL contained in paragraph 2.2 of the Debenture.

[11] By Order of the Court dated November 15, 2004, it was ordered that Court Sub-File No. 7:27 and Court Sub-File 7:51 be tried together, and evidence in one would be evidence in the other. The Court also ordered that CIBC and GMAC have leave to file applications in Court Sub-File No. 7:27 and Court Sub-File 7:51 claiming priority and entitlement to the same funds as claimed in those sub files by RBC and Cedarapids.

[12] CIBC and John Deere Limited ("JDL") appealed the final determination of the Trustee to this Court. The CIBC appealed portions of the Final Determination as follows:

- (a) That the Trustee erred in fact and law in determining that CIBC did not have a valid secured claim under the GSA;
- (b) That the Trustee erred in fact and law in determining that CIBC did not have a valid secured claim under the *Bank Security Act*;
- (c) That the Trustee erred in fact and law in determining that the scope of the CIBC Security under the Debenture and Supplemental Debentures and, if found to be valid, the GSA, was subordinated to the interest of the holders of Permitted Encumbrances including, *inter alia*, Unperfected PMSI Holders and in determining that the assets in which the Permitted Encumbrances had a security interest are held in trust by CIBC

for the Permitted Encumbrances.

[13] JDL and John Deere Credit Inc (“JDCI”) (Collectively “Deere”) were also secured creditors of HEL and objected to the determination made by the Trustee in favour of CIBC, which determination was not appealed by CIBC, namely the determination that the purported transition of the Debenture and the Supplemental Debentures under the PPSA was effective in respect of the Supplemental Debentures. This transition issue is not relevant to the current decision and is simply mentioned to reference the role of Deere as an appellant in the matter generally. In my judgment registered in the CIBC and Deere appeals from the Final Determination of the Trustee in relation to CIBC (**Hickman Equipment (1985) Ltd. (Re)** [2003] N.J. No. 87) (the “April 4, 2003 judgment”) I stated the following at par. 8:

The judgment in these matters will be confined to deciding the three issues of the appeal the CIBC set out ...except for the second portion of par. (c). It has been urged upon me, and I agree, that any decision as to whether or not the assets in which the Permitted Encumbrancers had a security interest were held in trust by CIBC for the Permitted Encumbrancers requires an evidential hearing or hearings where the factual background of the alleged Permitted Encumbrances is explored. An opportunity to do this will arise in the individual applications by secured creditors claiming security interest in such assets. Additionally this judgment will deal with the transition issue set out ...in the appeal of Deere...

[14] This general intent is also repeated by me in par. 72 of that judgment.

[15] In the April 4, 2003 judgment, in summary I found:

- (1) that the Supplemental Debentures have been properly transitioned pursuant to the PPSA;
- (2) that the Bank Act security was invalid and unenforceable as against the creditors of HEL;
- (3) that the GSA was valid and enforceable and was not explicitly or implicitly released or discharged by CIBC; and
- (4) that both the Debenture and the various Credit Agreements entered into between the CIBC and HEL in the year 2000 permit the granting by HEL to the holders of Permitted Encumbrances of security interests in priority to the security interests in inventory held by CIBC pursuant to both the Debenture (and Supplemental

Debentures) and the GSA.

[16] This decision was appealed to the Court of Appeal which rendered two separate decisions in relation thereto. In one (not relevant for the purpose of this present decision) the Court of Appeal dismissed an appeal by Deere from my decision that the Debenture and Supplemental Debentures had been properly transitioned under the PPSA. In the second decision (**Hickman Equipment 1985 Ltd. Re** [2004] N.J. No. 286) (the "Court of Appeal decision") the appeal was allowed in part. The issues decided by the Court of Appeal relevant for this current decision were:

- (i) CIBC, in par. 2.2 of the Debenture, subordinated the CIBC security interest created by the Debenture and Supplemental Debenture;
- (ii) CIBC did not subordinate the CIBC Security interest created by the GSA;
- (iii) Unperfected purchase money security interests have priority over the CIBC Security interest created by the Debenture and Supplemental Debenture;
- (iv) The CIBC Security interest created by the GSA has priority over unperfected Security interests, subject to any subordination agreement between CIBC and the holder of an unperfected Security interest;
- (v) CIBC properly transitioned the Supplemental Debentures under the PPSA;
- (vi) Upon the coming into force of the PPSA, CIBC Security interest created by the Debenture and the Supplemental Debentures, continued to have full force and effect.

Issues RBC and Cedarapids allege are not yet determined.

[17] RBC and Cedarapids argue that the following issues have not yet been determined by the Trustee, this Court, or the Court of Appeal:

1. Are RBC and Cedarapids persons of the class of persons for whose benefit the CIBC subordination contained in par. 2.2 of the Debenture was intended?
2. Did CIBC subordinate, in various written priority agreements between CIBC and RBC, the CIBC Security interest created by

the Debenture and Supplemental Debentures and the CIBC security interest created by the GSA to the interests of RBC?

3. What are the priorities of the competing security interests in the RBC Collateral and the Cedarapids Collateral when the General Subordination Agreement between CIBC and HEL (contained in par. 2.2 of the Debenture) and the specific subordination agreements between CIBC and RBC are enforced for the benefit of RBC and Cedarapids?

[18] RBC and Cedarapids point to my comments contained in pars. 8 and 72 of the April 4, 2003 decision (partially repeated in par. 13 hereof) and argue that I have not in fact decided those questions, implying thereby that the Court of Appeal decision of the April 4, 2003 decision similarly could not have determined issues which I had not determined in the April 4, 2003 decision.

[19] In response, CIBC and GMAC point out that both the RBC security interest and the Cedarapids security interest are unperfected purchase money Security interests under the PPSA, and arose at a point in time after the CIBC Debenture and Supplemental Debentures, and the CIBC General Security Agreement ("GSA"), had been perfected under the PPSA and after the GMAC Security had been perfected under the PPSA. They argue that the Court of Appeal decision determined that after the CIBC GSA was perfected, no subsequent unperfected purchase money security interests could gain priority over the various CIBC security interests under the Debenture and Supplemental Debentures, or the GSA. They claim that the Court of Appeal decided that only unperfected purchase money security interests, which arose before the perfection date of the CIBC GSA, could have priority over the security interests of CIBC because of the provisions of s. 2.2 of the Debenture which the Court of Appeal found would allow unperfected purchase money security interests to have priority over the floating charge contained in the Debenture. They, therefore, argue that as a matter of general law, the issue has been decided and no evidential hearing is necessary to determine this point. They argue, therefore, that the matter is *res judicata* and that the arguments being raised by CIBC and Cedarapids are simply variations of arguments that they made before the Court of Appeal, or could have raised before the Court of Appeal, and RBC and Cedarapids are now estopped from raising them in this Court.

PPSA Subordination Provisions.

[20] RBC and Cedarapids point to the following provisions of the PPSA arguing that subordination must be given effect to according to its terms:

41. (1) A secured party may subordinate, in a security agreement or otherwise, the secured party's security interest to any other interest.
- (2) A subordination is effective according to its terms between the parties and may be enforced by a third party if the third party is the person or one of the class of persons for whose benefit the subordination was intended
- ...
66. (1) The principles of the common law, equity and the law, except where they are inconsistent with the provisions of the Act, supplement this Act and continue to apply.
- (2) All rights and obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised and discharged in good faith and in a commercially reasonable manner.
- (3) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person. [Emphasis Added]

Debenture Section 2.2.

[21] Paragraph 2.2 of the Debenture reads:

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

Specific RBC Priority Agreements:

[22] There were two specific Priority Agreements entered into between CIBC and RBC. The relevant portion in each reads:

Would you please confirm by signing and returning this letter by fax your agreement that: (a) any security interest you may have, now or in the future, in the Equipment, including any proceeds (as defined in the Personal Property Security Act, 1989 of Ontario) of the Equipment, is hereby postponed and Subordinated in all respects to our interest in the Equipment and such proceeds;

[23] The above Agreements were executed by CIBC. GMAC was not requested by RBC to sign similar Priority Agreements. There was no dispute that these Priority Agreements gave RBC priority over the Security interests of CIBC in Units 2 to 9 (valued at \$884,500) of the RBC Collateral. Unfortunately for RBC, it had not sought a similar Priority Agreement with respect to Unit No. 1 of the RBC Collateral valued at \$240,000.

[24] Cedarapids did not obtain any similar Priority Agreements from CIBC or GMAC.

Section 36 PPSA Residual Priority Rules.

[25] There was general agreement that on the basis of the Residual Priority Rules under s. 36 of the PPSA, the competing security interests in the RBC Collateral had the following priority rankings:

1. CIBC Security interest created by the Debenture and Supplemental Debentures;
2. The GMAC security interest;
3. The CIBC security interest created by the GSA; and
4. The RBC security interest, or the Cedarapids security interest as the case may be.

Subordination Argument.

[26] RBC and Cedarapids argue that s. 2.2 of the CIBC Debenture, which is the first ranking security, permits subordination to unperfected purchase money security interests, and that RBC and Cedarapids, as such security interest holders, can in effect leapfrog over any intervening security interest (including the CIBC GSA) with the result that RBC and Cedarapids stand in the shoes of the first-ranking security of CIBC under the Debenture and Supplemental Debentures to the extent of the RBC and Cedarapids claims against HEL.

[27] In their text **Alberta Personal Property Security Handbook**, 4th Ed. (Carswell:Toronto 1995) the authors Cuming and Wood state:

At 378:

...Subordination agreements are frequently used to reverse the priority rules that would otherwise prevail in cases where a debtor is seeking non-purchase-money financing from a credit grantor who is not the first to register a financing statement

...

...

At 379:

There are two kinds of subordination agreements. The first is an agreement executed directly between the subordinating creditor and the benefitting creditor. The second kind of subordination agreement is one that is executed between the subordinating party and the debtor. The subordination provision is usually found in the security agreement. The provision permits the debtor to grant certain kinds of security interests in priority to the security interest created by security agreement. The benefitting creditor is not a party to the contract...

At 380-381:

...A subordination agreement should be distinguishable from abandonment or release of a security interest. A secured party who releases a security interest does not merely subordinate his security interest. The release extinguishes the security interest, and the secured party is not thereafter permitted to assert a security interest in the collateral...

[28] RBC and Cedarapids argue that s. 41 of the PPSA confers a statutory right on the subordinating creditor (here CIBC under its Debenture) to subordinate the priority otherwise given by the PPSA and the corresponding right on the benefitting creditor (here RBC and Cedarapids) to enforce the subordinated security interest for their benefit. They cite Houlden, J.A. in **Euroclean Canada v. Forestglade Inv.** (1985), 16 D.L.R. 4th 289 at 301-302 (Ont. C.A.) where he states:

In my opinion, S. 39 (the equivalent of Newfoundland's s 41) is intended to confer a statutory right on a secured party to waive the priority given him by the P.P.S.A. and to confer a corresponding right on the beneficiary of such a waiver to enforce it, even though he is not a party to the agreement which created it or has no knowledge of its existence.

[29] RBC and Cedarapids further argue that there is no requirement under s. 41 of the PPSA that the subordinating creditor must, in its own right, exercise the rights under the subordinated security interest in order for the benefitting creditor to enforce the subordination. In this regard, they point to the decision of Foisy, J.A. in **Re Chipps and Skyview Hotels Ltd.** (Alta. C.A.) (1994), 116 D.L.R. (4th) 385 where, commenting on the Alberta equivalent of Newfoundland s. 41 of the PPSA, Foisy, J.A. states:

...There is no other reasonable interpretation of s. 40 but that in order to enforce the subordination agreement, the subsequent creditor need not be a party to the contract.

This court's finding that there is no registration requirement or privity requirement for PNS-Holders to enforce subordination clauses is completely in line with the rules of statutory interpretation. The principle is stated clearly in *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.* (1973) 35 D.L.R. (3d) 1 at p. 5, [1973] S.C.R. 596: "It is of course trite law that no legislation whether it be by statute or by-law should be interpreted to leave parts thereof mere surplusage or meaningless."

To hold that either registration or privity is required would have the effect of rendering s. 40 meaningless.

[30] RBC and Cedarapids contend that the right conferred upon a creditor by s. 41 of the PPSA to enforce subordination is a right which is in the nature of a subrogation. They argue that subrogation, as an available remedy or method for determining the priority of competing security interests under the PPSA, is

recognized in both ss. 41 and 66(1) of the PPSA. Their contention is that the benefitting creditor is “subrogated” to the rights of the subordinating creditor to the extent necessary to give effect to the enforcement of a subordination. Where the subordinating creditor receives subordinated funds, subrogation creates an equitable lien on the funds and the subordinating creditor holds the funds in “trust” for the benefitting creditor to the extent necessary to give effect to the subordination. In support of this argument they quote from R. M. Good in **Legal Problems of Credit and Security**, 2d. (London: Sweet & Maxwell, 1988) at p. 98 where the author states:

How should the liquidator distribute the estate? As it happens, this particular circularity problem is a lot easier to solve than those posed by our property textbooks and arising from conflicting statutory provisions. Indeed, Professor Gilmore, who devotes an entire chapter to the mysteries of circularity which makes one wonder how we ever managed before computers, dismisses the circularity through contractual subordination as not a true circularity at all. At all events, the problem is readily soluble through the principle of subrogation. **Since F has priority over C by virtue of their agreement, so that C would be accountable to F for moneys received in the liquidation to the extent of C’s subordination, all the interests are satisfied by treating F as subrogated to C to the extent necessary to give effect to the subordination agreement.** That is to say, F will collect from the liquidator *in right of C* the amount due to C, or such part of that amount as is necessary to satisfy F’s claim. As regards any balance due to F, this is postponed to the claims of P under section 172(2)(b). That this is the correct solution was conceded in *Re Woodroffe’s (Musical Instruments) Ltd.* [1985] to all E.R. 908 per *Nourse J. P. 912.* **[Emphasis Added]**

[31] RBC and Cedarapids argue that the Canadian approach to resolving the circular priority problem is described by Cuming and Wood in their text **Alberta Personal Property Security Handbook** at p. 381:

A situation may arise where an intervening security interest ranks between the security interest of the subordinating creditor and the claim of the party in favour of whom the subordination is made. This is displayed in the following scenario:

A debtor (D) grants a security interest to SP1 covering all of D’s present and after-acquired personal property. The security agreement secures \$200,000. D grants a security interest in all present and after-acquired personal property to SP2 to secure a loan in the sum of \$100,000. D then grants SP3 a security interest in all present and after-acquired personal property to secure an advance of \$150,000. SP1 and SP3 enter into a subordination agreement under which SP1 agrees to postpone his claim until SP3’s claim is fully satisfied. The collateral is sold and \$225,000 is realized.

The proceeds of realization are insufficient to satisfy all the secured claimants.

The priority competition is resolved as follows:

The amount of SP1's claim (\$200,000) would be set aside and SP3's claim would be satisfied out of this fund. The remainder (\$50,000) would be allocated to SP1. SP2's claim would then be satisfied out of the remainder of the fund (\$25,000). The ultimate distribution therefore would be SP1: \$50,000; SP2: \$25,000; SP3: \$150,000. In essence, the ranking of the claims and distribution of proceeds is determined apart from the operation of the subordination agreement. The subordination agreement is then applied to permit SP3 to satisfy her claim out of SP1's share of the proceeds.

