

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

**FACTUM OF THE MOVING PARTIES
MEGA DIESEL HOLDINGS LTD. AND CHRIS ARON WOOD
(Returnable December 17, 2019)**

December 6, 2019

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PART I - OVERVIEW

1. The moving parties, Chris Aron Wood and Mega Diesel Holdings Ltd. (collectively, the “Moving Parties”), seek an Order that the stay of proceedings (the “Stay”) granted pursuant to Justice Hainey’s Order, dated March 11, 2019 (the “Receivership Order”),¹ be lifted for the purpose of allowing a pending appeal in the Court of Queen’s Bench of Alberta to proceed.²

2. The pending Court of Queen’s Bench appeal concerns issues related to an application by the debtors, Distinct Infrastructure Group Inc. (“DIG”) and iVac Services West Inc. (“iVac West”),³ to discharge the registration of certain writs of enforcement in favour of the Moving Parties and registered in the Alberta Personal Property Registry (the “APPR”), and to direct payment of funds to the Royal Bank of Canada (“RBC”) (the “Priority Dispute Appeal”).⁴

3. In the event the Stay is not lifted, the Moving Parties will be materially prejudiced by losing the ability to proceed with the Priority Dispute Appeal and be effectively estopped from recovering funds they may be otherwise entitled to and to which they may hold priority over RBC.⁵

PART II – FACTS

4. On March 11, 2019, Deloitte Restructuring Inc. (“Deloitte”) was appointed by the Court, as Receiver, without security, of all the assets, undertakings and properties of DIG and its subsidiaries set out in Appendix “A” pursuant to an Order of Justice Hainey (the “Receivership Order”).⁶

¹ Order of Justice Hainey, Motion Record of the Moving Parties, dated November 5, 2019 (“Moving Record”), Tab 3

² Affidavit of Chris Aron Wood, sworn October 15, 2019 (“Wood Affidavit”), Moving Record Tab 2 at para 2.

³ Alberta Court File No. 1703-13921; Moving Record Exhibits “P” and “Q”.

⁴ Wood Affidavit paras 27-29.

⁵ Wood Affidavit paras 4-11, paras 22-26.

⁶ Wood Affidavit para 2; Order of Justice Hainey, Moving Record, Tab 3.

5. The application for appointment of the Receiver was brought by RBC in respect of a secured indebtedness owing by DIG, and its subsidiaries, of approximately \$52,700,000.00.⁷

6. As a result of the Receivership Order, and section 9 thereof, the Priority Dispute Appeal in Alberta has been stayed pending further Order of the Court.⁸

The Alberta Proceedings

7. On July 31, 2017, the Moving Parties obtained consent judgement in the amount of \$422,398.81, plus costs, against DIG and iVac West.⁹

8. On September 1, 2017, a Writ of Enforcement was filed 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").¹⁰ The First Writ was also registered in the APPR on September 1, 2017.¹¹

9. On September 13, 2018, the Moving Parties obtained summary judgment in the amount of \$149,922.00, plus costs, against DIG and iVac West.¹²

10. On October 10, 2018, a Writ of Enforcement was filed with the Clerk of the Court of Queen's Bench of Alberta in the total amount of \$154,145.11, representing the summary judgment order plus costs (the "Second Writ").¹³ The Second Writ was registered in the APPR on October 10, 2018.¹⁴

⁷ Wood Affidavit at para 15.

⁸ Order of Justice Hainey, Moving Record, Tab 3, p 379.

⁹ Wood Affidavit at paras 4-5; Moving Record, Exhibits "A" and "B"; Note: On or about January 3, 2017, Mega Diesel Excavating Ltd. amalgamated into iVac Services West Inc., see Moving Record, Exhibit "B".

¹⁰ Wood Affidavit at para 6; Moving Record, Exhibit "C".

¹¹ Wood Affidavit at para 7; Moving Record, Exhibit "D".

¹² Wood Affidavit at para 8; Moving Record, Exhibit "E".

¹³ Wood Affidavit at para 9; Moving Record, Exhibit "F".

¹⁴ Wood Affidavit at para 10; Moving Record, Exhibit "G".

