

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE

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MONDAY, THE

JUSTICE HAINEY

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22nd DAY OF March, 2021

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

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

ORDER
(Appointing Special Receiver)

THIS MOTION brought by Deloitte Restructuring Inc. in its capacity as Receiver and Manager (the “**Receiver**”) of Distinct Infrastructure Group Inc., Distinct Infrastructure Group West., DistinctTech Inc., iVac Services Inc., iVac Services West Inc., and Crown Utilities Ltd. (collectively, the “**Debtors**”), appointed pursuant to the Order of this Court dated March 11, 2019 (the “**Receivership Order**”), 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 the Hon. J. Douglas

Cunningham, Q.C., as special receiver without security, of the Litigation Assets, (as defined herein) of the Debtors, as set out in the Receiver's Motion Record dated March 17, 2021 was heard this day by Zoom videoconference due to the COVID-19 pandemic.

ON READING the Special Report of the Receiver (Appointment of Special Receiver) dated March 17, 2021, the Affidavit of Service of Rose Bozzelli sworn on March 18, 2021, the Affidavit of Service of Emer Cartwright sworn on March 18, 2021 and on hearing the submissions of counsel for the Receiver, the Respondents, the intended Special Receiver and such other parties present, and on reading the consent of the Hon. J. Douglas Cunningham, Q.C., filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that the Hon. J. Douglas Cunningham, Q.C. be and is hereby appointed Special Receiver (the "**Special Receiver**") without security of the:

- (a) asset of Distinct Infrastructure Group Inc. ("**DIG**"), being the claim of DIG against its former directors and officers including the outstanding action commenced by Deloitte in its capacity as Receiver of DIG against Giuseppe Lanni also known as Joe Lanni, Alexander Agius, George M. Newman also known as Michael Newman, Garry Wetsch, Douglas Horner, Robert Normandeau, William Nurnberger, George Parselias, Royston Rachpaul, Jay Vieira, Emmanuel Bettencourt also known as

Manny Bettencourt, and Michael Mifsud in the Ontario Superior Court action number CV-20-00644260-0000 (the “**D&O Action**”); and

- (b) asset of DIG being the claim of DIG against MNP LLP, the former auditor of DIG, including the outstanding action commenced by Deloitte in its capacity as the Receiver of DIG against MNP LLP as Ontario Superior Court action number CV-20-00648746-00CL (the “**MNP Action**” and collectively with the **D&O Action** the “**Litigation Assets**”).

SPECIAL RECEIVER’S POWERS

3. **THIS COURT ORDERS** that subject to the provisions hereof and the Receivership Order, the Special Receiver is hereby empowered, authorized and directed as follows;

- (a) to take such steps as in the opinion of the Special Receiver are necessary or appropriate to preserve, protect and realize upon the Litigation Assets or any part or parts thereof;
- (b) to initiate, prosecute and continue the prosecution of any and all actions, applications, administrative hearings, arbitrations or proceedings, in Ontario or elsewhere, as may in the judgement of the Special Receiver be necessary or desired to properly manage, preserve, protect or realize upon the Litigation Assets;
- (c) to prosecute or defend, in any jurisdiction, all applications, proceedings, actions, administrative hearings or arbitrations now pending or hereinafter instituted by or against DIG or the Special Receiver, the prosecution or defence of which will, in the judgement of the Special Receiver be necessary or advisable to properly receive, manage, protect, preserve or realize on the Litigation Assets;

- (d) to settle or compromise any of the Litigation Assets which in the judgement of the Special Receiver should be settled or compromised;
- (e) to take any appeals or applications for judicial reviews that the Special Receiver shall deem proper and advisable in respect of any order or judgment pronounced in any application, proceeding, action, administrative hearing or arbitration affecting the Litigation Assets;
- (f) to conduct such investigations including forensic investigation as are necessary or appropriate in the opinion of the Special Receiver, in respect of the Litigation Assets;
- (g) to continue to retain and instruct Thornton Grout Finnigan LLP (“TGF”) as counsel in respect of the Litigation Assets, and to appoint, employ or retain such experts or other assistance from time to time on and on any basis, including on a temporary basis, as the Special Receiver considers necessary or desirable for managing, preserving, protecting or realizing on the Litigation Assets or generally exercising the powers and duties conferred by this Order;
- (h) without limiting the generality of any provisions hereof, and in relation to the Litigation Assets, the Special Receiver be and is hereby empowered with all of the powers of the Receiver granted to the Receiver in this proceeding in the Receivership Order, and the Interim Distribution, Expansion of Powers and Fee Approval Order dated May 3, 2019;
- (i) to cooperate with, provide instructions to and request information from, the Receiver in such manner as it deems appropriate, although the Receiver shall have no liability whatsoever (and is hereby released from any such liability) for

cooperating with, or for complying with or carrying out the requests of, the Special Receiver; and