[32] RBC and Cedarapids argue that CIBC and HEL expressly agreed that the security interest created by the Debenture and Supplemental Debentures and the security interest created by the GSA, would be independent of each other and interpreted and applied according to their own terms. They also argue that CIBC and HEL expressly agreed that security interest created by the GSA was in addition, and without prejudice, to the security interest created by the Debenture on Supplemental Debentures. There is no serious argument on this point and the position was supported by the findings in the Court of Appeal decision. RBC and Cedarapids contend that the mere fact that CIBC has another security interest ranking in priority between the Debenture and Supplemental Debentures in first position, and the RBC or Cedarapids security interest ranking in fourth position, does not prevent RBC and Cedarapids from leapfrogging over the CIBC GSA (and the intervening GMAC security) allowing them to step into the shoes of CIBC under the Debenture by reason of the permitted subordination under par. 2.2 of the Debenture.

CIBC and GMAC Response to Subordination Argument.

[33] CIBC and GMAC argue that the conventional definition of subrogation makes it clear that the concept only applies where one party pays the debt of another and is, therefore, entitled to the securities held by the creditor whom it has paid. They argue that this obviously does not apply to the present situation wherein RBC and Cedarapids are seeking to rely upon a general subordination clause contained in the Debenture, not having paid any portion of HEL's debt to CIBC which would entitle RBC and Cedarapids to such a subrogated remedy, nor has CIBC agreed to provide any such subrogated remedy to RBC and Cedarapids. They point to **Blacks Law Dictionary** (B.A. Garner Black's Law Dictionary (8th) St. Paul, MN - Thomson West 2004 at p. 1467-1468 where the author states:

Subrogation

1. The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor. For example, a surety who has paid a debt is, by subrogation, entitled to any security for the debt held by the creditor and the benefit of any judgment the creditor has against the debtor, and may proceed against the debtor as the creditor would. 2. The equitable remedy by which such a substitution takes place. 3. The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.

Subrogation is equitable assignment. The right comes into existence when the surety becomes obligated, and this is important as affecting priorities; but such right of subrogation does not become a cause of action until the debt is fully paid. Subrogation entitles the surety to use any remedy against the principal which the creditor could have used, and in general to enjoy the benefit of any advantage that the creditor had, such as a mortgage, lien, power to confess judgment, to follow trust funds, to proceed against a third person who has promised either the principal or the creditor to pay the debt. Lawrence P. Simpson, *Handbook on the Law of Suretyship* 205 (1950).

Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. Factually, the case arises because, for some justifiable reason, the subrogation plaintiff has paid a debt owed by the defendant." Dan B. Dobbs, *Law of Remedies* 4.3, at 404 (2d ed. 1993).

[34] CIBC and GMAC point to the case of **Farm Credit Canada v. Valley Beef Producers Co-operative Ltd.** (2003), 230 Sask R. 167 at para. 10-11 (Sask. Q.B.) where the indebtedness of Valley Beef to the Bank of Montreal was paid in full through enforcement proceedings by the Bank of Montreal. Valley Beef argued that as a result of its indebtedness to the Bank being satisfied, it was entitled to enforce any security interest that the Bank may have against other creditors. The Saskatchewan Court of Queen's Bench denied the existence of such a subrogated claim pointing to a similar definition of subrogation in the **Blacks Law Dictionary** as referred to in the preceding paragraph of this judgment. The Court then went on to state in par. 11:

This is not a situation, however, where a third party has paid the debts of a debtor

and, by so doing, is entitled to enforce the security held by the creditor against the debtor. The relationship between Valley Beef and the Bank was simply one of debtor/creditor with no third party involvement. That is, there was no "substitution of one party for another" which is the essence of a subrogated claim. Once the indebtedness was satisfied, in the manner described by Ms. Hildebrand in her affidavit, there was no longer a debt in existence upon which a third party could enforce a security interest. In my opinion, the law of subrogation is therefore of no assistance to Valley Beef.

[35] CIBC and GMAC contend that a generalized subordination clause is not sufficient to create the concept of subrogation. In this regard they dispute the applicability of the Ontario decision of *N' Amerix Logistix Inc. (Re)* (2001), 57 O.R. (3rd) 248, stating that the general quotes therein relied upon by RBC and Cedarapids which appear to support RBC and Cedarapids, have to be considered in light of the fact that the party seeking the subrogation in the *N' Amerix* case had, in fact, paid an obligation of *N' Amerix* to the Bank of Nova Scotia. They contend that that situation does not approach the current situation where the only basis upon which RBC and Cedarapids assert a subrogated claim is on the basis of a generalized subordination clause contained on the Debenture. CIBC and GMAC contend that this is not sufficient to support a subrogated claim.

[36] In response to the quotations from R. M. Good in *Legal Problems of Credit and Security*, relied upon by RBC and Cedarapids, CIBC and GMAC contend that the learned author is not asserting that the secured creditor is, in fact, subrogated to the rights of the junior creditor. Rather, they argue that the author suggests that the senior creditor can be treated as subrogated so that the liquidator may pay the junior creditor to the extent necessary to satisfy the senior creditor's claim under the Subordination Agreement. The treatment of the senior creditor as being subrogated to a junior creditor was simply a mechanism to address the difficulties of understanding the concept of circular priority. CIBC and GMAC argue, in fact, that in the *Re Woodroffes* decision referenced by the author, there was, in fact, no finding of subrogation, nor was the term subrogation even used, nor any suggestion made that the creditor had any other rights conferred upon her other than the right of payment where the first payee would ordinarily be the bank. (See: *Re Woodroffes (Musical Instruments) Ltd.* [1985] 2 All E.R. 908.)

Decision on Subordination/Subrogation Argument of RBC and Cedarapids.

[37] It is clear from the Court of Appeal decision that the Court of Appeal decided that neither the CIBC GSA, nor the various Credit Agreements put in place between CIBC and HEL in the year 2000, contained any general right of subordination whereby third party creditors could obtain priority over the security in place between CIBC and HEL. Essentially, the Court of Appeal decided that once the GSA was perfected in January of 2000, no unperfected purchase money security interest could gain priority over it, and that the only security over which unperfected purchase money security interest could gain priority was the Debenture, provided that the unperfected purchase money security interest, for which priority was sought, arose before the perfection date of the GSA.

[38] The Court of Appeal stated at pars. 46 to 49:

What does it matter in law that suppliers of inventory who did not protect their interests (through registration pursuant to the PPSA or by obtaining express subordination from CIBC) may have assumed that somehow, notwithstanding their failure to act to protect their interests, those interests were nonetheless protected? Absent some action or statement by CIBC indicating its intention generally to subordinate its security interests to the un-perfected interests of inventory suppliers (and none is referred to by the Trial Division judge), CIBC has a clear right to rely on the priority its security interests gained from the provisions of its security agreements and their registration under the PPSA.

As unhappy a result as this is from the perspective of the suppliers, it seems to me that is what must follow from the suppliers losing their priority by failing to register their purchase money security interest in the inventory that they supplied to Hickman Equipment.

The rule is simple: register and obtain priority; fail to register and lose priority, in this case to the GSA and the Credit Agreement. (The result is different regarding the Debenture, for the reasons set out above.)

Suppliers who financed inventory had the means to protect their interests. Some protected their interests through registration. Others protected their interests by obtaining express subordination from CIBC. Some did not protect their interests in either way. Those who did not now face the harsh consequences of having failed to do so. [Emphasis Added]

[39] Clearly the Court of Appeal came to the decision that the provisions of the GSA saw HEL warranting that its Collateral was, and would at all times be, free of any charge except in favour of CIBC or incurred with CIBC's prior written consent. The Court also found that the operative Credit Agreement at the time also only constituted a negative pledge and not a general subordination and dismissed suggestions by counsel for opposing parties to CIBC that the negative pledge provisions were, in other jurisdictions in Canada, considered as general subordination agreements.

[40] What can be taken from these findings, as the Court of Appeal did not specifically address the issues now before this Court in terms of subrogation? The coming into force of the PPSA brings about a whole new regime giving certain rights and imposing certain obligations upon creditors who intend to obtain security over the assets of a debtor for which security they desire priority over existing creditors. Section 19 of the PPSA clearly gives the right to intended subsequent creditors to obtain from existing creditors particulars of existing Security Agreements, the particular collateral secured, the terms of payment on such security and the balance outstanding. There is nothing in s. 19, however, which makes reference to agreements in existence between a lender and its creditor, which agreements in and of themselves would not constitute security agreements but would merely be general agreements with respect to the operation of the accounts as between the creditor and the debtor. The Credit Agreements in place between CIBC and HEL would constitute such agreements. I am satisfied that under s. 19 of the PPSA, Cedarapids and RBC would not have been entitled to demand copies of such agreements prior to seeking to put in place security from HEL which would purport to have priority over CIBC. This being said, however, s. 41 of the PPSA, dealing with subordination agreements, in my view creates a different right to information. By virtue of s. 41, a secured party may subordinate in a security agreement or otherwise, the secured party's security interest to any other security interest. That subordination is effective in accordance with its terms as between the parties and may be enforced by a third party if the third party is a person or the class of persons for whose benefit the subordination was intended. How is the intended beneficiary of the subordination to know of its existence if it is not contained within the security agreement of which the intended subsequent secured creditor is entitled to a copy under s. 19 of the PPSA? Obviously, such an intended subsequent creditor could not, under s. 19 of the PPSA, enforce or claim a right to a copy of an agreement between the original debtor and creditor permitting subordination if that agreement was not contained within the security

agreement. However, that does not make an agreement between the original creditor and the debtor, relating to subordination, which is contained "otherwise" than a security agreement, irrelevant for the purposes of determining what is the contractual state of affairs as between the original creditor and the debtor.

[41] It must be remembered in the fact situation at hand in this present matter that Cedarapids made no inquiries whatsoever of CIBC as to the state of the CIBC security from HEL. RBC sought specific Priority Agreements and obtained them with respect to Items 2 to 9 in the RBC Collateral. It did not seek such a Priority Agreement with respect to Unit 1 and there was no evidence that it sought any information from CIBC with respect to the existence of a generalized Subordination Agreement between CIBC and HEL. It may well be that RBC had knowledge of the s. 2.2 generalized subordination contained in the Debenture because the Debenture was registered in the Public Registry of Deeds prior to the advent of the PPSA and a copy thereof would have been obtainable by RBC without the necessity of any inquiry of CIBC. However, the Court of Appeal has clearly found that the GSA and the Credit Agreements do not contain any generalized subordination provision and merely contain negative pledges which give no right to any subsequent secured creditor to obtain priority over CIBC. These two agreements, coming after the Debenture, and prior to the taking of security by RBC and Cedarapids, must be interpreted to establish what was the current state of contractual affairs as between CIBC and HEL at the time that RBC and Cedarapids took their security. The clear interpretation is that at that time HEL did not have any contractual right to generally grant security interest to third parties which would gain priority over the security interest of CIBC without the prior written consent of CIBC. Surely, as between the original creditor (CIBC) and the original debtor (HEL) their agreed security arrangements must predominate over the interests of subsequent unperfected purchase money security interest creditors where, in the case of Cedarapids, that creditor took no steps to protect its interest and, in the case of RBC, took incomplete steps to protect all of its interest. The fact that the provisions restricting the right to give priority security are contained partly in the GSA and partly in the Credit Agreements is irrelevant from the point of view of determining what is the total contractual situation existing between CIBC and HEL at the time RBC and Cedarapids took their security. Nothing which was done by CIBC in any way misled RBC and Cedarapids with respect to the state of its contractual security arrangements with HEL. RBC and Cedarapids acted entirely at their own peril and must accept the consequences of not protecting their interests which they had the capacity to do under the PPSA if their

loans constituted purchase money security interests.

[42] This conclusion is supported, in my view, by ss. 66 of the PPSA which provides that the principles of common law, equity and law merchant, except where they are inconsistent with the provisions of the PPSA, supplement the PPSA and continue to apply. Section 66(2) provides that all rights and obligations arising under a security agreement, under the PPSA, or under any other applicable law, must be exercised and discharged in good faith and in a commercially reasonable manner. Section 66(3) provides that a person does not act in bad faith merely because a person acts with the knowledge of the interest of some other person. In my view, the arguments put forward by RBC and Cedarapids with respect to subordination and subrogation, are not commercially reasonable. Obviously, in interpreting the state of a contractual relationship as between a creditor and a debtor, the later agreements, if inconsistent with prior agreements, override the earlier agreement. Commerce could not function otherwise. For RBC and Cedarapids to argue that it is commercially reasonable that CIBC should be hung out to dry simply because its earlier Debenture gave a general right of subordination, whereas its subsequent security documents and agreements did not permit it, is not a commercially reasonable argument and cannot be supported. I conclude, therefore, that the RBC security and the Cedarapids security are subsequent in priority to both the Debenture and Supplemental Debentures on the one hand and the GSA of CIBC on the other hand. The RBC security, and the Cedarapids security, cannot "leapfrog" over the GMA security and the CIBC GSA, to stand in the shoes of CIBC under the obsolete generalized subordination contained in s. 2.2 of the Debenture.

Res Judicata.

[43] As indicated earlier in this judgment, the issues determined by me in the hearing of the appeal by CIBC from the final determination of the Trustee involved legal analysis of the scope of the Debenture and the GSA, and particularly whether those Security Agreements were subordinated to unperfected purchase money security interest holders. I clearly contemplated that "evidential hearings" would be held to determine the interest of individual unperfected purchase money security interest holders once the legal issues were decided. Clearly, the subordination/subrogation arguments raised by RBC and Cedarapids, in this present hearing, could have and should have been raised at the original hearing before me on the CIBC appeal from the final determination of the Trustee. The issues raised are

ones of general application. Only the question of whether RBC and Cedarapids were persons for whose benefit the subordination existed were matters which required evidence. At the initial hearing before me the emphasis, on the part of the creditors, opposed to CIBC, was that both the Debenture s. 2.2 and the Credit Agreements gave a generalized right of subordination. In my decision arising from that hearing, I agreed that the s. 2.2 of the Debenture gave a generalized right of subordination. The Court of Appeal supported this conclusion, but limited its effectiveness to the period of time up to the perfection of the GSA. I also concluded that the various Credit Agreements contained general rights of subordination. In this regard, I was overturned by the Court of Appeal who concluded that both the GSA and the Credit Agreements merely contained negative pledges and not any generalized rights of subordination. The issues argued in this current matter by RBC and Cedarapids could just have readily been argued before me in the initial hearing and the decision made in respect thereof.

[44] What happened in the Court of Appeal with respect to argument on subordination? In their factum filed with the Court of Appeal, RBC and Cedarapids argued, *inter alia*, that all of CIBC's security documents should be considered in giving effect to subordination by CIBC in favour of unperfected purchase money security interest holders. In par. 28 they stated:

Independent of whether clauses 4 and 5 operate as a Negative Covenant with lien exceptions, any subordination by CIBC under the terms of the Debenture, or the 2000 Credit Agreements is effective respecting the CSA.