11. The First Writ was registered in the APPR against 17 serial number goods owned by DIG and/or iVac West.¹⁵

RBC's Security Interest and Debt Position

12. On or about September 21, 2016, DIG entered into a general security agreement with RBC, which was registered in the APPR on September 23, 2016 (the "Security Agreement").¹⁶

13. The Security Agreement provided RBC with a security interest in all of DIG's present and future Personal Property.¹⁷

14. As set out in the Receiver's Prefiling Report, as of February 27, 2019, advances made by RBC to DIG amounted to approximately \$52,700,000.00.¹⁸

15. As of December 31, 2018, DIG owed its creditors approximately \$82,400,000.00 and had incurred an equity deficit of about \$82,600,000.00.¹⁹

16. According to DIG's public disclosure, RBC is expected to suffer losses on its debt position and subordinated lenders and shareholders are not expected to see recovery of any monies owed.²⁰

The Ritchie Bros Auction

17. 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 owed by DIG.²¹

¹⁵ Wood Affidavit at para 11; Moving Record, Exhibit "D", p 27.

¹⁶ Wood Affidavit at para 12; Moving Record, Exhibit "H", p 64.

¹⁷ Wood Affidavit at para 13; Moving Record, Exhibit "H", p 64.

¹⁸ Wood Affidavit at para 15; Moving Record, Exhibit "I", p 92.

¹⁹ Wood Affidavit at para 16; Moving Record, Exhibit "I", pp 92, 99.

²⁰ Wood Affidavit at para 17; Moving Record, Exhibit "J".

²¹ Wood Affidavit at para 18; Moving Record, Exhibit "K", pp 115-118.

18. Of the equipment sold at the Edmonton auction, the First Writ was registered in the APPR against the following DIG/iVac vehicles:²²

<i>Lot</i>	<i>Serial Number</i>	<i>Sale Price</i>
421	5KKPALD12FPGK2956	\$327,500.00
423	5KKPALD10EPFP3871	\$260,000.00
424	5KKPALD12EPFP3870	\$300,000.00
428	5KKPALDRXDPFA9979	\$260,000.00

(collectively, the “Subject Vehicles”)

19. As a result of the Edmonton auction and sale of the Subject Vehicles, the Moving Parties’ Alberta counsel contacted Ritchie Bros on or about December 20, 2019 to advise of the First Writ and request payment of the net proceeds of sale of the Subject Vehicles.²³

20. In correspondence, dated January 2, 2019, Ritchie Bros advised the Moving Parties’ Alberta counsel that DIG had instructed it to hold off paying the outstanding net proceeds of sale of the Subject Vehicles.²⁴ DIG advised Ritchie Bros that it was disputing the First Writ and as a result the net proceeds were held back.²⁵

²² Wood Affidavit at para 19.

²³ Wood Affidavit at para 20; Moving Record, Exhibit “L”.

²⁴ Wood Affidavit at para 21; Moving Record, Exhibit “M”, p 124.

²⁵ Wood Affidavit at para 21; Moving Record, Exhibit “M”, p 123.

RBC's Apparent Waiver and Subordination

21. 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 as long as DIG made a "voluntary prepayment" of "at least" \$2,000,000.00 towards its outstanding indebtedness, RBC would consent to the auction (the "Prepayment Agreement").²⁶

22. In connection with RBC's consent, the bank sent Ritchie Bros a completed Security Interest Form (the "Security Form") having reviewed the assets to be sold through the auction, including the Subject Vehicles.²⁷

23. On the Security Form there were two options for RBC to select from, as follows:

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 lessor 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 (including of all applicable taxes), being the amount that we are owed which is secured by, among other things, the Equipment.²⁸

24. Of the options provided, RBC selected the first, indicating either that it had no interest in the Equipment and the proceeds of sale, or that it had a valid interest but did not wish to receive the proceeds from the sale.²⁹

²⁶ Wood Affidavit at para 22, Moving Record, Exhibit "N"; Supplementary Affidavit of Ivana Ditta, sworn December 5, 2019, Exhibit "A".

²⁷ Wood Affidavit at para 23.