- (j) to communicate with the Receiver, the Applicant, and TGF in its role as counsel to the Receiver and the Special Receiver in such manner as it deems fit. Any communications between the Special Receiver, the Receiver, the Applicant, and TGF in its role as counsel to the Receiver related in any way whatsoever to the recovery of the Litigation Assets, and whether occurring before or after the issuance of this Order, are and are hereby deemed to be protected by privilege.

4. **THIS COURT ORDERS** that nothing contained in this Order, shall affect, vary, derogate or amend the rights, obligations and duties of the Receiver pursuant to the Receivership Order or any other Order issued in this proceeding, save and except and solely with respect to the management of and prosecution and realization of the Litigation Assets. Upon the conclusion of the proceedings in respect of the Litigation Assets and any final Orders or Judgments being rendered or settlements being reached in respect of the Litigation Assets, all proceeds and entitlements which may be realized for the benefit of DIG shall form part of the Property over which the Receiver has been appointed and shall only be distributed in accordance with a further Order of the Court in this proceeding. For the avoidance of doubt, the Special Receiver will not deal with any disputes as to the priority or entitlement of the creditors of DIG to the proceeds of the Claims.

5. **THIS COURT ORDERS** that the Receiver, its counsel and any persons acting on any of their respective instructions to forthwith grant access to the originals of, and deliver a copy of such books and records which the Special Receiver requests as being potentially relevant to the Litigation Assets and the performance of the Special Receiver's mandate pursuant to this Order.

6. **THIS COURT ORDERS** that the Special Receiver, including his heirs and assigns, shall have no personal liability as a result of his appointment, or as a result of performing his duties hereunder and/or carrying out the engagement pursuant to this Order, save and except for liability arising as a result of a wilful misconduct of the Special Receiver. No person having notice of this Order shall be entitled to institute any action or proceeding of any description whatsoever against the Special Receiver, in any way relating to the performance of his functions under this Order without first obtaining leave of this Court upon seven (7) clear days' notice to the Special Receiver. This provision survives the termination of the Special Receiver's mandate under this Order.

7. **THIS COURT ORDERS** that the Special Receiver shall be paid its reasonable fees and disbursements by the Receiver at his usual rates within 30 days after delivery of an account in respect thereof.

8. **THIS COURT ORDERS** that the Special Receiver may apply to this Court for advice and directions as to the exercise of the powers conferred upon the Special Receiver by this Order.

9. **THIS COURT ORDERS** that the Statement of Claim in the D&O Action is hereby amended in accordance with the draft Amended Statement of Claim attached hereto as Schedule "A".

10. **THIS COURT ORDERS** that the Statement of Claim in the MNP Action is hereby amended in accordance with the draft Amended Statement of Claim attached hereto as Schedule "B".

11. **THIS COURT ORDERS** that the style of cause in the D&O Action shall be amended as follows:

DISTINCT INFRASTRUCTURE GROUP INC. by its
Special Receiver, J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

GIUSEPPE LANNI also known as JOE LANNI, ALEXANDER AGIUS,
GEORGE M. NEWMAN also known as MICHAEL NEWMAN, GARRY
WETSCH, DOUGLAS HORNER, ROBERT NORMANDEAU, WILLIAM
NURNBERGER, GEORGE PARSELIAS, ROYSTON RACHPAUL, JAY
VIEIRA, EMMANUEL BETTENCOURT also known as MANNY
BETTENCOURT, and MICHAEL MIFSUD

Defendants

12. **THIS COURT ORDERS** that the style of cause in the MNP Action shall be amended as follows:

DISTINCT INFRASTRUCTURE GROUP INC. by its
Special Receiver, J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

MNP LLP

Defendant

13. **THIS COURT ORDERS** that this Order is effective from the date that it is made and is enforceable without any need for entry and filing.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DISTINCT INFRASTRUCTURE GROUP INC. by its
~~Receiver, DELOITTE RESTRUCTURING INC.~~ Special Receiver, J. DOUGLAS
CUNNINGHAM, Q.C.