[45] This argument was further detailed in the Court of Appeal at p. 136 of the transcript in the following exchange between Rowe, J.A. and Greg Smith, counsel for RBC:

Justice Rowe: That's fine. I just haven't understood the point, are you saying that if there is subordination under the Debenture, it doesn't matter what's in the GSA, there is subordination under the GSA as well?

Mr. Smith: Yes.

(ii) On page 144 of the Transcript, Mr. Smith makes the following argument:

Is the subordination that has been determined to have been given, given to the same collateral that you're now trying to use this GSA to assert your priority.

And if it is, then whatever liability you've secured by the GSA is subject to an existing subordination...

- (iii) On page 148 of the Transcript, there is the following exchange between Madam Justice Welsh and Mr. Smith:

Madam Justice Welsh: Well, are you saying, in respect of the GSA, anything more than when it came to making the GSA, there was an already existent agreement and in the absence of having torn that agreement up, you interpret the GSA in light of the fact that you already had these prior commitments.

Mr. Smith: Yes. And that includes the specific subordinations that GMAC had and John Deere. They don't get erased just because of the GSA.

- (iv) At page 150-153, there is the following exchange between Madam Justice Cameron and Mr. Smith:

Madam Justice Cameron: Now, in respect of your clients, their interests arose after the PPSA was brought in and after the GSA?

Mr. Smith: RBC's bid (sic), yes, I can't speak to –

Madam Justice Cameron: So why for the purpose of, why for the purpose of – I mean, I can see an argument in respect of those persons, for whom subordination worked between the debenture and the GSA. It seems to me that that's one thing because you've got a bunch of people who say hang on now, we got this GSA and in the meantime we got some rights and you can't by virtue of this GSA wipe us out. We got interests here. But for a client who was not involved prior to the GSA, why should you be concerned about the Debenture and why should you use the Debenture to interpret their rights.

Mr. Smith – Because section 41 says that I, as a third party, can rely on subordination by CIBC, whether it's in the security agreement or otherwise and this is part of the "or otherwise". And if they kinda fell asleep at the switch in 1985, that's their problem. It still exists. In fact, that they didn't fall asleep because they're relying on it, they continued with their Supplemental Debentures, and they're using it to gain first in time for 1985. That's important to them. So they are still relying on this document. They only way that –

Madam Justice Cameron: ...you've got to actually get rid of, in your view, the Debenture before you can say, in your relationship with Hickman's, before

you can say to somebody who comes much later down the road, you can't go back to that document which even the parties might no longer see as being important.

Mr. Smith: I can go back to it as a document that contains a subordination by CIBC or me, that I can take the time – for me the third party, in the same way

- (v) At page 156, Mr. Smith makes the following argument:

Well, in terms of the GSA, let's just work with the GSA. I don't see it, let's say. Now I look otherwise, there are other documents I can look to, I can look to a letter, I can look to a credit agreement, I can look to an existing valid enforceable mortgage. What's confusing, I think, is that this subordination is tied up in a security agreement in and of itself, but that doesn't make it any less subordination that I can rely on as part of the "or otherwise" as it relates to the GSA.

- (vi) At page 170 of the Transcript, there is the following exchange between Madam Justice Welsh and Mr. Smith:

Madam Justice Welsh: And my second question is I wanted to make sure because I think you started to answer my question from this morning about the PPSA and the GSA, am I correct in understanding your argument is that the Credit Agreement is critical and is relevant and the Debenture is also still relevant and as Justice Rowe would say it wouldn't matter which either of it was, if we've got one or the other and you get the subordination coming out of either one, then that's all you need.

Mr. Smith: Yes.

- (vii) At pages 173-175, the following exchange occurs between Mr. Smith and Madam Justice Cameron:

Mr. Smith: ...I only make this comment, that it has not been determined whether any of these comments before the court are still out there waiting for a decision, come within the definition of the permitted encumbrancers as the receiver put it and as Justice Hall put it. And I refer to page 28, paragraph 72 of his decision where he talks about what is the purpose of the hearing before him and what was not the purpose. And that paragraph about half way down the right hand side of the sentence that begins- the sentence before, "It is only necessary therefore for the third party claiming the benefit of the

subordination to be able to establish that it is one of the class of persons." So, all that he was interested in is establishing whether there was subordination. It would be left to a later day for individuals to come within it. And I know Mr. Kendall has, you know, suggested that RBC may not come within that class. Well, I disagree with that view. There's been no determination of that point, been no evidence led before Justice Hall.

So we all had to come back at another day, but on our own individual matters to decide whether or not we fit within this category.

Madam Justice Cameron: The only point from the perspective of this side of things is if you have to make statements and there are in fact differences, depending on where you fit in along the way, then presumably we're not going to be of any assistance unless we particulate where those division lines are.

[46] The Newfoundland and Labrador Court of Appeal recently set out the applicable test for *res judicata* and issue estoppel in **Furlong v. Avalon Bookkeeping Services Ltd.** (2004), 239 Nfld. & P.E.I.R. 197 (NLCA). The Court of Appeal cited the following tests in relation to *res judicata* and issue estoppel:

- *res judicata*

13 The modern doctrine of *res judicata* has its source in *Henderson v. Henderson*, [1843-60] All E.R. Rep. 378, where Wigram V.C. stated, at pp. 381-382:

In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

14 The above statement in *Henderson* has come to be known as "cause of action estoppel". The difference between it and "issue estoppel" was highlighted by Higgins

J. of the High Court of Australia in *Hoystead v. Federal Commission of Taxation* (1921), 29 C.L.R. 537, at pp. 560 and 561:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

15 Green J.A. for this Court (now Green C.J.T.D.) considered the distinction between the two branches of *res judicata* in *Quinlan v. Newfoundland (Minister of Natural Resources)* (2000), 192 Nfld. & P.E.I.R. 144, at paras 6 and 7:

... The principles underlying the *res judicata* doctrine are the promotion of finality of litigation and the prevention of a multiplicity or fragmentation of proceedings. Subject to the restrictive rules respecting reopening a case on the grounds of mistake or fraud or to allow for the reception of new evidence, a litigant ought not to be able to retry a cause of action, or to claim any relief flowing therefrom, that has already been litigated between the same parties or their privies (often referred to as "cause of action estoppel" or "merger" of the cause of action in the original judgment).

The doctrine also applies (sometimes referred to as "issue estoppel") to prevent a litigant from relitigating an issue that was fundamental to, and was decided in, previous litigation between the same parties or their privies even though the causes of action in the two proceedings were not identical. ...

16 The definition of "issue estoppel" in *Hoystead* was adopted by Dickson J. (later C.J.) in *Angle v. Minister of National Revenue*, (1974), [1975] 2 S.C.R. 248, at p. 254. On the same page, Dickson J. gave approval to the three requirements for issue estoppel which Lord Guest listed in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No. 2), [1967] 1 A.C. 853 (H.L.), at p. 935, namely:

... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. ...

17 The requirements for cause of action estoppel were identified a year later in *Town of Grandview v. Doering*, [1976] 2 S.C.R. 621, and were subsequently précised by Hewak C.J.Q.B. in *Bjarnarson v. Manitoba* (1987), 48 Man. R. (2d) 149, at para. 6, as follows:

The Supreme Court of Canada in the case of *Town of Grandview v. Doering* ... identified four criteria that must be present before the doctrine of cause of action estoppel would apply:

1. There must be a final decision of a court of competent jurisdiction in the prior action;
2. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action (mutuality);
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

Furlong v. Avalon Bookkeeping Services Ltd. (2004) 239 Nfld. & P.E.I.R. 1978 at para. 13-17 (NLCA)

See also:

Quinlan v. Newfoundland (Minister of Natural Resources) (2000), 192 Nfld. & P.E.I.R. 144 (NLCA)

Danyluk v. Ainsworth Technologies Inc. (2001), 201 DLR (4th) 193 (SCC)

R.L. Coolsaet of Canada Ltd., Re (1997), 45 C.B.R. (3d) 33 (Ontario Court of Justice (General Division))

Scherer v. Price Waterhouse [1985] O.J. No. 881 (Ontario Supreme Court - High Court of Justice)

Treasure Island Gardens Ltd. v. Lawson (1969), 13 C.B.R. (N.S.) 47 (Ontario Supreme Court)

[47] Are the tests for issue estoppel satisfied?

- (i) That the same question has been decided:

Yes. The central issue of whether unperfected PMSIs rank in priority to CIBC has already been decided by the Court of Appeal.

- (ii) That the judicial decision which is said to create the estoppel was final.

Yes. The Court of Appeal Judgment was a final decision which has not been appealed. RBC and Cedarapids had the right to seek leave to appeal to the Supreme Court of Canada but chose not to do so.

- (iii) That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Yes. RBC and Cedarapids filed written arguments before the Court of Appeal, attended the hearing of the appeal and presented their arguments to the Court of Appeal on this issue. Any other arguments that RIBC and Cedarapids wanted to make could have been argued at the Court of Appeal if RBC and Cedarapids wanted those arguments considered.

- (iv) The basis of the cause of action was or could have been argued.

Yes. In **The Doctrine of Res Judicata in Canada** (Second Edition) Butterworths 2004 at 51-52 the author, Donald J. Laing states:

The fundamental nature of the question cannot be changed by advancing it in a different fashion. Where different legal consequences flow from the same factual question, or the same factual question can be cloaked in different legal classifications or categorizations, the question is estopped since "re-engineering" a claim and the "never-ending ingenuity of counsel to create new formulations and characterizations cannot displace" issue estoppel.

...Within any one issue, there may be several arguments available which assist a party to secure a favourable determination of the issue

and, although a party may fail to advance certain arguments, the issue itself may nevertheless be estopped.

[48] I am also satisfied that the doctrine of cause of action estoppel applies in this situation in that the basis of the claim of RBC and Cedarapids was argued, or could have been argued, at the Court of Appeal. **Hogue v. Montreal Trust Co.** (1997), 162 N.S.R. (2d) 321.A.); leave to appeal to SCC refused (1998), 167 N.S.R. (2d) 400n.

[49] I am satisfied that RBC and Cedarapids are simply attempting to relitigate what has already been argued before and determined by the Court of Appeal. It is necessary to bring finality to litigation. In **Danyluk v. Ainsworth Technologies Inc.** (2001), 201 DLR (4th) 193 at par. 18 (S.C.C.) the Court stated:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be relitigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings are to be avoided.

[50] I am not satisfied that there is any need for me to exercise any residual discretion that I may have to refuse to apply estoppel with respect to this matter.

Disposition.

[51] The appeals of RBC and Cedarapids are dismissed with costs in favour of CIBC and GMAC. It is ordered that:

1. The proceeds arising from the RBC Collateral in the amount of \$1,134,500 be paid by the Trustee to GMAC less the Trustee's 15 percent withholding fee under the Costs Allocation Plan of the Receivership Order;
2. That GMAC pay to CIBC, pursuant to the Priority Agreement in place between them, the sum of \$240,000 less the Trustee's fee under the Costs Allocation Plan hereinbefore referred to;

3. That the proceeds from the Cedarapids Collateral in the amount of \$1,876,500, less the hereinbefore mentioned Trustee's fees under the Cost Allocation Plan, be paid by the Trustee to GMAC;
4. That GMAC pay to CIBC the sum of \$1,867,500, less the Trustee's fee under the Cost Allocation Plan, as acknowledged as owing by GMAC to CIBC under the Priority Agreement in place between them.

I order that CIBC and GMAC have their costs in this matter on the party and party scale as taxed.

Justice

Tab T



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This is EXHIBIT "T" referred to in the
Affidavit of Chris Wood

Sworn before me at Vancouver

in the Province of British Columbia this

15 day of October, 2019

[Signature]
A Commissioner for taking Affidavits
in the Province of British Columbia

September 9, 2019

VIA EMAIL djmiller@tgf.ca / rbengino@tgf.ca

DJ Miller / Rachel Bengino
Thornton Grout Finnigan
100 Wellington Street West, Suite 3200
Toronto, Ontario
M5K 1K7

Dear Ms. Miller and Ms. Bengino:

**Re: Receivership of Distinct Infrastructure Group Inc. et al.
Court File No. CV-19-00615270-00CL**

We are counsel to Chris Aron Wood and Mega Diesel Holdings Ltd., creditors of Distinct Infrastructure Group Inc. ("DIG"). We write seeking your consent to lift the stay imposed by the March 11, 2019 Order of Justice Hainey (the "Receivership Order") to allow an ongoing appeal to proceed before the Court of Queen's Bench of Alberta.

As you are aware, prior to the appointment of the Receiver, our clients were attempting to enforce outstanding judgments against DIG (and its related wholly-owned subsidiaries) in Alberta, in the amount of approximately \$575,000.00.¹

In their attempt to enforce the outstanding judgments, an issue arose as to the priority over certain assets registered in the Alberta Personal Property Registry as between our clients and Royal Bank of Canada (the "Priority Dispute").

Master Schlosser, of the Court of Queen's Bench of Alberta, granted an Order in the Priority Dispute in favour of RBC and DIG, from which our clients have appealed (the "Schlosser Order"). However, as a result of the Receivership Order, our clients are estopped from pursuing their appeal of the Schlosser Order in Alberta.

¹ Order of Master Smart in the amount of \$422,398.81 plus interest and costs (Court of Queen's Bench of Alberta Court File No. 1703-13921) and Order of Master Schlosser, in the amount of \$149,922 plus interest and costs (Court of Queen's Bench of Alberta Court File No. 1703-21939).

- 2 -

We understand that our clients' Alberta counsel served your office on or about April 23, 2019 with a copy of the Notice of Appeal in the Priority Dispute, as well as the appeal materials filed with the Court of Queen's Bench of Alberta.

On review of the Receiver's publicly filed materials, there is a substantial risk that there will be no funds available from which our clients may seek to enforce their outstanding judgments.

Given that the Priority Dispute is currently a live issue before the Alberta courts, it is our view that the stay imposed in this matter is resulting in a material prejudice as against our clients and should properly be lifted in order to allow the appeal of the Schlosser Order to proceed.

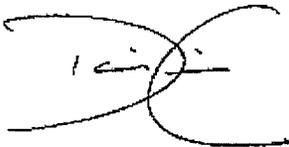
As such, we seek your written consent, pursuant to the Receivership Order, to lift the stay imposed in order to allow the Appeal of the Schlosser Order.

Should you fail to provide consent to lift the stay, we have instructions to bring a motion forthwith seeking to lift the stay, and will seek costs against the Receiver as a result.

We look forward to receiving your response by no later than Monday, September 16, 2019. Failing which, we will proceed to arrange for a motion on this issue.

Sincerely,

BIRENBAUM, STEINBERG, LANDAU, SAVIN & COLRAINE LLP

A handwritten signature in black ink, appearing to read "David Cassin". The signature is stylized with a large, sweeping flourish that loops around the name.