²⁸ Wood Affidavit at para 23, Exhibit "O", 132.

²⁹ Wood Affidavit at para 23, Exhibit "O".

The Waiver/Subordination Dispute

25. As a result of RBC's selection on the Security Form, and the Prepayment Agreement, the Moving Parties have taken the position in the Priority Dispute Appeal that RBC effectively waived and subordinated its priority security interest, pursuant to section 40 of the *Personal Property Security Act*,³⁰ over the Subject Vehicles, and that RBC is estopped from enforcing and benefitting from its Security Agreement over the proceeds concerning the Subject Vehicles.³¹

26. On February 15, 2019, DIG brought an application in the Court of Queen's Bench of Alberta seeking to discharge the registration of the First Writ, and seeking a direction of payment of the net proceeds of sale of the Subject Vehicles to RBC.³²

27. The application was before Master Smart who ultimately adjourned the application to March 11, 2019 to allow RBC to be formally served and instruct counsel to attend.³³

28. On March 11, 2019, at the return of DIG's application, Master Schlosser of the Court of Queen's Bench of Alberta granted DIG's application, Ordering that the First Writ over the Subject Vehicles be discharged, and directing the monies held by Ritchie Bros from the proceeds of sale of such vehicles to be applied to RBC's secured indebtedness (the "Schlosser Order").³⁴

Appeal of the Schlosser Order

29. The Moving Parties appealed the Schlosser Order and filed their Notice of Appeal in the Court of Queen's Bench of Alberta on March 13, 2019.³⁵

³⁰ RSA 2000, c P-7.

³¹ Wood Affidavit at paras 25-26.

³² Wood Affidavit at paras 27-28; Moving Record, Exhibit "P".

³³ Wood Affidavit at para 28; Moving Record, Exhibit "P", pp 157-158.

³⁴ Wood Affidavit at para 29; Moving Record, Exhibit "Q".

³⁵ Wood Affidavit at para 30; Moving Record, Exhibit "R".

30. On April 23, 2019, the Priority Dispute Appeal was perfected and the Moving Parties filed their Appellants' Brief with the Court of Queen's Bench of Alberta.³⁶

31. A copy of the Appellants' Brief and transcripts from the proceedings before Master Smart and Master Schlosser was served on counsel to DIG and RBC on April 23, 2019.³⁷

32. As a result of the Stay, the Moving Parties have been estopped from proceeding with the hearing of the Priority Dispute Appeal in Alberta.

PART III – ISSUES & LAW

33. The sole issue to be determined on this motion is whether the Stay, pursuant to the Receivership Order, should be lifted for the purpose of allowing the Moving Parties to proceed with their pending Priority Dispute Appeal in Alberta.

A. Principles for Lifting a Stay Pursuant to a Receivership Order

34. In considering whether to lift a stay of proceedings imposed by a receivership order, a court should consider the totality of the circumstances and the relative prejudice to both sides.³⁸

35. A court may order that a stay be lifted where it is satisfied that the party seeking leave is likely to be materially prejudiced by the stay, or there are other equitable grounds on which to justify lifting the stay.³⁹

³⁶ Wood Affidavit at para 31; Moving Record, Exhibit "S".

³⁷ Wood Affidavit at para 40; Moving Record, Exhibit "U".

³⁸ *Romspen Investment Corp. v Courtice Auto Wreckers Ltd.*, 2017 ONCA 301 [*Romspen*] at para 30, Moving Parties' Book of Authorities ("Moving Authorities"), Tab 1; *Peoples Trust Co. v Rose of Sharon (Ontario) Retirement Community*, 2012 ONCSC 7319 (Commercial List) [*Peoples Trust*] at para 5, Moving Authorities, Tab 2.

³⁹ *GE Canada Equipment Financing GP v Northern Sawmills Inc.*, 2012 ONSC 6664 [*GE Canada*] at para 34, Moving Authorities, Tab 3.