Plaintiff

and

GIUSEPPE LANNI also known as JOE LANNI, ALEXANDER AGIUS,
GEORGE M. NEWMAN also known as MICHAEL NEWMAN, GARRY
WETSCH, DOUGLAS HORNER, ROBERT NORMANDEAU, WILLIAM
NURNBERGER, GEORGE PARSELIAS, ROYSTON RACHPAUL, JAY
VIEIRA, EMMANUEL BETTENCOURT also known as MANNY
BETTENCOURT, and MICHAEL MIFSUD

Defendants

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff.
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF

YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date “July 20, 2020” Issued by Local Registrar

Address of court office: 330 University Avenue, 9th Floor
Toronto ON M5G 1R7

TO: Giuseppe Lanni (aka Joe Lanni)
9 Warwood Road
Toronto, ON M9B 5B2

AND TO: Alexander Agius
2938 Coulson Court
Mississauga, ON L5M 5S8

AND TO: George M. Newman (aka Michael Newman)
460 Queens Quay West
Suite 1102E
Toronto, ON M5V 2Y4

AND TO: Garry Wetsch
#220 - 190 Boudreau Road
St. Albert, AB T8N 6B9

AND TO: Douglas Horner
52 - 53305 Range Road 273
Spruce Grove, AB T7X 3N3

AND TO: Robert Normandeau
95 Eaglewood Drive
Bedford, NS B4A 3B3

AND TO: William Nurnberger
77 Belfield Road
Suite 102
Toronto, ON M9W 1G6

AND TO: George Parselias
77 Belfield Road
Suite 102
Toronto, ON M9W 1G6

AND TO: Royston Rachpaul
77 Belfield Road
Suite 102
Toronto, ON M9W 1G6

AND TO: Jay Vieira
77 Belfield Road
Suite 102
Toronto, ON M9W 1G6

AND TO: Emmanuel Bettencourt (aka Manny Bettencourt)
305 Glebeholme Blvd.
Toronto, ON M4J 1T1

AND TO: Michael Mifsud
77 Belfield Road
Suite 102
Toronto, ON M9W 1G6

CLAIM

1. The Plaintiff, Distinct Infrastructure Group Inc. (“**DIG**”), claims as against the Defendants:
 - (a) damages for negligence and breach of duties in the principal amount of \$60,000,000.00;
 - (b) pre- and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
 - (c) the costs of this action on a partial indemnity basis, plus Harmonized Sales Tax; and
 - (d) such further and other relief as this Honourable Court deems just.

The Parties

2. The Plaintiff, DIG, is a corporation registered in the Province of Alberta with its former principal place of business in Ontario. It is the parent company of a group of companies which provided design, engineering, construction and maintenance services to telecommunication firms, utilities and government bodies across Canada.
3. DIG and its subsidiaries are currently subject to a receivership Order of Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) dated March 11, 2019, whereby Deloitte Restructuring Inc. (“**Deloitte**”) was appointed as receiver and manager of DIG and its various subsidiaries (the “**Receivership Order**”). On March 22, 2021, the Honourable J. Douglas Cunningham Q.C. was appointed as Special Receiver over certain litigation assets of DIG, including this claim.

4. The defendant, Joe Lanni, was a director of DIG. He held the position of co-CEO and Senior Vice-President of Sales and Marketing prior to his termination for cause on February 18, 2019. He was also a director of Distinct Infrastructure Group West Inc., DistinctTech Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd., each a subsidiary of DIG.
5. The defendant, Alex Agius, was a director of DIG. He held the position of co-CEO of DIG prior to his termination for cause on February 18, 2019. He was also a director of Distinct Infrastructure Group West Inc., DistinctTech Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd., each a subsidiary of DIG.
6. The defendant, Michael Newman, was a director of DIG from October 2, 2015 until August 31, 2018. He was the chair of the Audit Committee and was a member of the Compensation Committee and the Corporate Governance Committee.
7. The defendant, Garry Wetsch, was a director of DIG from October 2, 2015 until DIG's receivership on March 11, 2019. He was a member of the Audit Committee, the Compensation Committee and the Corporate Governance Committee.
8. The defendant, Doug Horner, was a director of DIG from May 2, 2017 to DIG's receivership on March 11, 2019. He was a member of the Audit Committee and the chair of the Compensation Committee and the Corporate Governance Committee.
9. The defendant, Rob Normandeau, was a director of DIG from November 21, 2017 to DIG's receivership on March 11, 2019.