David Cassin
DC

cc Clients

Tab U

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April 23, 2019

Our File Number.: 2402818/ST

Sent via Email and Courier

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Attention: Graham Sanson
 Email: GSanson@bmlp.ca
 File No. 105031-011

Attention: Arif Chowdhury
 Email: achowdhury@fasken.com
 File No. unknown

Attention: Rachel Bengino
 Email: rbengino@tgf.ca
 File No. 300-204

Dear Counsel:

Re: Chris Aron Wood and Mega Diesel Holdings Ltd. v Mega Diesel Excavating Ltd. and
 Distinct Infrastructure Group Inc.
 Court File Number: 1703-13921
 Appeal of Order of Master W.S. Schlosser, dated March 11, 2019

Please find enclosed the following documents for service upon you as Counsel in these proceedings:

- Filed transcript of Application heard before Master L.A. Smart on February 15, 2019;
- Filed transcript of Application heard before Master W.S. Schlosser on March 11, 2019; and
- Brief filed on behalf of the Appellants.

As a professional courtesy, our office will not take any further steps in this matter or require any further documents from any party until after the issue regarding the stay of proceedings pursuant to the Order Appointing Receiver of the Ontario Superior Court, dated March 11, 2019 is dealt with.

Yours truly,

BOSECKE & ASSOCIATES

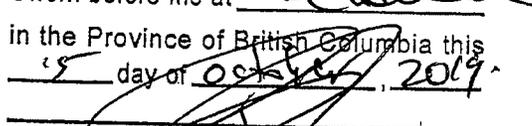
Per:


 Sal Tinajero
 ST/bb

This is EXHIBIT "U" referred to in the
 Affidavit of Chris Wood

Sworn before me at Kelowna

in the Province of British Columbia this
 '5 day of October, 2019.


 A Commissioner for taking Affidavits
 in the Province of British Columbia

Form 28
[Rule 6.14]

Clerk's Stamp



COURT FILE NUMBER 1703-13921

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFFS CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

DEFENDANTS MEGA DIESEL EXCAVATING LTD. and DISTINCT INFRASTRUCTURE GROUP INC.

DOCUMENT **BRIEF OF THE APPELANTS, CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD. APPEALING A MASTER'S ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT BOSECKE & ASSOCIATES
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File no. 2402818

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF SOLICITOR FOR MEGA DIESEL EXCAVATING LTD. and DISTING INFRASTRUCTURE GROUP INC. BISHOP & MCKENZIE LLP
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File no. 105031-011

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TABLE OF CONTENTS

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IX. CONCLUSION AND RELIEF REQUESTED.....12

LIST OF AUTHORITIES

TAB	NAME OF AUTHORITY
"D"	<i>Bahcheli v Yorkton Securities Inc.</i> 2012 ABCA 166
"E"	<i>Personal Property Security Act</i> , RSA 2000, c P-7, s. 40.
"F"	<i>Chiips Inc. v Skyview Hotels Limited</i> , 1994 ABCA 243
"G"	<i>The Maritime Life Assurance Company v. Saskatchewan River Bungalows Ltd.</i> [1994] 2 SCR 490.
"H"	Alberta Personal Property Security Act Handbook, 4 th Ed. (Carswell: Toronto 1995), Cuming and Wood, at page 380
"I"	<i>In Re Hickman Equipment (1985) Ltd. (In Receivership)</i> , 2005 NLTD 122

OVERVIEW AND SUMMARY OF POSITION

1. This is an appeal of an Order of Master W.S. Schlosser directing that a writ of enforcement registered in the Alberta Personal Property Registry (the "PPR") be discharged against certain equipment and that certain monies held in trust by Ritchie Bros. Auctioneers (Canada) Ltd. ("Ritchie Bros.") be paid to the Royal Bank of Canada (the "RBC").
2. Prior to the sale of the equipment by Ritchie Bros., the Defendants to this action, Distinct Infrastructure Group Inc. ("DiG") and iVac Services West Inc. ("iVac"), being the successor by amalgamation of Mega Diesel Excavating Ltd. ("Excavating"), had granted a General Security Agreement to the RBC against all their present and after acquired personal property.
3. Subsequent to the registration of the RBC's General Security Agreement, the Plaintiffs obtained judgments against the Defendants in amounts totaling not less than \$572,320.81 plus interests and costs.
4. At the time of the sale of the equipment by Ritchie Bros., the RBC agreed to waive its security interest in the equipment in exchange of receiving a voluntary payment of at least \$2 million from the Defendants to this action, which it did receive in full. The Appellants rely on section 40 of the *Personal Property Act*, RSA 2000, c P-7 and argue that they are entitled to enforce the waiver agreement between the RBC and the Defendants.
5. Further, or in the alternative, the Appellants served a garnishee summons on Ritchie Bros. that would have required Ritchie Bros. to pay the total amount of \$583,749.87 into Court for the benefit of the Defendants' judgment creditors.

MATERIALS BEFORE THIS COURT

6. The materials before this Court consist of the following:
 - a. Affidavit of William Nurnberger, sworn on December 18, 2018;
 - b. Affidavit of William Nurnberger, sworn January 4, 2019;
 - c. Affidavit of Chris Aron Wood, sworn February 7, 2019;
 - d. Supplemental Affidavit of William Nurnberger, sworn February 8, 2019;
 - e. Supplemental Affidavit of Beth Marie Brown, sworn February 14, 2019;
 - f. Transcript of proceedings before Master L.A. Smart, heard on February 15, 2019.
 - g. Affidavit of Gary Ivany, sworn March 1, 2019;

- h. Transcript of proceedings before Master W.S. Schlosser, heard on March 11, 2019;
- i. Appeal Brief of Chris Aron Wood and Mega Diesel Excavating Ltd., filed April 23, 2019;
- j. Respondent Brief of Distinct Infrastructure Group Inc. and iVac Services West Inc, to be filed.; and
- k. Respondent Brief of the Royal Bank of Canada, to be filed.

RELEVANT FACTS

Security Interests

7. On September 21, 2016, the Respondents, Distinct Infrastructure Group Inc. (“DiG”) and Mega Diesel Excavating Ltd. (“Excavating”) entered into a General Security Agreement with the Royal Bank of Canada (the “RBC”) where DiG and Excavating granted the RBC a security interest in all their present and future personal property. This General Security Agreement was properly registered with the Alberta Personal Property Registry (the “PPR”).
8. Excavating has since been amalgamated into iVac Services West Inc. (“iVac”).
9. On July 31, 2017, Master L.A. Smart granted a Consent Judgment in the within action to the Appellants, Chris Aron Wood (“Wood”) and Mega Diesel Holdings Ltd. (“Holdings”) in the amount of \$422,398.81. The Appellants registered a Writ of Enforcement in the PPR against 17 of the serial number goods owned by iVac, including the following motor vehicles:

Description	Serial No.
2013, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALDRXDPFA9979
2014, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALD12EPFP3871
2014, Western Star, 4900SA, 2000 Gallon Tri Drive, Hydro Vac Truck	5KKPALD10EPFP3870

2014, Western Star, 4900SA, 2066 Gallon Tri Drive, Hydro Vac Truck	5KKPALD12FPGK2956
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(the "Subject Vehicles")

10. In a different court action [Court of Queen's Bench action number 1703-21939], the Appellants sued Distinct Infrastructure Group Inc. ("DiG") for payment on an outstanding debt (the "Second Action"). On September 13, 2018, Master W.S. Schlosser granted an Order for Summary Judgment in the amount of \$149,922.00 plus interest and costs against DiG. The Appellants properly registered a Writ of Enforcement in the PPR with registration no. 18101524102.

September 13, 2018 Order for Summary Judgment by Master Schlosser, TAB A

Auction and Sale of Equipment

11. On or about December 11, 2018, DiG and iVac directed Ritchie Bros Auctioneers (Canada) Ltd. ("Ritchie Bros") to conduct an auction in Edmonton, Alberta and in Toronto, Ontario (the "Auction") to sell various equipment owned by the Respondents (The "Equipment"), including the Subject Vehicles. The total proceeds from the Auction by Ritchie Bros. totaled \$8,235,711.00. Of these total proceeds, approximately \$4,200,000.00 was paid to prior secured creditors. Priority over the remaining \$4,035,711.00 (the "Net Proceeds") is the main issue of this Appeal.

Para 13 of Affidavit Sworn by William Nurnberger on December 18, 2018.

12. When the Respondents approached the RBC to approve the sale, the parties agreed that in exchange of the RBC approving the sale, DiG would make a voluntary prepayment of the principal in an aggregate amount of at least \$2 million towards the [RBC] Term Loan (the "Agreement"). This payment was to be in addition to any other regularly scheduled payments. As part of the Agreement, the RBC sent what it called a "waiver" to Ritchie Bros.

Exhibit "A" to Affidavit of William Nurnberger, dated February 8, 2019.

13. The waiver that the RBC acknowledged sending to Ritchie Bros. (the "Waiver") expressly states that "We [the RBC] have no interest in the Equipment nor in 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.” The Waiver defines Equipment to include all four Subject Vehicles.

Exhibit “A” to Supplemental Affidavit of Beth Brown, dated February 14, 2019.

Exhibit “G” to the Affidavit of Gary Ivany, dated March 1, 2019.

14. Upon receiving the Waiver, Ritchie Bros. contacted the Appellants’ counsel requesting a payout statement and advised that the Appellants should expect to receive full payment of the amount owing to them.

Exhibit “B” to Affidavit of Chris Aron Wood, dated February 7, 2019.

15. On or about January 9, 2019, a representative from Ritchie Bros. advised the Appellants’ counsel that DiG would be disputing any fund being paid out to the Appellant.

Exhibits “C” and “D” to Affidavit of Chris Aron Wood, dated February 7, 2019.

16. On January 11, 2019, the counsel for the Appellants filed a Garnishee Summons for the Second Action against Ritchie Bros. (the “Garnishee Summons”). Ritchie Bros. was properly served with the Garnishee Summons on January 14, 2019.

Garnishee Summons issued for Court of Queen’s Bench Action No. 1703-21939,
TAB B.

17. When the Appellants’ counsel contacted counsel for the RBC to inquire about its position, Counsel for the RBC confirmed that:

- a. The RBC has knowledge of the auction and sale of the Subject Vehicles;
- b. The RBC did not control the sale and auction of the Subject Vehicles;
- c. The RBC has not made any formal demands for any proceeds from the sale of the Subject Vehicles. Rather, it is Distinct and iVac who voluntarily intend to pay the entire Net Proceeds of the sale of the Subject Vehicles to the RBC; and
- d. The RBC Secured Indebtedness is comprised of a credit facility that would allow Distinct, iVac, or any other Distinct Affiliates to re-draw any amounts applied towards this RBC Secured Indebtedness. Distinct, iVac or any other Distinct Affiliate could re-draw the entire amount of the net sale proceeds of the Subject Vehicles that Distinct and iVac wish to apply to the RBC Secured Indebtedness.

Exhibit "E" to Affidavit of Chris Aron Wood, dated February 7, 2019.

18. On January 21, 2019, Gary Ivany, a representative from the RBC, confirmed with John Nashmi, DiG's Chief Financial Officer, that Ritchie Bros. had deposited funds in excess of \$2 million into DiG's bank accounts and was looking to have these funds paid to the RBC.

Exhibit "F" to Affidavit of Gary Ivany, sworn March 1, 2019.

19. At the time of the original application, Counsel for DiG and iVac confirmed that the RBC has already been paid close to \$3,00,000 by the Defendants and Ritchie Bros. held approximately \$1 million pending resolution of this dispute.

Transcript of proceedings before Master Smart on February 15, 2019, page 7.

ISSUES

20. This is a priority dispute between the Appellants and the RBC with regards to the Net Proceeds of sale of the Subject Vehicles deriving from the Auction. This issue can be resolved by answering the following questions:
- e. Did the RBC waive its security interest to the Subject Vehicles and can the Appellant enforce such waiver?
 - f. What is the effect of the Garnishee Summons?
21. The Appellants take the position that the RBC waived its security interest to the Subject Vehicles and that the Appellants can enforce such waiver. Further, the Garnishee Summons was validly issued and Ritchie Bros. ought to have paid the required amount into Court.

PREVIOUS DECISION

22. This matter was first heard by Master Smart on February 15, 2019. At that initial hearing, Master Smart correctly identified the issue before the court being whether the Agreement between the Respondents and the RBC to have Ritchie Bros. pay the funds to DiG allowed for the Appellants' writ to attach. Master Smart pointed out that as there was no connection between the payment to be made pursuant to the Agreement and the Net Proceeds, there was a risk that the Court would rule in a manner that would negatively affect the RBC. As the RBC chose not to attend that initial application, despite having been informed of the same, Master Smart adjourned the matter and directed counsel for DiG and iVac to send a formal notice of the application to counsel for the RBC. Master Smart went on to warn that

any subsequent attempts [by the RBC] to enforce their security against the funds will not be received positively by the Court.

Transcript of proceedings before Master Smart on February 15, 2019.

23. The matter was then heard by Master Schlosser on March 11, 2019. At that time, Master Schlosser, without reviewing any Affidavits filed on behalf of the Respondents or the RBC, and without hearing any representations from counsel for the RBC, quickly ruled that:

- g. the Appellants could not rely on the Agreement or on the Waiver because the Appellants were not parties to the Agreement; and
- h. The Garnishee Summons was subject to the RBC's security interest.

24. Accordingly, Master Schlosser directed that the entirety of the Net Proceeds be paid directly to the RBC.

Transcript of proceedings before Master Schlosser on March 11, 2019.

Order of Master Schlosser, dated and filed on March 11, 2019, TAB C.

STANDARD OF REVIEW

25. An appeal of a decision of a Master of the Court of Queen's Bench of Alberta is a *de novo* proceeding with no deference owed to the Master's decision, and therefore the standard of review is correctness

Bahcheli v Yorkton Securities Inc. 2012 ABCA 166, TAB D.

ARGUMENT

Issue 1: Waiver of Security Interest by the RBC to the Subject Vehicles and Enforceability

General Overview of this Section

26. Master Schlosser erred in ruling that the RBC did not waive its security interest to the Subject Vehicles, and even if it did, that the Appellants, as third parties, cannot enforce such Waiver.
27. To succeed in portion of the Appeal, the Appellants must demonstrate that the RBC waived its security interest to the Equipment (including the Subject Vehicles) and that the Appellants were part of the class of persons intended to benefit from such waiver. The

statutory framework in which the Appellants rely is derived from section 40 of the *Personal Property Security Act*, RSA 2000, c P-7. (the “PPSA”), which states that:

A secured party may, in a security agreement or otherwise, subordinate the secured party’s security interest to any other interest, and the 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 a class of persons for whose benefit the subordination was intended.

Section 40 of the *Personal Property Security Act*, RSA 2000, c P-7, TAB E.

28. When interpreting this clause, Courts have stated that [s.40] of the PPSA conferred a statutory right on a secured party to waive the priority given him by the PPSA and a corresponding right on the beneficiary of such a waiver...to enforce it. Because of this provision, the PPSA will not prevent a subsequent credit grantor from claiming priority over a prior secured creditor where the latter has agreed to subordinate its claim. The question is whether the alleged subordination clause actually had that effect.