36. On a motion for leave to lift a stay under a receivership order, courts may find guidance in the jurisprudence that has developed regarding requests to lift stays imposed by the *Bankruptcy and Insolvency Act*, RSC 1985, c B3.⁴⁰

37. In determining whether to lift the stay, there is no requirement to establish a *prima facie* case, however an applicant must establish that there are sound reasons to relieve against the stay.⁴¹

38. While there is no requirement to establish a *prima facie* case, courts are not precluded from any consideration of the merits of the proposed action where it is relevant to the issue of whether there are ‘sound reasons’ for lifting the stay.⁴² As the Court in *Ma, Re* noted, “if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.”⁴³

B. The Court Should Exercise its Discretion to Lift the Stay

(i) The Stay is Resulting in a Material Prejudice to the Moving Parties

39. In accordance with Master Schlosser’s March 11, 2019 Order, the First Writ has been discharged and the net proceeds of sale from the Subject Vehicles have been paid to RBC.⁴⁴

40. As a result of the Stay, the Moving Parties’ Priority Dispute Appeal has been stayed subject to the written consent of the Receiver or further Order of the Court.⁴⁵

⁴⁰ *Peoples Trust* at para 5; *GE Canada* at para 35.

⁴¹ *GE Canada* at para 35; *Ma, Re*, [2001] OJ No 1189 (ONCA) [*Ma, Re*] at para 2, Moving Authorities, Tab 4.

⁴² *Ma, Re* at para 3.

⁴³ *Ma, Re* at para 3.

⁴⁴ Wood Affidavit at para 33; Moving Record, Exhibit “Q”.

⁴⁵ Order of Justice Hainey, Moving Record, Tab 3, p 379.

41. As well, the Receiver is now in possession of all of DIG's books and records, which may be relevant to the Priority Dispute Appeal.⁴⁶

42. The Receiver is in the process of realizing upon DIG's, and its subsidiaries', assets in an effort to minimize the losses suffered by RBC under the Security Agreement.⁴⁷

43. Given the amount outstanding to RBC under the Security Agreement and DIG's representations, via its public disclosure, that RBC as its principal secured lender will suffer losses and other creditors are not expected to see any recovery,⁴⁸ there is a real risk that there will be no funds available to satisfy the monies owed to the Moving Parties under both Consent and Summary Judgment Orders.

44. The issue of competing security priorities is a live issue before the Alberta courts and the Receivership Order and resulting Stay is operating to effectively bar a hearing on the merits of the Priority Dispute Appeal.

45. If the Moving Parties are successful on the Priority Dispute Appeal, then RBC was never entitled to the proceeds from the sale of the Subject Vehicles from the Ritchie Bros auction and such funds should have properly been paid to the Moving Parties as a result of RBC's waiver and/or subordination of its security interest in the Subject Vehicles.

⁴⁶ Supplementary Affidavit of Ivana Ditta, sworn November 5, 2019 ("Supplementary Moving Record"), Exhibit "E".

⁴⁷ Wood Affidavit para 34; Supplementary Moving Record, Exhibit "E".

⁴⁸ Wood Affidavit at paras, 15-17, 35; Moving Record, Exhibits "I" and "J".

46. In *Peoples Trust Co. v Rose of Sharon (Ontario) Retirement Community*,⁴⁹ a lien-holder applied to lift a stay imposed under a receivership order on grounds that it required the stay lifted to allow it to pursue its construction lien action.⁵⁰

47. The court in *Peoples Trust* found that the moving party would be materially prejudiced if it was not able to advance its lien claim.⁵¹

48. Similarly, in terms of prejudice, if the Stay is not lifted the Moving Parties have no way of effectively adjudicating their rights on the pending Priority Dispute Appeal and will lose their ability to do so without further Order of this court.

(ii) *No Prejudice to the Receiver, RBC, or Other Creditors*

49. Lifting the Stay will not prejudice the Receiver, RBC, or other creditors in the Receivership proceedings.

50. If the Priority Dispute Appeal is allowed and the Court of Appeal finds in favour of the Moving Parties, then the funds at issue were never properly RBC's, and are not otherwise subject to the Receivership proceedings as they are squarely the property of the Moving Parties.

51. Alternatively, if the Priority Dispute Appeal is denied, then the Moving Parties' appeal will have been finally adjudicated in Alberta and Master Schlosser's Order will be upheld, thereby validating RBC's entitlement to the proceeds of sale funds.