10. Together, Messrs. Newman, Wetsch, Horner and Normandeau are referred to as the “**Outside Directors**”.
11. The defendant, William Nurnberger, was Vice-President of Corporate Development until early 2018, at which time he became the interim Chief Financial Officer until his suspension on January 31, 2019 and termination for cause on February 10, 2019.
12. The defendant, George Parselias, who represented himself to be a Chartered Professional Accountant, was the Vice-President of Finance until his termination for cause on February 10, 2019.
13. The defendant, Royston Rachpaul, who is a Chartered Professional Accountant – Certified General Accountant was the Controller.
14. The defendant, Jay Vieira, was Vice-President of Corporate and Legal Affairs and in-house counsel to DIG.
15. The defendant, Emmanuel Bettencourt was the CFO of DIG until his resignation effective December 31, 2017. He was also a director of Distinct Infrastructure Group West Inc., DistinctTech Inc., iVac Services West Inc. and Crown Utilities Ltd., and an officer of iVac Services Inc., each a subsidiary of DIG.
16. The defendant, Michael Mifsud, was Vice-President of Operations.
17. Together, Messrs. Lanni, Agius, Nurnberger, Parselias, Rachpaul, Vieira, Bettencourt and Mifsud are referred to as the “**Inside Directors and Officers**”.

Facts

18. DIG was a publicly listed company on the TSX Venture Exchange through a reverse takeover. It specialized in providing design, engineering, construction and maintenance services to telecommunication firms, utilities and government bodies across Canada. This included underground construction, aerial construction, inventory management, and technical services including fibre to the building and home.
19. DIG operated primarily from Toronto, Ontario. It employed approximately 300 people across Canada, with the majority of its employees based in Ontario.
20. DIG was financed primarily by the Royal Bank of Canada (the “**Bank**”) pursuant to a credit facility agreement dated March 23, 2017 (as amended in writing by agreements dated November 21, 2017 and September 12, 2018) by which the Bank made available a non-revolving term loan in the aggregate principal amount of \$20 million and a revolving credit facility up to the aggregate principal amount of \$35 million (subject to DIG’s borrowing base).
21. The revolving credit facility was margined against DIG’s accounts receivable and work in progress. DIG was required to certify to the Bank the amounts of its accounts receivable and work in progress in monthly margin reports. Mr. Parselias signed the monthly margin reports on behalf of DIG.
22. DIG’s obligations to the Bank were secured, *inter alia*, pursuant to a general security agreement over all of the real and personal property of DIG and its subsidiaries.

23. DIG was also financed by the issuance of shares from its treasury. In November 2017, Seafort Capital Inc. purchased 6,800,000 common shares of DIG for \$9,180,000 pursuant to a private placement.
24. DIG was also financed by the sale of debentures. On September 12, 2018, DIG announced the closing of a \$10 million private placement offering of unsecured convertible debenture units to Rogers Financial Management Limited, consisting of unsecured subordinated convertible debt and common share purchase warrants.
25. In June of 2018, DIG announced that it was restating its previously audited and publicly issued financial statements for its fiscal year 2016. DIG had included certain project scope and consumable amounts in the determination of revenue which were not recoverable, and had recorded certain amounts of work in progress (referred to as 'unbilled revenue' in DIG's financial statements) on completed projects as accounts receivable, when it ought to have been recorded as work in progress.
26. The restated accounts amended DIG's revenue, work in progress and accounts receivable. Revenue and work in progress decreased by \$4,471,174, and \$13,364,537 was reclassified from accounts receivable to work in progress.
27. In November 2018, the Bank became concerned with DIG's financial performance. The Bank and DIG agreed to appoint Deloitte as a consultant to review DIG's operations and assess its financial position.