Chiips Inc. v Skyview Hotels Limited, 1994 ABCA 243 at paras 10-11, TAB F.

Waiver of Security Interest

29. Waiver occurs when one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party. The essentials of waiver are two-fold (i) full knowledge of the deficiency and (ii) the unequivocal intention to relinquish the right to rely on it. It is not necessary that the intention be expressed in a formal legal document. It may be expressed in some informal fashion or may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

The Maritime Life Assurance Company v. Saskatchewan River Bungalows Ltd., [1994] 2 SCR 490, TAB G.

30. In this case, the RBC’s intentions to waive its security interest are clearly set out in the Agreement and confirmed by the Waiver it sent to Ritche Bros.

31. The Agreement outlined in the email correspondence dated December 19, 2019 between Gary Ivany, the RBC's Representative, and William Nurnberger, the Respondent's representative, states that:

The RBC would consent to the asset disposition [including the Subject Vehicles] on the strict condition that immediately upon such disposition, DiG shall make a voluntary prepayment of principal in an aggregate amount of at least \$2 million towards its Term Loan... "Failure to make such prepayment to the Term Loan...shall result in an Event of Default under the Credit Agreement. [Emphasis Added]

[Exhibit "A" to Affidavit of William Nurnberger, dated February 8, 2019.]

32. There is no necessary connection between the Net Proceeds from sale of the Equipment and the voluntary payment that was to be made by the DiG. In other words, the RBC did not actually request or require payment of any portions from the Net Proceeds; rather, the RBC only requested that the Respondents make a subsequent voluntary payment of \$2 million to pay down its debt to the RBC. It can very reasonably be implied that DiG can make the voluntary payment from any of its resources, and that it can use the entirety of the Net Proceeds for other purposes, such as to maintain its operations or to pay down debts owed to other creditors.

33. This proposition is strengthened by the wording of the Waiver document that the RBC sent to Ritchie Bros. on December 19, 2018. Such Waiver provided the RBC with the following two options for dealing with proceeds of sale in the equipment being offered for sale at the Auction, for which the RBC selected Option 1:

Option 1: "We have no interest in the Equipment nor in 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.

Option 2: We represent that we have a valid security interest in the Equipment and are entitled to the proceeds thereof. You are authorized to sell the Equipment. Our security interest in the Equipment and the proceeds from the sale thereof is hereby released on the condition that we will receive the lesser of...

a) The Net Proceeds generated from the sale of the Equipment. Net Proceeds being gross proceeds of the sale of the Equipment less amounts owing to

- (i) prior ranked secured creditors, if any, and (ii) Ritchie Bros. Auctioneers for commission charged and costs incurred; or
- b) \$ _____ on or about January 7, 2019 with a per diem rate of \$ _____ thereafter (inclusive of all applicable taxes), being the amount that we are owed which is secured by, among other things, the Equipment.

Exhibit "A" to Supplemental Affidavit of Beth Brown, dated February 14, 2019.

Exhibit "G" to the Affidavit of Gary Ivany, dated March 1, 2019.

34. The Agreement and Waiver documents speak for themselves. With full knowledge of its rights and entitlement to over \$4 million of the Net Proceeds, the RBC clearly and unequivocally waived its rights to the Net Proceeds and selected Option 1 in the Waiver. Had the RBC intended to receive any of the Net Proceeds from the Auction sale, it would have clearly selected Option 2. This selection was a clear, conscious and unequivocal selection by the RBC.
35. The only reasonable inference that can be derived from the RBC selecting Option 1 is that the RBC relied on its Agreement with the Respondents and accepted a voluntary payment of at least \$2 million as full satisfaction for consenting to the sale of the equipment at the Auction. Counsel for the RBC confirmed that the RBC had not made any formal demands for the Net Proceeds despite having full knowledge of the sale. From this, it can be reasonably assumed that the RBC clearly intended the Net Proceeds to be used by the Respondents for other purposes, such as continuing its operations and paying other creditors.

Exhibit "E" to Affidavit of Chris Aron Wood, dated February 7, 2019.

36. Further, given that, prior to the original application being heard, the RBC had been voluntarily paid around \$3 million from the Defendants, the Agreement between the RBC and the Respondents was fully satisfied.

Enforcement by Subsequent Creditors

37. For the purposes of this Appeal, it is important to distinguish between a subordination of a security interest and an abandonment, release or waiver of a security interest. A secured party who releases [or waives] a security interest does not merely subordinate his security

interest. The release extinguishes the security interest, and the secured party is not thereafter permitted to assert his security interest in the collateral.

Alberta Personal Property Security Act Handbook, 4th Ed. (Carswell: Toronto 1995), Cuming and Wood, at page 380, TAB H.

In Re Hickman Equipment (1985) Ltd. (In Receivership), 2005 NLTD 122 at para 27, TAB I.

38. While s. 40 of the PPSA is typically used to interpret subordination clauses found within various general security agreements, it can also be applied to the enforcement of a waiver agreement, such as the Agreement and Waiver in this case. As already expressed in this Brief, the RBC agreed to waive its security interest to the Equipment in exchange of receiving a voluntary payment from DiG of at least \$2 million. There was no necessary connection between the Net Proceeds and the voluntary payment laid out in said Agreement.
39. As a waiver fully extinguishes a party's rights to the collateral, the Agreement and Waiver rendered the RBC an unsecured creditor of DiG and iVac in so far as the Net Proceeds are concerned. The RBC's security interest to the Equipment was fully extinguished to the benefit of all subsequent creditors.
40. It cannot be said that the RBC intended DiG or iVac to keep the entirety of the Net Proceeds in priority to the Appellants, who have a valid interest registered in the PPR. Such reasoning would run against the purpose of the PPR, which is the basis for determining priority between different creditors. As such, given that the RBC intended for DiG or iVac to receive the portion of the Net Proceeds that the RBC would have been entitled to had it not been for the Agreement and Waiver, the RBC also intended for the Appellants (as a creditor of DiG and iVac) to be paid in priority to DiG or iVac. Therefore, the Appellants are clearly within the class of persons for whom the RBC's waiver was intended.

Issue 2: Effect of Garnishee Summons

41. Master Schlosser erred in finding that the Garnishee Summons was subject to the RBC's security interest.
42. At the time the Appellants served the Garnishee Summons on Ritchie Bros., the RBC had forwarded its Waiver to Ritchie Bros. and the Appellants were the only remaining creditors of the Respondents with an interest [the two Writs] registered with the PPR.

43. Section 78 of the *Civil Enforcement Act*, states that a garnishee summons attaches to the garnished obligation when the garnishee summons is served on the garnishee, in this case, Ritchie Bros.
44. As was understood by all parties at the time of the Auction, Ritchie Bros. would pay the Net Proceeds to DiG, and, as far as Ritchie Bros. was concerned, the RBC would not receive any funds from the proceeds of sale of any of the Equipment. The only reasonable interpretation of such payment arrangement is that payment of the Net Proceeds to DiG was an obligation by Ritchie Bros. that, on the day of service of the Garnishee Summons, was payable to DiG, bringing this payment arrangement within the definition of "current obligation" that is set out in s. 77(1)(a) of the *Civil Enforcement Act*, RSA 2000, c C-15.
45. Given the above, regardless of any side agreements between the Respondents and the RBC, to satisfy its obligations under the Garnishee Summons, Ritchie Bros. should have paid the amount of \$583,749.87 into Court.

CONCLUSION AND RELIEF REQUESTED

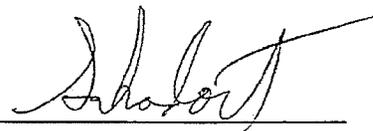
46. Master W.S. Schlosser erred in directing that the Appellant's writ be discharged against the Subject Vehicles and by directing that the entirety of the funds held in trust by Ritchie Bros. be paid to the RBC.
47. At the time of the sale of the equipment by Ritchie Bros., the RBC waived its security interest in the equipment in exchange of receiving a voluntary payment of at least \$2 million from the Defendants to this action, which it received. Relying on section 40 of the PPSA, the Appellants argue that they are entitled to enforce the waiver agreement between the RBC and the Defendants.
48. Further, or in the alternative, the Appellants served a garnishee summons on Ritchie Bros. that would have required Ritchie Bros. to pay the total amount of \$583,749.87 into Court for the benefit of the Appellants, being the Defendants' only judgment creditors with writs registered in the PPR.

49. As such, the Appellants request an Order directing the RBC to pay to the Appellants the entire amount owing under both of their Judgments plus interests and costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23TH DAY OF APRIL, 2019.

BOSECKE & ASSOCIATES

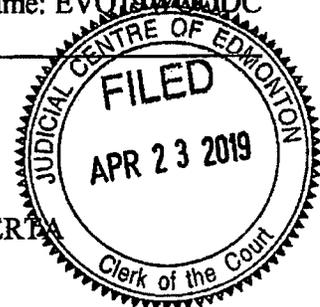
PER

A handwritten signature in black ink, appearing to read 'Sal Tinajero', written over a horizontal line.

Sal Tinajero,
Solicitor for the Appellants, Chis Aron Wood
and Mega Diesel Holdings Ltd.

TAB	DESCRIPTION
"A"	September 13, 2018 Order for Summary Judgment by Master Schlosser
"B"	Garnishee Summons issued for Court of Queen's Bench Action No. 1703-21939
"C"	Order of Master Schlosser, dated and filed on March 11, 2019
"D"	<i>Bahcheli v Yorkton Securities Inc.</i> 2012 ABCA 166
"E"	<i>Personal Property Security Act</i> , RSA 2000, c P-7, s. 40.
"F"	<i>Chiips Inc. v Skyview Hotels Limited</i> , 1994 ABCA 243
"G"	<i>The Maritime Life Assurance Company v. Saskatchewan River Bungalows Ltd.</i> [1994] 2 SCR 490.
"H"	Alberta Personal Property Security Act Handbook, 4 th Ed. (Carswell: Toronto 1995), Cuming and Wood, at page 380
"I"	<i>In Re Hickman Equipment (1985) Ltd. (In Receivership)</i> , 2005 NLTD 122

Action No.: 1703-13921
E-File Name: EVQ18W00DC
Appeal No.:



IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

BETWEEN:

CHRIS ARON WOOD and
MEGA DIESEL HOLDINGS LTD.

Plaintiffs

- and -

MEGA DIESEL EXCAVATING LTD. and
DISTINCT INFRASTRUCTURE GROUP INC.

Defendants

PROCEEDINGS

Edmonton, Alberta
February 15, 2019

Transcript Management Services
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

2

3 February 15, 2019

Morning Session

4

5 Master Smart
6 of Alberta

Court of Queen's Bench

7

8 G.W. Sanson

For Mega Diesel Excavating Ltd. and Distinct
Infrastructure Group Inc.

9

10 S. Tinajero

For C. Wood and Mega Diesel Holdings Ltd.

11 T. Selinske

Court Clerk

12

13

14 **Discussion**

15

16 MASTER SMART:

Okay. That takes me to 24, Wood v. Mega Diesel

17 Excavating.

18

19 MR. SANSON:

Good morning, Master. This is my application.

20 Sanson, first initial 'G' for the record. This is my application on behalf of the defendants,
21 Distinct Infrastructure Group and Mega Diesel Excavating Ltd. Or, more accurately, the
22 application is on behalf of iVac Services West Inc., which is the successor by
23 amalgamation to the defendant Mega Diesel Excavating.

24

25 MASTER SMART:

All right.

26

27 **Submissions by Mr. Sanson**

28

29 MR. SANSON:

This application is seeking to remove the
30 plaintiffs' writ from four vehicles belonging to iVac that were sold recently. I'll try to give
31 you a very brief background. The plaintiffs in this action obtained two judgments, one in
32 this action and one in what I'll just refer to as the related action. These judgments total
33 around \$584,000 plus costs and interest.

34

35 The first judgment was granted in July 2017. A writ was filed and registered at PPR
36 thereafter in September of 2017. Sometime later the plaintiffs amended their registration
37 to include registration against certain vehicles owned by iVac. Those vehicles, however,
38 are subject to a prior general security interest in favour of RBC. That security interest was
39 granted in 2016 and registered at Personal Property Registry in September of 2016, around
40 a year before the writ of enforcement.

41

1
2 MR. SANSON: It's what's shown in my client's sworn evidence
3 and also with respect to what Mr. Stuart Brotman, counsel for RBC, has advised and has
4 responded to my friend accordingly.

5
6 This case -- so what happened -- so there was an agreement between the parties, my client
7 and RBC, I mean.

8
9 MASTER SMART: Were going to apply it on different credit
10 facilities, whatever?

11
12 MR. SANSON: Yes.

13
14 MASTER SMART: All right.

15
16 MR. SANSON: And so as a result of that, they did not direct
17 Ritchie Bros. to pay the proceeds to RBC directly but, rather, allowed or indicated that they
18 wished the proceeds to go to the clients so that the clients could apportion the funds to the
19 facilities as per their agreement. And that's what my friend here is referring to is there was
20 a direction given to Ritchie Bros. that they were not seeking to receive the proceeds.

21
22 And so what I -- my friend is seek -- as he mentioned, he's taking the position that this is a
23 waiver of a security interest, and he's relying on, I believe, section 40 of the *Personal*
24 *Property Security Act*, which he handed me this morning.

25
26 I don't know if you happen to have another copy for -- I'll just hand up this highlighted
27 section that my friend has provided.

28
29 And the issue here is that I don't -- I think it would be a great leap to assume that the
30 direction given to Ritchie Bros. constitutes a subordination of their interest. In this case,
31 section 40 -- well, first of all, I don't think that the direction given was necessarily a
32 subordination agreement or anything that contemplated subordination. But, moreover,
33 section 40 states that:

34
35 ... the subordination is effective ... between the parties and may
36 be enforced by a third party if the third party is the person or one
37 of a class of persons for whose benefit the subordination was
38 intended.

39
40 And I think in this case it's fairly clear on the evidence that this was not intended to benefit
41 a writ holder, and there was no -- and what happened was RBC, without knowledge of any

1 writ, subordinated their interests perhaps only to the client, knowing that the money would
2 come back to them and that I don't think this is something that's captured by section 40 as
3 a subordination in favour of a class of persons when those class of persons were never
4 contemplated. And, arguably, there's no evidence that RBC even had knowledge of the
5 writ, likely would not have structured it this way if they would have known that would
6 have become an issue.

7

8 MASTER SMART: Okay.

9

10 MR. SANSON: And I'll let my friend speak.

11

12 **Submissions by Mr. Tinajero**

13

14 MR. TINAJERO: First of all, I'm going to pass up the affidavit that
15 includes the RBC's waiver.

16

17 MASTER SMART: Right.

18

19 MR. TINAJERO: So the Court is --

20

21 MASTER SMART: Their letter, yeah, or whatever it is.

22

23 MR. TINAJERO: And I will also pass up the affidavit from my
24 friend that --

25

26 MASTER SMART: Okay.

27

28 MR. TINAJERO: -- and I'll also pass up the affidavit that was filed
29 by my friend, outlining the agreement between the RBC and their client.

30

31 MASTER SMART: Okay. So this agreement says, We'll let you sell
32 \$2 million worth of equipment, and you're to pay us \$2 million?