⁴⁹ 2012 ONSC 7319.

⁵⁰ *Peoples Trust* at paras 1-3.

⁵¹ *Peoples Trust* at para 14.

52. There appears to be no valid reason for the Receiver not to consent to lifting the Stay. It will not suffer any prejudice, let alone material prejudice, if the Stay is lifted.

(iii) *There are Sound Reasons to Lift the Stay*

53. Along with the material prejudice suffered by the Moving Parties if the within motion is denied, there are sound reasons otherwise to lift the stay.

54. The Priority Dispute Appeal has been perfected and can likely be dealt with expeditiously as a result.⁵²

55. As well, though the Moving Parties are not required to establish a *prima facie* case in the underlying Priority Dispute Appeal, nor is this Court tasked with determining whether one exists,⁵³ the Priority Dispute Appeal has merit and should be heard before the Court of Appeal of Alberta.

56. On DIG's initial application, returnable February 15, 2019 before Master Smart, Master Smart heard submissions from counsel to DIG and the Moving Parties, and after considering the issue before him briefly, Master Smart noted:

MASTER SMART: But, I mean, I don't know if RBC is of the mind that they're at no risk here, but I think there's something to the argument being made. And whether it's a subordination or not, there are these funds which are ostensibly available and available through the release of funds to your client. So they possess the funds from a sale over which there's no claim of security. There is waiver, if you will. I don't know if it's subordination. It may be waiver.⁵⁴

57. Master Smart ultimately adjourned DIG's application to allow RBC to be formally served and instruct counsel to attend and so did not determine the issue before him conclusively.⁵⁵

⁵² Wood Affidavit at para 40; Moving Record, Exhibit, Exhibit "U".

⁵³ *GE Canada* at para 35; *Peoples Trust* at para 5; *Ma, Re* at paras 2-3.

⁵⁴ Moving Record, Exhibit "P", p 153, ln 13-18.

⁵⁵ Wood Affidavit at paras 27-28.

58. While Master Schlosser ultimately granted DIG's relief on its application on March 11, 2019, the underlying merit to the Priority Dispute Appeal remains and should be ultimately determined by the Court of Appeal of Alberta on the appeal record filed before it and not collaterally before this Court on the limited record to lift the Stay.

(iv) Totality of the Circumstances Favours Lifting the Stay

59. Given the material prejudice suffered by the Moving Parties if the Stay is not lifted, the lack of, or minor, prejudice the Receiver and other parties may suffer, and taking into consideration the otherwise equitable grounds to lift the Stay, the totality of the circumstances favour lifting the Stay.


60. This Court is not being asked to make an order on the merits of the Priority Dispute Appeal, nor on whether RBC effectively waived and thereby subordinated its priority to the sale of proceeds from the Subject Vehicles.

61. Instead, the Moving Parties seek an Order lifting the Stay to allow them to proceed with their pending Priority Dispute Appeal to determine finally their entitlement to funds pursuant to the First Charge.

PART IV – ORDER REQUESTED

62. For the reasons set out above, the Moving Parties respectfully request an Order lifting the Stay so that they may pursue the Priority Dispute Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2019.



Craig Colraine (31792P)
David Cassin (70846N)

Lawyers for the Moving Parties,
Mega Diesel Holdings Ltd. and Chris Aron
Wood

APPENDIX "A"

List of Subsidiaries

Distinct Infrastructure Group West Inc.

DistinctTech Inc.

iVac Services Inc.

iVac Services West Inc.

Crown Utilities Ltd.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Romspen Investment Corp. v Courtice Auto Wreckers Ltd.*, 2017 ONCA 301
2. *Peoples Trust Co. v Rose of Sharon (Ontario) Retirement Community*, 2012 ONCSC 7319 (Commercial List)
3. *GE Canada Equipment Financing GP v Northern Sawmills Inc.*, 2012 ONSC 6664
4. *Ma, Re*, [2001] OJ No 1189 (ONCA)

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Personal Property Security Act, RSA 2000, c P-7

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.

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

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