28. In January of 2019, DIG appointed John Nashmi as its new Chief Financial Officer. (“CFO”) to, among other things, assist Deloitte in its review of DIG’s operations and financial position. Mr. Nashmi replaced Mr. Nurnberger, who acknowledged in a letter to DIG in 2019 that he was unqualified for the role of interim CFO. Mr. Nurnberger had been interim CFO since Mr. Bettencourt’s departure from the role at the end of 2017.
29. Mr. Nashmi conducted investigations into DIG’s financial position, and discovered that there were current and historical misstatements in DIG’s annual audited and quarterly unaudited financial statements and in the financial disclosures to the Bank. In particular, and amongst other irregularities described in more detail below, Mr. Nashmi discovered that DIG’s accounts receivable and work in progress amounts were substantially overstated.
30. As a result of his investigations, Mr. Nashmi as CFO wrote down a total of \$56.8 million from DIG’s accounts receivable and work in progress.
31. On February 13, 2019, DIG announced that its audited financial statements for the year ending December 31, 2017, and its unaudited financial statements for the first three quarters of 2018, should no longer be relied upon. In response, the Ontario Securities Commission issued a Notice of Temporary Order and Hearing, which ceased all trading in shares of DIG as of February 15, 2019.
32. At a meeting of the board of directors on February 18, 2019, Mr. Nashmi presented his preliminary findings on the financial position of DIG. He reported that significant

adjustments and write-downs to DIG's financial position would be necessary, including a write-down of approximately \$23 million to accounts receivable, and a write-down of between \$20 million and \$30 million to work in progress.

33. On the same day, February 18, 2019 the board of directors voted to dismiss Mr. Lanni and Mr. Agius as Co-CEOs for cause.
34. By court Order dated March 11, 2019, Deloitte was appointed as receiver of DIG on the application of the Bank.
35. At the time of the receivership, DIG owed its creditors approximately \$82.4 million, of which approximately \$52.7 million was owed to the Bank. Recoveries in the receivership will be less than \$10 million, and DIG's creditors (including the Bank) will suffer substantial losses.
36. But for the negligence of the defendants, the truth about DIG's financial position would have been known. DIG would have been liquidated at an earlier date and tens of millions of dollars of losses would have been avoided.

The Defendants' Misstatements are Discovered

37. In the course of their investigations, Deloitte and Mr. Nashmi discovered that, between 2015 and 2018, the defendants misstated DIG's true financial position (the "**Misstatements**") to various parties, including DIG's creditors, potential investors and the public.

38. Mr. Nashmi and the members of a Special Committee of the Board came to a preliminary view that the September 30, 2018 interim financial statements:
- (i) overstated accounts receivable by approximately \$22.7 million (reducing them to approximately \$15 million from \$37.7 million reported);
 - (ii) overstated work in progress by approximately \$34 million (reducing it to approximately \$1.7 million from the \$35.7 million reported);
 - (iii) overstated inventory by approximately \$2.1 million (reducing it to approximately \$0.1 million from the \$2.2 million reported);
 - (iv) overstated prepaid expenses by approximately \$2.2 million (reducing it to approximately \$1.1 million from the \$3.3 million reported);
 - (v) overstated shareholders' equity by approximately \$63.4 million (reducing it to a deficit of approximately \$38 million from the \$25.4 million surplus reported).
39. The Receiver has determined that accounts receivable and work in progress were overstated by at least \$12,965,000 or 54% in 2015, \$21,221,000 or 48% in 2016 \$36,811,000 or 58% in 2017, and \$49,636,000 or 69% in 2018.
40. Since 2015, and with the approval of the defendants, DIG provided the Bank with monthly borrowing base reports, certified on behalf of DIG by Mr. Parselias in his role as Vice-President of Finance. These borrowing base reports were materially misleading.

41. Since 2015, and with the approval of the defendants, DIG had also allowed its annual audited and unaudited quarterly accounts to be released to the public. The accounts were also provided directly to potential investors. These accounts were also materially misleading.
42. Some or all of the Inside Directors and Officers were directly involved in making the Misstatements. The individual Inside Directors and Officers either (i) made or directed the Misstatements, or (ii) were aware or ought to have been aware of the Misstatements and failed to take any steps to correct them or report the Misstatements to responsible corporate representatives who could take corrective action.
43. To the extent it is determined that individual Inside Directors and Officers were not actually aware of the Misstatements, they negligently failed to detect the Misstatements or to put in place qualified personnel and financial controls appropriate to prevent and/or detect the Misstatements.