33

34 MR. TINAJERO: You make a voluntary payment after the sale of
35 the vehicles.

36

37 MASTER SMART: M-hm. Right.

38

39 MR. TINAJERO: Our first position is -- to backtrack, our position
40 is (a) the borrowers, the debtors here, they're trying to enforce RBC's interests when the
41 RBC is not even here to contest our client being paid out. They haven't taken a position as

1 to our client's interest. It is the debtors who are trying to say that -- who are trying to direct
2 where the proceeds of the sale get paid to, and that is contrary to the provisions -- and that
3 would be contrary to the provisions of the *Personal Property Security Act*.

4
5 In this case, if anything, this would be a priority dispute between the RBC and our clients.
6 The borrowers have no standing to bring this application. And, further, it's very clear from
7 the evidence that the RBC did waive their entire interest against all those vehicles, and our
8 clients were the next in line, so we are entitled to be paid out.

9
10 The RBC has not contested our position.

11
12 MASTER SMART: Have they been given notice of this application?

13
14 **Submissions by Mr. Sanson**

15
16 MR. SANSON: I have given notice of this application to counsel
17 for RBC, Mr. Brotman.

18
19 MASTER SMART: M-hm.

20
21 MR. SANSON: In Fasken in Ontario. His correspondence can
22 actually be found in that same affidavit of William Nurnberger at tab B, Exhibit B, in which
23 he clarifies to my friend the nature of this agreement. I understand that the wording with
24 respect to the \$2 million doesn't speak to the entirety of what was agreed to. I note that that
25 email is something after the fact confirming that \$2 million is to be applied to the term loan
26 specifically. However, as Mr. Brotman points out to my friend here in his email at Exhibit
27 B, he states: (as read)

28
29 The auction could have potentially contravened one or more
30 covenants in the loan document, so the borrower sought consent
31 from RBC. In the course of those discussions it was agreed that
32 the auction could proceed without triggering a breach and that the
33 net proceeds would be applied against the indebtedness to RBC.

34
35 So it would be fair to say that RBC required that auction proceeds be applied against the
36 indebtedness.

37
38 **Submissions by Mr. Tinajero**

39
40 MR. TINAJERO: And I would say this is an agreement between the
41 RBC and their client that was dealt with outside of the priority process. The RBC waived

1 their security interests to the vehicles, allowing DIG to obtain the proceeds and then make
2 a voluntary payment, not necessarily from those proceeds but make a voluntary payment
3 to the RBC thereafter.
4

5 Further, it is our position that this is an -- if the -- what it appears that DIG and the borrowers
6 wanted to do here: There is a credit facilitated with the RBC, which Mr. Brotman's firm
7 has not been called. And, in fact, any of the proceeds that are applied to a loan can be
8 readvanced to the borrowers. In this case, there's more than ten signatories to the credit
9 agreement. We already have a judgment against two of them. There would be nothing
10 stopping the borrowers, or the debtors, from applying all of the proceeds to the RBC loan
11 and then drawing back on the different entities where we don't have a -- where we don't
12 actually have any recourse about -- to.
13

14 This is an egregious way to try to circumvent paying a creditor of two judgments that
15 amount to \$585,000. At the end of the day, the RBC is not contesting our priority, and in
16 fact, they did waive their interest to the vehicles.
17

18 **Submissions by Mr. Sanson**
19

20 MR. SANSON: Just to quickly respond to that, I think it's, you
21 know, perhaps incorrect to say that RBC is not contesting the position when they do seek
22 to receive these funds. And I think Mr. Brotman's position makes that clear that they do
23 intend to receive the net proceeds of sale.
24

25 Further, I think that a security interest can include future advances. It can include revolving
26 credit facilities. It's quite common for those to be secured interests.
27

28 And, further, I think the issue here is it's just simply a matter of one of priorities and whether
29 or not a waiver, in fact, occurred. I don't believe that the document provided to Ritchie
30 Bros. or any other actions by RBC necessarily constitute a waiver for the reasons I've sort
31 of set out, which is that I don't think that was contemplated by the agreement.
32

33 MASTER SMART: Well, what they said -- and I suspect this is where
34 counsel is coming from -- was, You can sell it and you can take the money; we'll be looking
35 for a payment. But they don't tie the two together.
36

37 MR. TINAJERO: Exactly.
38

39 MASTER SMART: So for a moment, at least, the funds are in the
40 hands of, I guess, iVac. And they say at that moment their writ attaches. And they may
41 have made a promise to pay some money out of their bank account, but -- well, I guess, it's

1 not even in their bank account yet, but -- because the net sale proceeds were a million
2 dollars, you said, or some money --
3

4 MR. TINAJERO: Well, based on their evidence the sale proceeds
5 are about 8.2 million, and there's actually \$4 million after paying all their secure creditors,
6 just not us.
7

8 MASTER SMART: Well, secured creditors --
9

10 MR. TINAJERO: Yeah, but --
11

12 MASTER SMART: -- are entitled to -- yeah.
13

14 MR. TINAJERO: -- yeah, and there would be about \$4.2 million
15 left after paying a few creditors, and that is based on the affidavit that I've provided by my
16 friend. And I have it right here if you'd like to take a look at it.
17

18 MASTER SMART: Okay. All right. But Ritchie Bros. held back a
19 million?
20

21 MR. SANSON: Correct.
22

23 MR. TINAJERO: That's correct.
24

25 MASTER SMART: Saying, Okay, well -- and I guess they gave the
26 other three-point-some million to your client?
27

28 MR. SANSON: Sir, that is correct, and (INDISCERNIBLE) have
29 already been applied to enforce the RBC indebtedness.
30

31 MR. TINAJERO: But it was given directly to his client, not to the
32 RBC.
33

34 MASTER SMART: No, I understand.
35

36 MR. TINAJERO: Yeah.
37

38 MASTER SMART: So RBC is aware of the application, and I guess
39 I'll presume implicitly they're giving authority to iVac to bring the application because they
40 want the million dollars.
41

8

1 MR. SANSON: I think that would be fair.
2
3 MASTER SMART: Yeah.
4
5 MR. TINAJERO: Presumably, but there's also no evidence
6 directing that, but, yeah.
7
8 MASTER SMART: Well, I mean, we have to apply some common
9 sense to things from time to time.
10
11 MR. TINAJERO: Yeah.
12
13 MASTER SMART: But, I mean, I don't know if RBC is of the mind
14 that they're at no risk here, but I think there's something to the argument being made. And
15 whether it's a subordination or not, there are these funds which are ostensibly available and
16 available through the release of the funds to your client. So they possess the funds from a
17 sale over which there's no claim of security. There is a waiver, if you will. I don't know if
18 it's a subordination. It may be a waiver.
19
20 MR. TINAJERO: A waiver. It's more like a waiver.
21
22 MASTER SMART: And I'm sure that in their minds that just simply
23 meant -- I don't know why they would prefer the money flow through iVac. That's --- but,
24 whatever. It sounds like they still have a working relationship with them.
25
26 MR. TINAJERO: At the end of the day, the RBC is a big
27 institution, and they have plenty of legal counsel.
28
29 MASTER SMART: Yeah.
30
31 MR. TINAJERO: So, yeah.
32
33 MASTER SMART: Of course, they do. And they're working with a
34 customer --
35
36 MR. TINAJERO: M-hm.
37
38 MASTER SMART: -- saying, Well, you know, whether -- you know,
39 we're comfortable that if you get the money, you're going to pay it to us.
40
41 MR. TINAJERO: M-hm.

- 1
2 MASTER SMART: I know it's not what they're saying. I read the
3 language, but that's what they're saying to the customer. So we don't need Ritchie Bros. to
4 cut us the cheque directly; we're pretty satisfied that if it comes to you -- if it comes to you,
5 iVac, then you'll pay us this money.
6
7 The question, then, is: Does that, though, open the door for the writ to attach? And that's
8 what I think you're saying.
9
- 10 MR. TINAJERO: That's exactly. Yeah.
11
- 12 MASTER SMART: And it's an interesting argument.
13
- 14 MR. TINAJERO: And, yeah. And our issue here is the -- like, based
15 on the correspondence there is -- the RBC only required a \$2 million voluntary payment.
16 And we're not calling it a loan. They were saying, You can take the entire proceeds; they're
17 over \$4 million. As long as you give us \$2 million, we'll allow you to take the rest. That's
18 exactly what that email is saying.
19
- 20 MR. SANSON: I do wish to clarify. The email does say, Under
21 the explicit condition that there's a voluntary payment. A voluntary -- I mean, if it's an
22 explicit condition, I think it's a funny mincing of words. What actually -- what had in fact
23 happened was a bit of a back and forth in terms of how much would be applied to which
24 facilities.
25
- 26 MASTER SMART: M-hm.
27
- 28 MR. SANSON: And so eventually they settled on 2 million
29 towards the term loan, which is not a revolving credit. And that's what I think the email
30 perhaps was saying, and in reality the remainder of the proceeds, in accordance with my
31 client's affidavit, were to go to the rest of the RBC indebtedness, including the line of credit.
32
- 33 MASTER SMART: Well, I'm uncomfortable deciding this without
34 RBC here.
35
- 36 MR. TINAJERO: Okay.
37
- 38 MASTER SMART: If they choose not to come, I guess that's up to
39 them, but I'm not sure they had formal notice. I think they're aware of the application, but
40 they haven't been served with notice saying, You should appear, I don't think.
41

10

- 1 MR. SANSON: That is correct.
- 2
- 3 MASTER SMART: Yeah, okay.
- 4
- 5 MR. SANSON: In fact, Mr. Brotman told me he was unable to
6 officially accept service of this application.
- 7
- 8 MASTER SMART: Okay. Well, then, he should find somebody that's
9 in Alberta that can officially accept service for RBC and have someone attend. And they
10 may want to file some additional evidence. I don't know. But at this point in time I think
11 they are at risk. I've not decided that, counsel, but it certainly on the face of it is problematic
12 for them. And, I mean, I'm -- I think we need to know what their position is on this and do
13 they have arguments that they want to make as the secured creditor as to their entitlement,
14 the priority.
- 15
- 16 And I will say this. Any subsequent attempts to enforce their security against the fund will
17 not be received positively by the Court. In other words, they need to deal with it based on
18 what the facts are now. So if, for example, under the GSA -- and I'm sure they have this in
19 assignment of all of the book debts.
- 20
- 21 MR. TINAJERO: There is in the GSA, but the GSA does include a
22 clause that allows as long as a sale is conducted in the ordinary course of business, the RBC
23 can waive any priority there.
- 24
- 25 MASTER SMART: Yeah. Well, and I don't know if this is ordinary
26 course or not. You know what? That may be another problem for them. I don't know.
- 27
- 28 MR. TINAJERO: Yeah.
- 29
- 30 MASTER SMART: But the reality is is that those funds are there
31 now. I've said I wouldn't receive that favourably if there is an assignment of book debts,
32 but I do recall many times acting for secured creditors where unsecureds were -- we did a
33 lot of work to marshal funds, and then we came along and took it with the security.
- 34
- 35 MR. TINAJERO: M-hm.
- 36
- 37 MASTER SMART: It's not what's happened here.
- 38
- 39 MR. TINAJERO: No, that's not.
- 40
- 41 MASTER SMART: But there was many an application made where

- 1 someone did all the work; we came along and snapped up the money, much to the chagrin
2 of the unsecured creditor and their counsel, who was on a contingency.
3
- 4 But that's, you know -- so that's maybe a reality, and that might be an argument that's
5 before -- and as I said, I'm not too fond of that idea. I may not hear this. I think odds are I
6 probably won't, although I don't know how long we should adjourn this for. The million is
7 sitting with Ritchie Bros. It's not going anywhere.
8
- 9 MR. TINAJERO: Well, we do have a garnishee summons that we
10 sent to Ritchie Bros.
11
- 12 MASTER SMART: Right.
13
- 14 MR. TINAJERO: Perhaps it might be best if we put the money into
15 court.
16
- 17 MASTER SMART: Well, how about if we just stay payment and we
18 leave the funds with Ritchie Bros. for now?
19
- 20 MR. TINAJERO: Okay. That's fine.
21
- 22 MASTER SMART: Rather than create that. Okay?
23
- 24 MR. TINAJERO: Yeah, that's fine.
25
- 26 MASTER SMART: Fair enough?
27
- 28 MR. SANSON: Yeah, I would agree with that.
29
- 30 MASTER SMART: Okay. So I know you haven't talked to RBC
31 about when they would be available. What are we thinking in a time frame?
32
- 33 MR. SANSON: In terms of service I think it would -- I would be
34 able to effect service based on -- in addition to be speaking with Mr. Brotman, of course.
35
- 36 MASTER SMART: M-hm.
37
- 38 MR. SANSON: There's an address in the *PPSA* that I would be
39 able to serve.
40
- 41 MASTER SMART: Okay. Well, presumably --

- 1 MR. SANSON: That is correct.
2
- 3 MASTER SMART: Yeah, okay.
4
- 5 MR. SANSON: In fact, Mr. Brotman told me he was unable to
6 officially accept service of this application.
7
- 8 MASTER SMART: Okay. Well, then, he should find somebody that's
9 in Alberta that can officially accept service for RBC and have someone attend. And they
10 may want to file some additional evidence. I don't know. But at this point in time I think
11 they are at risk. I've not decided that, counsel, but it certainly on the face of it is problematic
12 for them. And, I mean, I'm -- I think we need to know what their position is on this and do
13 they have arguments that they want to make as the secured creditor as to their entitlement,
14 the priority.
15
- 16 And I will say this. Any subsequent attempts to enforce their security against the fund will
17 not be received positively by the Court. In other words, they need to deal with it based on
18 what the facts are now. So if, for example, under the GSA -- and I'm sure they have this in
19 assignment of all of the book debts.
20
- 21 MR. TINAJERO: There is in the GSA, but the GSA does include a
22 clause that allows as long as a sale is conducted in the ordinary course of business, the RBC
23 can waive any priority there.
24
- 25 MASTER SMART: Yeah. Well, and I don't know if this is ordinary
26 course or not. You know what? That may be another problem for them. I don't know.
27
- 28 MR. TINAJERO: Yeah.
29
- 30 MASTER SMART: But the reality is is that those funds are there
31 now. I've said I wouldn't receive that favourably if there is an assignment of book debts,
32 but I do recall many times acting for secured creditors where unsecureds were -- we did a
33 lot of work to marshal funds, and then we came along and took it with the security.
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36 MASTER SMART: M-hm.
37
38 MR. SANSON: There's an address in the *PPSA* that I would be
39 able to serve.
40
41 MASTER SMART: Okay. Well, presumably --

- 1
2 MR. SANSON: So I think we should be able to do this fairly
3 quickly.
4
- 5 MASTER SMART: -- they can get a hold of somebody that can
6 accept service to come and deal with this.
7
- 8 MR. TINAJERO: Okay.
9
- 10 MR. SANSON: Yes.
11
- 12 MASTER SMART: If they want to play that game, well, then maybe
13 the Court will decide without their participation. But they're the ones that need to assert the
14 priority. I think that's true.
15
- 16 MR. TINAJERO: M-hm.
17
- 18 MASTER SMART: You're here as a quasi-agent, I think, and it's your
19 desire that the funds be paid there. But there's a lot to the story. And so adjournment?
20
- 21 MR. TINAJERO: I would be available in two weeks. March 1st
22 might give the RBC sufficient time.
23
- 24 MR. SANSON: I'm not available the second week of March but
25 any time within the first week of March I should be available.
26
- 27 MASTER SMART: Well, that's -- it's Friday, March 1st.
28
- 29 MR. SANSON: Sorry. I mean I'm gone, so the 4th to the 8th I
30 would be available.
31
- 32 MASTER SMART: Well, okay. The following week, counsel?
33
- 34 MR. TINAJERO: The 4th would work perfectly for me.
35
- 36 **Decision**
37
- 38 MASTER SMART: Okay. So we'll adjourn the matter to March 4th.
39 In the meantime there'll be a stay on the obligation of Ritchie Bros. to pay the funds into
40 court under the garnishee summons so that they don't get worried about getting into trouble
41 for hanging onto the funds.

1
2 MR. TINAJERO: Yeah.
3
4 MASTER SMART: And the application, in my view, should proceed
5 that day. Who knows? Maybe a master is going to want it to go to a special because they
6 want to read the material, but I don't know that. At this point I'm not suggesting that has to
7 happen.
8
9 MR. TINAJERO: Okay.
10
11 MASTER SMART: But it's something that you may want to think
12 about, but we'll hear what the Royal Bank has to say.
13
14 MR. TINAJERO: Okay.
15
16 MASTER SMART: All right? And I can tell you I won't be available
17 to hear it because that morning I'm on a plane to someplace warm. Or at least I hope it's
18 warm.
19
20 MR. SANSON: Okay.
21
22 MASTER SMART: Given the way the weather is in the world, it may
23 not be. But in any event, I -- and I am intrigued by the ultimate resolution.
24
25 MR. TINAJERO: Yeah.
26
27 MASTER SMART: It's an interesting issue that's arisen here. Okay.
28
29 MR. SANSON: Thank you.
30
31 MASTER SMART: Thank you.
32
33 MR. SANSON: Thank you, Master.
34
35 MR. TINAJERO: Thank you very much, Sir.
36
37 MASTER SMART: All right. Madam clerk, we'll give this back.
38
39 MR. SANSON: I think those are all yours.
40
41 MR. TINAJERO: Yeah, those are all mine. Thank you very much.

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MASTER SMART:

Yeah.

THE COURT CLERK:

You're welcome.

PROCEEDINGS ADJOURNED UNTIL MARCH 4, 2019S

1 **Certificate of Record**

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3

I, Tracy Selinske, certify that this recording is a record made of the evidence in the proceedings in the Court of Queen's Bench, held in Courtroom 212, at Edmonton, Alberta, on the 15th day of February, 2019, and that I, Tracy Selinske, was the court official in charge of the sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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I, Catherine FosterFlynn, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Catherine FosterFlynn, Transcriber
Order Number: AL-JO-1002-7307
Dated: March 14, 2019

Action No.: 1703-13921
E-File No.: EVQ19WOODC
Appeal No. _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON



BETWEEN:

CHRIS ARON WOOD and MEGA DIESEL HOLDINGS LTD.

Plaintiffs

and

**MEGA DIESEL EXCAVATING LTD. and
DISTINCT INFRASTRUCTURE GROUP INC.**

Defendants

PROCEEDINGS

**Edmonton, Alberta
March 11, 2019**

**Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034**

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton,
2 Alberta

3

4

5 March 11, 2019

Morning Session

6

7 Master Schlosser

Court of Queen's Bench
of Alberta

8

9

10 S. Tinajero

For C. Wood and Mega Diesel Holdings Ltd.

11 G. Sanson

For IBAC Services West Inc.

12 H. Roskey

For RBC

13 (No Counsel)

For Mega Diesel Excavating Ltd. and Distinct
Infrastructure Group Inc.

14

15 C. Jones

Court Clerk

16

17

18 **Discussion**

19

20 MASTER SCHLOSSER:

Number 35 Wood and Mega Diesel Excavating.

21

22 MR. SANSON:

Good morning, Master. I wonder if the Court

23 might prefer to stand this matter down to the end of the list. There are counsel for both --

24 there is two clients. It might take a little bit longer.

25

26 MASTER SCHLOSSER:

What do you want to talk about putting this to a

27 Special?

28

29 MR. SANSON:

I wouldn't -- we would very much prefer not to

30 have this go to a Special and it is all of our hope that we can do this today.

31

32 MASTER SCHLOSSER:

We have got dates in April. At any rate, I will

33 put you to the end temporarily.

34

35 MR. SANSON:

Thank you.

36

37 (OTHER MATTERS SPOKEN TO)

38

39 MR. SANSON:

Good morning, Master. I suppose this leaves

40 us, number 25 on the list.

41

2

1 MASTER SCHLOSSER: 25, okay.

2

3 MR. SANSON: My name is Sanson, first initial 'G' from Bishop
4 McKenzie, for the applicant. This is my friend's, Mr. Tinajero, is here on behalf of the
5 plaintiff/respondent and my friend, Ms. Roskey is here on behalf of the Royal Bank of
6 Canada.

7

8 MASTER SCHLOSSER: Sorry, which one is this again?

9

10 MR. SANSON: This is number 35.

11

12 MASTER SCHLOSSER: 35, okay.

13

14 MR. SANSON: Sorry, not 25.

15

16 MASTER SCHLOSSER: Yes.

17

18 **Submissions by Mr. Sanson (Application)**

19

20 MR. SANSON: So this is my application to -- to remove the
21 plaintiffs' writs from four vehicles belonging to our client, the defendant IBAC Services
22 West Inc. (phonetic) that were sold at auction back in December. IBAC is not named as
23 a defendant in the style of cause in this action. They are successor by an augmentation to
24 one of the defendants, just for clarity.

25

26 I will try to give you a very brief background. I will try to keep it short.

27

28 The plaintiffs' writ holders, obtained two judgments against the defendants. These
29 judgments total around \$584,000, plus costs and interests. The first judgment, the one in
30 this action was granted in July of 2017. A writ was filed in respect to that judgment and
31 registered at PPR in September of -- September 1st, 2017.

32

33 At the plaintiffs' request, the defendant, IBAC, would give a statutory declaration listing
34 certain vehicles as owned by IBAC and accordingly, the plaintiff amended the
35 registration of its writ at PPR to approve registration against those vehicles.

36

37 Those vehicles, however, are subject to a prior general security interest and payor of RBC
38 and that security interest and all present -- our present personal property, was granted to
39 RBC and registered that security interest at PPR on September 23rd, 2016 --

40

41 MASTER SCHLOSSER: The general security agreement?

3

1

2 MR. SANSON: Yes.

3

4 MASTER SCHLOSSER: So September?

5

6 MR. SANSON: September 23rd, 2016, is its registration date at
7 Personal Property Registry, so approximately a year before the plaintiffs' registered their
8 writ of enforcement.

9

10 MASTER SCHLOSSER: Okay.

11

12 MR. SANSON: The security indebtedness and to RBC is around
13 53 million dollars. So in this case pursuant to the sections of the *Civil Enforcement Act*,
14 obviously security interest was registered at the PPR at the time that the plaintiffs' writ
15 was registered pursuant to Section 35 of the *Civil Enforcement Act*. As security interest
16 has priority over a writ that binds the property if at the time the writ was registered and
17 security interest was already registered with PPR.

18

19 MASTER SCHLOSSER: Okay.

20

21 MR. SANSON: The issue in this is case is that the four vehicles
22 were sold at auction in December of 2018. The proceeds of the sale of those four subject
23 vehicles is around 1 million dollars. We submit that the entire net proceeds are payable
24 to RBC as they have priority and because nothing is up for the writ holder.

25

26 And so what happened here was that the defendants and RBC came to an agreement with
27 RBC as to how the proceeds would be apportioned among the various creditor facilities
28 that make up the RBC security indebtedness. For this reason, RBC, unaware of the writ,
29 directed Ritchie Bros. to pay the money out, the proceeds from the auction to the
30 defendants so that it may be applied to the creditor facilities as agreed. And that's when,
31 during the course of this, the issue of my friend's writ came up, and so now it is what we
32 are doing -- this is essentially an issue with respect to priority and between RBC and the
33 writ holder.

34

35 I can let my friend sort of speak to -- or to the writ holder's position and RBC's position,
36 but as I understand it, basically it amounts to an issue of waiver or subordination of some
37 kind by RBC that the -- we are -- because they directed that the money be paid out to the
38 defendants so that it could be applied to the base credit facilities, but we submit that this
39 isn't an issue of waiver, in large part, because by RBC's evidence, they had no knowledge
40 of this writ. And by directing that, they weren't seeking to affect any sort of waiver.
41 They weren't expecting that the money would be paid to Distinct or IBAC in any sort of

1 way, but rather that it would be applied towards the security indebtedness, pursuant to
2 their general security agreement.

3

4 So we are asking that the writs be removed because they simply don't attach to any
5 interest of the debtors.

6

7 MASTER SCHLOSSER: Okay.

8

9 **Submissions by Mr. Tinajero (Application)**

10

11 MR. TINAJERO: Okay, thank you. Our position is clear. Our
12 position is that the RBC waived its security interest on the vehicles and it cannot after the
13 fact, as a unsecured creditor accept priority over our clients' writ.

14

15 I do have two affidavits that I am --

16

17 MASTER SCHLOSSER: But back up a little bit though. The vehicles
18 were sold; the money was somewhere?

19

20 MR. TINAJERO: Yeah.

21

22 Well, let's back up. When the sale -- and I do have a copy of the -- an email evidence in
23 agreement between the RBC and the defendants. And that email clearly states that if the
24 defendants made a 2-million-dollar voluntary payment after the sale to the RBC, the RBC
25 would consent to a sale. There is nothing there requiring the defendants to pay the entire
26 amount of the quotes to the RBC. All it says is if -- you can sell a vehicle voluntarily.
27 However, we only want 2 million dollars from you.

28

29 Subsequent -- if we look at the -- if we turn back a page in that agreement, the rider -- the
30 representative from the RBC does acknowledge that they sent them a waiver to Ritchie
31 Bros. A waiver being a release of their security interest against the vehicles, which is
32 attached as an exhibit to this affidavit.

33

34 MASTER SCHLOSSER: This was after it was sold?

35

36 MR. TINAJERO: That was -- I think all the vehicles were in the
37 process of being sold.

38

39 MASTER SCHLOSSER: I am sorry?

40

41 MR. TINAJERO: From what I understand it was sent while the

- 1 vehicles were in the process of being sold.
2
- 3 MASTER SCHLOSSER: Okay. And did you rely on this in any way?
4
- 5 MR. TINAJERO: No, but it is a waiver. It is not a subordination
6 agreement.
7
- 8 I do have a case from the Court of -- Supreme Court --
9
- 10 MASTER SCHLOSSER: Well, okay, but hold it.
11
- 12 Did they discharge their general security agreement from the registry?
13
- 14 MR. TINAJERO: They did not.
15
- 16 MASTER SCHLOSSER: Okay. So they told Ritchie Bros. that they had
17 no interest in the equipment?
18
- 19 MR. TINAJERO: That's correct.
20
- 21 MASTER SCHLOSSER: And you didn't rely on it?
22
- 23 MR. TINAJERO: Well, our intent -- there is no need for reliance
24 once they waive their security interest. They no longer have a security interest.
25
- 26 MASTER SCHLOSSER: No, but they didn't really waive it because they
27 didn't discharge it.
28
- 29 MR. TINAJERO: But the waived it. They don't need to discharge
30 it and I have -- I do have case law dealing with this matter.
31
- 32 MASTER SCHLOSSER: Okay.
33
- 34 MR. TINAJERO: I have a case from the Supreme Court of
35 Newfoundland and Labrador Trial Division, citing Professor Wood and Professor
36 Cumming. Personal Property Handbook which I have in hand here. In there --
37
- 38 MASTER SCHLOSSER: So the proposition is, is that I am a security
39 holder and if I say to a third party that I don't have an interest in something.
40
- 41 MR. TINAJERO: M-hm.

1

2 MASTER SCHLOSSER: And I leave the interest registered against the
3 title of the thing, my saying to the third party is sufficient to give priority to another writ
4 holder?

5

6 MR. TINAJERO: Well, their secure -- there is an initial waiver.
7 Like, Supreme Court of Canada has set out the test for waiver, which has two
8 components. First, you have full knowledge of your -- full knowledge of your rights.

9

10 MASTER SCHLOSSER: Right.

11

12 MR. TINAJERO: And you have the absolute intention to -- I have
13 it written here.

14

15 MASTER SCHLOSSER: Okay, but that waiver comes up, it's a classic
16 circumstance where, let's imagine you and I have a contract.

17

18 MR. TINAJERO: Yeah.

19

20 MASTER SCHLOSSER: It's question of whether or not I am going to
21 waive insistence on a term of that contract between you and me and typically waivers
22 spoken of is a species of estoppel, or a principle of fair dealing. I would say to you that I
23 am not going to insist on that term of the contract, and you rely on it, then you can either
24 say that I must stop from asking that the term be enforced, or you can fairly say that I
25 waived it. But we are not talking about third parties or outsiders, or that kind of thing.

26

27 MR. TINAJERO: We are not, but the Section 4 of the *Property*
28 *Security Act* is clear that a third party can enforce a subordination agreement, and I am
29 here, I am quoting Professor Wood and Cummings saying: (as read)

30

31 A subordination agreement should be distinguished from
32 abandonment or release of the security interests. A secured party
33 who releases a security interest does not mean a subordinated
34 security interest, the release extinguishes a security interest and the
35 secured party is not thereafter permitted to reassert his security
36 interest in the collateral.

37

38 **Submissions by Mr. Sanson (Reply)**

39

40 MR. SANSON: Sir, if I may, I think that when we are speaking
41 of our secure -- subordination of interest, I think my friend is relying on speaking of

1 Section 40 of the *Personal Property Security Act* which states specifically that, yes, a
2 subordination agreement may be enforced by a third party, but only if the third part is the
3 person or one of a class of persons for whom the benefit the subordination was intended
4 and in this case it clearly --
5

6 MASTER SCHLOSSER: Well, I mean, if I say something to a third party
7 and there is no involvement, no relationship; I mean, what does that matter?
8

9 MR. SANSON: Certainly.
10

11 MR. TINAJERO: Well --
12

13 MASTER SCHLOSSER: Let's say I go to a cocktail party and say to
14 somebody at the cocktail party, I have no interest in that bulldozer but I don't release my
15 general security agreement.
16

17 **Submissions by Mr. Tinajero (Reply)**
18

19 MR. TINAJERO: Well, I don't think that is analogous to this -- to
20 the fact of this case.
21

22 Let's maybe back up and I explain a bit.
23

24 MASTER SCHLOSSER: No, but there might be a representation to
25 Ritchie Bros.
26

27 MR. TINAJERO: Yes.
28

29 MASTER SCHLOSSER: For a very specific purpose.
30

31 MR. TINAJERO: Yes. That they released their -- they enter into a
32 --
33

34 MASTER SCHLOSSER: No, no. they only say to Ritchie Bros. we have
35 no interest in it.
36

37 MR. TINAJERO: Okay.
38

39 MASTER SCHLOSSER: For Ritchie Bros. purposes, which is don't pay
40 money to us despite the fact that we have our general security agreement registered
41 against us.