Duties of the Inside Directors and Officers

44. The Inside Directors and Officers of DIG owed fiduciary duties and other duties of care to DIG, both under statute and at common law. These duties required the Inside Directors and Officers to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. These duties also required the Inside Directors and Officers to act honestly and in good faith, with undivided loyalty and to advance the best interests of DIG.

45. The duties of the Inside Directors and Officers included the obligations:
- (a) to fully and accurately disclose DIG's true financial position;
 - (b) not to materially misstate the financial position of DIG to DIG's creditors, potential investors and the public;
 - (c) to detect, correct and prevent any material misstatements made about DIG's financial position;
 - (d) to put in place qualified personnel and financial controls appropriate to detect any material misstatements; and,
 - (e) to report to their superiors and the Board and its Committees on material misstatements that they knew or ought to have known were being made.

Duties of the Outside Directors

46. The Outside Directors of DIG owed fiduciary duties and other duties of care to DIG, both under statute and at common law. These duties required the Inside Directors and Officers to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. These duties also required the Outside Directors to act honestly and in good faith, with undivided loyalty and to advance the best interests of DIG.
47. In particular, the Outside Directors of DIG had duties:
- (a) to detect any material misstatements made by the Inside Directors and Officers of DIG (or others engaged on their behalf) as to the true financial position of DIG;

- (b) to assess, with appropriate diligence, the veracity of the representations of the Inside Directors and Officers;
 - (c) to ensure that individuals with the appropriate qualifications and experience were hired to key positions at DIG including the chief executive officers, chief financial officer, vice president of finance and financial controllers;
 - (d) to put in place qualified personnel and financial controls appropriate to detect any material misstatements; and,
 - (e) to examine DIG's financial accounts and investigate the irregularities and inconsistencies in those accounts to satisfy themselves that the financial reporting was accurate.
48. The Outside Directors of DIG who were members of the Audit Committee were responsible to take reasonable steps to ensure that the financial statements were accurate and free of material misstatements, including:
- (a) by overseeing the process by which financial disclosure was made to and by DIG's auditors;
 - (b) by overseeing the process by which suitable and competent external auditors were retained;
 - (c) by reviewing and assessing the performance of DIG's external auditors; and
 - (d) by monitoring the process by which internal controls were put in place and assessing the reliability of such controls;

- (e) by investigating irregularities and inconsistencies in DIG's financial accounts; and
- (f) by increasing the diligence with which it oversaw the preparation of the financial statements in response to the restatement of DIG's 2016 financial statements, which ought to have been a red flag to the Outside Directors.

49. The Outside Directors of DIG who were members of the Corporate Governance Committee were responsible to ensure that the roles of CEO and senior management were occupied by individuals with suitable qualifications, expertise and competence, and to manage the replacement of such individuals where they failed to meet those standards.

Breaches of the Duty of Care: Inside Directors and Officers

50. In breach of their duty to DIG, some or all of the Inside Directors and Officers misstated the true financial position of DIG to DIG's creditors, potential investors and the public in the following ways.

51. First, since at least 2015, some or all of the Inside Directors and Officers misstated DIG's work in progress in the following manner:

- (a) made adjustments to the work in progress general ledger account where there was no apparent commercial support for the adjustments and no explanation provided in the financial records for such adjustments. Some of the adjustments were reversed after month end; however, they had already had the effect of improving DIG's reported financial position at month end for reporting purposes.

- (b) inflated work in progress for certain projects without any apparent commercial justification. Particularly, as part of the 2017 audit, the external auditors restated the 2016 work in progress (unbilled revenue) amount by decreasing revenue and unbilled revenue by \$4.5M to account for amounts deemed not to be recoverable. In addition, for many projects, the work in progress amounts are greater than the total amounts ever invoiced to the client for the respective project, resulting in an overstatement of work in progress balances.
 - (c) made routine adjustments of up to 40% per purchase order without any commercial justification.
52. Second, since at least 2015, some or all of the Inside Directors and Officers misstated DIG's accounts receivable in the following manner:
- (a) individual invoice amounts were recorded multiple times in DIG's accounts, such that DIG had multiple outstanding invoices with identical invoice amounts without any apparent commercial justification, and the invoices were ultimately cancelled through credit memos; and
 - (b) from time to time, work in progress amounts (which did not correspond to work actually in place) were invoiced and moved to accounts receivable. As there was no apparent underlying work, these invoices remained unpaid and would age until, when the invoice approached the point where it would no longer be eligible for margining into DIG's borrowing base, the invoice would be credited in DIG's financial system, and work in progress amounts would be recorded to replace the

credited invoice. The fictitious invoices were never written off (or expensed) in the accounts of DIG presented to the Bank and other stakeholders.