- 1
2 MR. TINAJERO: Exactly. They said, We don't want any money
3 from this. They had a second agreement with --
4
5 MASTER SCHLOSSER: No, they do want the money.
6
7 MR. TINAJERO: Well, they said they didn't --
8
9 MASTER SCHLOSSER: But they wanted it in a roundabout way.
10
11 MR. TINAJERO: Oh, they don't because they had a separate
12 agreement with the borrowers where if the borrowers paid them 2 million dollars then the
13 words: would probably be entitled to keep the rest. That's exactly what that email says.
14
15 MASTER SCHLOSSER: Okay, but how much does it go for? Was it half
16 a million or a million?
17
18 MR. TINAJERO: All the proceeds sold. But I believe the
19 (INDISCERNIBLE) have been paid prior to secured interest -- secured prior for about 4
20 million dollars. The RBC has already been paid out 2.5 million dollars. So as far as we
21 are concerned the RBC's -- the other agreement has been satisfied. That -- any other
22 proceeds would have been for the benefit of the -- the RBC would have entitled the
23 borrowers to benefits from those proceeds. They would not have necessarily gone to the
24 RBC.
25
26 MASTER SCHLOSSER: But they are not entitled to more than they are
27 owed.
28
29 MR. TINAJERO: Sorry?
30
31 MASTER SCHLOSSER: They are not entitled to more than they are
32 owed.
33
34 MR. TINAJERO: No, but they had the agreement which the RBC
35 clearly said, they gave us 2 million dollars and then you can do the rest with the proceeds.
36 Whatever you want. It doesn't have to be -- it's money that would be paid to the
37 borrowers. It wouldn't be paid to the -- it would not be -- and if that was the case we
38 would be actually -- that would not be the intention of Property Security Registry where a
39 borrower would be paid ahead of a writ -- a property right as a writ.
40
41 MR. SANSON: With respect, Sir, that -- the representation that

1 there is merely only -- that RBC was merely only looking for 2 million dollars and that
2 was somehow the agreement of the parties, I think, is contradicted by both our clients'
3 affidavits and the RBC's affidavits to state that the agreement was merely a 2 million
4 dollars being applied to the term loan, the remainder of which would be -- the remainder
5 of the proceeds would be applied to other credit facilities and at the RBC.

6

7 MR. TINAJERO: That's what I am --

8

9 MASTER SCHLOSSER: Well, it's kind of a forbearance. I mean weren't
10 they under by, was it 50 million, or was it --

11

12 MR. SANSON: It's about --

13

14 MR. TINAJERO: It's about 55 -- 52, 53 million at the RBC, so we
15 are not contesting that. We are not contesting the fact that the RCB has a TSA out for
16 most of the assets. But what we are contesting is the fact that the RBC specifically
17 waived their interest against these four vehicles. And the RBC, there was a side
18 agreement between the borrowers and the RBC. The agreement has been satisfied and
19 the RBC said that clearly and purposely sent a waiver to the Ritchie Bros. advising that
20 they don't want any proceeds from the sale of the vehicles. Then thereafter Ritchie Bros.
21 contacted our office to ask for a payout statement and they advised that we would be paid
22 out in full,

23

24 Soon after --

25

26 MASTER SCHLOSSER: Yes, but Ritchie Bros. sells something.

27

28 MR. TINAJERO: Yeah.

29

30 MASTER SCHLOSSER: And the purchaser pays the money to Ritchie
31 Bros. It's not Ritchie Bros. money.

32

33 MR. TINAJERO: No.

34

35 MASTER SCHLOSSER: They say, Well, who do we pay?

36

37 MR. TINAJERO: Yeah.

38

39 MASTER SCHLOSSER: And so let's imagine that they say the Royal
40 Bank, it has a general security agreement, we could pay them or we could pay the owner
41 of the property, in which case it would go to the people on the title of it.

10

- 1
2 MR. TINAJERO: No.
3
4 MASTER SCHLOSSER: And payable by the owner to those people.
5
6 MR. TINAJERO: But -- and I guess then we should have
7 mentioned this. We have a garnishee summons on two -- for the two judgments that were
8 served to Ritchie Bros. So any money that will be paid to the borrowers in this case,
9 would tentatively have to be paid into court for the benefit of the writ holders. So that
10 what my friends are trying to do, they are trying to sidestep that issue, the writ and rather
11 than pay the money to the borrowers as was their original agreement, they want it paid
12 directly to the RBC, which is contrary to any of the agreement that they had.
13
14 MASTER SCHLOSSER: But what is the difference though between
15 paying it directly to the RBC and paying it to the debtor, subject to the general security
16 agreement.
17
18 MR. TINAJERO: Well, if they pay it to a debtor, the writ will
19 attach, again, and the money would be garnishee and we go into court for the benefit of
20 correctness.
21
22 MASTER SCHLOSSER: No, but you would still be second though.
23
24 MR. TINAJERO: No, because the RCB --
25
26 MASTER SCHLOSSER: Second to the RBC interest.
27
28 MR. TINAJERO: No because the RBC waived their security
29 interest.
30
31 MASTER SCHLOSSER: Okay. Anything further counsel?
32
33 MR. TINAJERO: Again, I do want to say -- this is the borrower's
34 application, the RBC was not involved on this until Master Smart gave them the
35 opportunity to come into court. They weren't for a previous application, they decided not
36 to come. We were originally advised that the RBC was not contesting our writ, rather
37 that it was -- the borrowers who were contesting our writ, and it was payment of the writ
38 and that's all in affidavit evidence. And further -- and then counsel for the RBC, Mrs.
39 Roskey can confirm that any funds are paid to the borrower -- or to the borrower of the
40 RBC that it can be redrawn as part of the line of credit by the borrowers and apply -- and
41 use for their own purposes.

- 1
2 What our concern is that this whole application, this whole issue is a scheme by the
3 borrowers to not pay our writ. What our concern is, is the money goes to the RBC --
4
- 5 MASTER SCHLOSSER: So the RBC is a co-conspirator here --
6
- 7 MR. TINAJERO: I am not trying to say --
8
- 9 MASTER SCHLOSSER: -- to defraud the writ holders.
10
- 11 MR. TINAJERO: I am not trying to say they are trying to defraud
12 anyone, what I am trying to say the borrowers -- this is part of a general security
13 agreement. There are about 11 signatories. We only have judgments against two of
14 them. So if we allowed the funds to be paid towards RBC line of credit, any of the other
15 9 entities can only withdraw the money for their own purposes avoiding paying of the
16 writ. That is one of the main concerns.
17
- 18 Our issue is the RBC did not consent -- did not oppose this application until -- it has not
19 appeared in Court until today and they were very well aware of the application and it was
20 the borrowers who had contested the payment to the writ holders.
21
- 22 MASTER SCHLOSSER: Okay, but the bottom line is they are here
23 now.
24
- 25 MR. TINAJERO: They are here now.
26
- 27 **Decision (Application)**
28
- 29 MASTER SCHLOSSER: They've been given an opportunity to give
30 evidence and make argument. I agree with them. I don't agree that the facts here support
31 a waiver on the part of RBC to give up its claim to the proceeds of sale of this machinery.
32
- 33 I don't -- in my view, the representation that was made to Ritchie Bros. if is sufficient to
34 have done that, is not something the writ holder is entitled to rely on.
35
- 36 MR. TINAJERO: Sir, with respect. It's not just the representation
37 that was made to Ritchie Bros.
38
- 39 MASTER SCHLOSSER: I am sorry?
40
- 41 MR. TINAJERO: It's not just the representation that was made to

1 Ritchie Bros. The representation was made as part of an agreement between the
2 borrowers and the RBC.
3
4 MASTER SCHLOSSER: Okay. But you are not party to it and it was not
5 made to you, and so I am concluding that --
6
7 MR. TINAJERO: Okay.
8
9 MASTER SCHLOSSER: -- that is not a representation for which you
10 could rely.
11
12 MR. TINAJERO: And fair enough. And I appreciate that.
13 Probably our position is that would be an appeal to a higher court, that would be for my
14 client to decide later on.
15
16 MASTER SCHLOSSER: I am sorry, say that again?
17
18 MR. TINAJERO: Our position would be that would be an appeal -
19 - or if that is your ruling.
20
21 MASTER SCHLOSSER: All right, well --
22
23 MR. TINAJERO: And that's fine enough. That --
24
25 MASTER SCHLOSSER: Very good okay.
26
27 MR. TINAJERO: Yeah, thank you.
28
29 MASTER SCHLOSSER: So who wants to do an order so you can get
30 your appeal started?
31
32 MR. SANSON: Well, I have a form of order I can show to my
33 friend right now, essentially saying nothing more than the registrar is to strike the writs
34 from the four subject vehicles and that the monies held by Richie Bros. are to be paid to
35 RBC to be applied to the RBC secured indebtedness and awarding costs to myself and to
36 the RBC.
37
38 MASTER SCHLOSSER: That's fine.
39
40 Thank you, gentlemen.
41

1 MR. SANSON: Thank you.

2

3 MR. TINAJERO: Thank you.

4

5 MASTER SCHLOSSER: Thank you, ma'am.

6

7 MS. ROSKEY: Thank you.

8

9

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11 PROCEEDINGS CONCLUDED

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1 Certificate of Record

2

3 I, Carrie Jones, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench, held in courtroom 213, at Edmonton, Alberta, on the
5 11th day of March, 2019, and that I was the court official in charge of the sound-recording
6 machine during the proceedings.

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1 **Certificate of Transcript**

2

3 I, C. Emblin, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best of
6 my skill and ability, and the foregoing pages are a complete and accurate transcript of the
7 contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

11

12 C. Emblin, Transcriber

13 Order Number: AL-JO-1002-7310

14 Dated: March 15, 2019

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IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

ROYAL BANK OF CANADA
Applicant

-and-

DISTINCT INFRASTRUCTURE GROUP INC., et al
Respondents

Court File No. CV-19-00615270-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF CHRIS ARON WOOD
(Sworn, October 15, 2019)

BIRENBAUM, STEINBERG, LANDAU,
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Lawyers for Mega Diesel Holdings Ltd.
and Chris Aron Wood

TAB 3

Court File No. CV-19-00615270-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE)
JUSTICE *HANEY*)

11TH
MONDAY, THE ~~8TH~~
DAY OF MARCH, 2019

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended



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

ORDER
(appointing Receiver)

THIS APPLICATION made by Royal Bank of Canada (the "Applicant" or the "Bank") for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA") appointing Deloitte Restructuring Inc. as receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of Distinct Infrastructure Group Inc., Distinct Infrastructure Group West Inc., DistinctTech Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd. (collectively, the

- 2 -

"Debtors") acquired for, or used in relation to a business carried on by the Debtors, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Gary Ivany sworn February 28, 2019 and the Exhibits thereto and on hearing the submissions of counsel for the Applicant and the Receiver, no one else appearing or served, and on reading the consent of Deloitte Restructuring Inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, Deloitte Restructuring Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, arranging for provision of utilities,

- 3 -

the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- (g) to settle, extend or compromise any indebtedness owing to the Debtors;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby

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conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$500,000, provided that the aggregate consideration for all such transactions does not exceed \$1,500,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required.

- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

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- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;
- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;
- (q) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have;
- (r) to make an assignment in bankruptcy on behalf of any or all of the Debtors; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, including but not limited to, Joe (Giuseppe) Lanni, Alex Agius and George Parselias, and all other persons acting on their instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

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5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure. All such Persons shall preserve the Records in their original format and shall not alter, amend, erase or destroy any Records without the prior written consent of the Receiver.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall preserve such Records in their original format and shall not alter, amend, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least

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seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days' notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

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NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

- 9 -

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or

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relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

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20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow from the Bank by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$2,000,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that, pending further Order of the Court, for a period of fifteen (15) calendar days following the date of this Order (the "Interim Comeback Period"), the Receiver's Borrowing Charge shall not extend to collateral that is subject to a properly perfected security interest that is in priority to the Bank's security, including purchase money security interests. Any secured creditor that wishes to take the position that the priority charges granted pursuant to this Order should not extend to collateral subject to their security interest shall serve a motion on notice to the Receiver and the Bank within fifteen (15) calendar days of the date of this Order, seeking such relief. In the absence of an Order being granted in respect of such motion that is served within the Interim Comeback Period, all priority charges under this Order including the Receiver's Borrowings Charge set forth in paragraph 21 above, will apply to all assets, including those subject to purchase money security interests, equipment leases or other

- 12 -

interests that may be in priority to the Bank's security, immediately upon the conclusion of the Interim Comeback Period without any further steps being taken.

23. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

25. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

26. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: www.insolvencies.deloitte.ca/en-ca/dig.

27. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, email, or facsimile transmission to the Debtors' creditors or other interested parties at their respective

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addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery, email, or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

RETENTION OF LAWYERS

28. THIS COURT ORDERS that the Receiver may retain solicitors to represent and advise the Receiver in connection with the exercise of the Receiver's powers and duties, including without limitation, those conferred by this Order. Such solicitors may include Thornton Grout Finnigan LLP, solicitors for the Applicant herein, in respect of any matter where there is no conflict of interest. The Receiver shall, however, retain independent solicitors in respect of any legal advice or services where a conflict exists, or may arise.

GENERAL

29. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

30. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of any of the Debtors.

31. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

32. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within

proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

33. THIS COURT ORDERS that the Applicant shall have its costs of this Application, up to and including entry and service of this Order, provided for by the terms of the Application security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estates with such priority and at such time as this Court may determine.

34. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



ENTERED / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAR 11 2019

PER / PAR: *W*

SCHEDULE "A"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that Deloitte Restructuring Inc., the receiver (the "Receiver") of the assets, undertakings and properties of Distinct Infrastructure Group Inc., Distinct Infrastructure Group West Inc., DistinctTech Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd. (together, the "Debtors") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the 11th day of March, 2019 (the "Order") made in an action having Court file number CV-19-00615270-00CL, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver

to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

Deloitte Restructuring Inc., solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____
Name:
Title:

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

ROYAL BANK OF CANADA

- and -

DISTINCT INFRASTRUCTURE GROUP INC. et al.

Applicant

Respondents

Court File No. CV-19-00615270-00CL

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

Proceedings commenced at Toronto

**ORDER
(appointing Receiver)**

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Lawyers for the Applicant, Royal Bank of Canada

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

ROYAL BANK OF CANADA
Applicant

-and-

DISTINCT INFRASTRUCTURE GROUP INC., et al
Respondents

Court File No. CV-19-00615270-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD OF THE APPLICANTS,
MEGA DIESEL HOLDINGS LTD.
AND CHRIS ARON WOOD
(Returnable December 17, 2019)

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