53. These Misstatements had the effect of overstating DIG's reported accounts receivable and work in progress, thereby increasing DIG's borrowing base on the Bank's revolving credit facility.
54. Third, the value of DIG's prepaid expenses and inventory accounts were misstated, in a manner which overstated the balance sheet value of DIG's assets and understated DIG's expenses. These Misstatements had the effect of improving DIG's reported profit.
55. The Misstatements were made to inflate the value of DIG's assets in order to keep DIG in compliance with its banking covenants and increase DIG's borrowing base on its revolving line of credit with the Bank.
56. Full particulars of all the misstatements of DIG's accounts and financial position are not yet known to the plaintiff but will be provided prior to trial.
57. The Inside Directors and Officers negligently breached their duty of care to DIG in that they failed to accurately report DIG's true financial position when they knew or ought to have known that:
 - (a) DIG's financial disclosure was inaccurate, incomplete and misleading;
 - (b) the value of DIG's accounts receivable was overstated;
 - (c) the existence, value and recoverability of DIG's work in progress was misstated;

- (d) the actual age of certain amounts of DIG's accounts receivable was misstated; and
- (e) the value of DIG's prepaid expenses and inventory accounts was overstated.

58. In addition, the Inside Directors and Officers breached their duty of care to DIG by:

- (a) failing to detect the misstatements, where they would have discovered the misstatements had they exercised the due diligence and skill expected of an individual in their position;
- (b) failing to put in place appropriate policies, procedures and processes to ensure accurate financial reporting;
- (c) failing to put in place adequate systems to allow the monitoring of the financial position of DIG and the detection of misstatements, and as a result failed to notice DIG's financial misstatements;
- (d) failing to allocate sufficient resources to monitoring DIG's officers, including those DIG officers responsible for the preparation of financial statements;
- (e) failing to report the Misstatements to senior officers or the board of directors when they ought to have known or ought to have discovered that such misstatements had occurred; and,
- (f) failing to discharge their duties with the competence and skill expected of a reasonably qualified individual in the position they occupied.

Breaches of the Duty of Care: Outside Directors

59. The Outside Directors negligently failed to exercise their oversight function. They failed to properly monitor the conduct of the Inside Directors and Officers, failed to investigate the irregularities and inconsistencies in DIG's financial accounts and failed to detect or correct the Misstatements. In particular, the Outside Directors were negligent in that they:
- (a) failed to discharge their duties with the competence and skill expected of reasonably qualified individuals in the position they occupied;
 - (b) failed to detect or remedy the Misstatements where they would have discovered and remedied the Misstatements had they exercised the due diligence and skill expected of an individual in their position;
 - (c) failed to identify or failed to properly investigate red flags that ought to have alerted them to the possibility of financial misstatements including but not limited to:
 - (i) disagreements between the external auditor and the Inside Directors and Officers including over the practice of inflating projects for no valid commercial purpose;
 - (ii) failing to investigate recurring working capital deficiencies and lack of profitability in circumstances where work in progress and accounts receivable were increasing dramatically;
 - (iii) failing to react when internal financial control deficiencies were brought to their attention;

- (iv) appointing Mr. Nurnberger to the position of interim CFO when he had no qualifications or experience for the position and was incompetent;
 - (v) failing to insist that a qualified and competent CFO be appointed following Mr. Bettencourt's departure at the end of 2017;
 - (vi) failing to investigate or take disciplinary action when they knew or ought to have known that the Inside Officers and Directors were misrepresenting material facts including the qualification of an alleged independent expert on IFRS compliance retained to assist management;
 - (vii) failing to investigate recurring spikes in work in progress in the 4th quarter of each year and corresponding reversals of work in progress entries early in the first quarter of each year;
- (d) failed to ensure that adequate systems be put in place to allow them to monitor the financial position of DIG and detect misstatements, and as a result failed to notice the Misstatements;
 - (e) failed to ensure that competent individuals were employed in key roles, particularly roles related to finance;
 - (f) failed to appropriately review the work of individuals in key roles, particularly roles related to finance;
 - (g) failed to ensure that the reporting of DIG's financial position (both to the Bank and to the public) was accurate; and

- (h) approved the annual audited and quarterly unaudited financial statements from 2015 to Q2 2018 that materially misstated DIG's financial position and results.
60. Members of the Audit Committee failed to exercise their oversight function, in that they failed to act in accordance with their responsibilities under the Audit Committee Charter. In particular, members of the Audit Committee were negligent in that they:
- (a) failed to reasonably oversee DIG's accounting and financial reporting processes;
 - (b) failed to reasonably review the integrity of DIG's financial statements;
 - (c) failed to reasonably oversee the work of DIG's independent auditor;
 - (d) failed to understand the reason, meaning and import of disagreements between the independent auditor and DIG management over the state of DIG's accounts;
 - (e) failed to ensure that DIG's internal controls were adequate to identify deficiencies or misstatements in DIG's financial statements; and
 - (f) recommended the approval of annual audited and quarterly unaudited financial statements from 2015 to Q2 2018 that materially misstated DIG's financial position and results.
61. Members of the Corporate Governance Committee failed to exercise their function, in that they failed to ensure that the roles of CEO and senior management were occupied by individuals with suitable qualifications, expertise and competence, and to manage the replacement of such individuals where they failed to meet those standards.

Consequences of the Breaches of Duty of Care

62. As a consequence of the Misstatements and negligence described herein, creditors of DIG extended additional credit to DIG that they would not have extended had they been aware of the true financial position of DIG. DIG took on debt that it could never repay and was doomed to fail.
63. In particular:
- (a) the Bank continued to make available credit facilities to DIG and continued to advance funds under those credit facilities in reliance on the misstated financial position reported in the borrowing base reports and DIG's audited annual and unaudited quarterly financial statements;
 - (b) members of the public purchased debentures in DIG in reliance on DIG's audited and unaudited financial statements; and
 - (c) members of the public purchased shares in DIG in reliance on DIG's audited and unaudited financial statements.
64. But for the Misstatements and negligence described herein, DIG's creditors would have been aware that DIG was a loss-making and insolvent business that was unable to repay any further amounts advanced. DIG's creditors would not have extended further credit to DIG.
65. If the defendants had discharged their duties to DIG, it would have been revealed that DIG's financial disclosure was misstated, DIG was in a substantially worse financial

position than publicly reported and that DIG was not in compliance with its banking covenants.

66. But for the negligence of the defendants, DIG would have been liquidated at an earlier date.

67. Instead, as a result of the Misstatements and negligence described herein, DIG's operations continued, DIG continued to incur losses and DIG took on additional debt that it could never afford to repay. The defendants are liable for the increase in DIG's liquidation deficit caused by the additional debts.

Damages

68. DIG has suffered damages by reason of the negligence of the defendants described herein.

69. The measure of DIG's damages ought to be the increase in the liquidation deficit from the time when DIG would have been liquidated had the defendants properly discharged their duties, to the time when DIG was in fact liquidated. This amount is currently estimated to be \$56.5 million.

DIG proposes that this action be tried in Toronto, Ontario on the Commercial List and managed with the receivership proceeding of DIG in Court File No. CV-19-00615270-00CL.

“July 20, 2020”

THORNTON GROUT FINNIGAN LLP

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Lawyers for the Plaintiff, Distinct Infrastructure
Group Inc.

DISTINCT INFRASTRUCTURE GROUP INC.

and

GIUSEPPE LANNI also known as JOE LANNI et al.

Plaintiff

Defendants

Court File No.: CV-20-00644260-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at **Toronto**

AMENDED STATEMENT OF CLAIM

THORNTON GROUT FINNIGAN LLP
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Toronto ON M5K 1K7

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Lawyers for the Plaintiff, Distinct Infrastructure Group Inc.

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

B E T W E E N:

DISTINCT INFRASTRUCTURE GROUP INC. by its
~~Receiver, DELOITTE RESTRUCTURING INC.~~ Special Receiver, J. DOUGLAS
CUNNINGHAM, Q.C.

Plaintiff

and

MNP LLP

Defendant

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff.
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date “October 2, 2020” Issued by Local Registrar

Address of court office: 330 University Avenue, 9th Floor
Toronto ON M5G 1R7

TO: **MNP LLP**
Suite 2000, 330 5th Ave SW
Calgary, AB T2P 0L4

CLAIM

1. The Plaintiff, Distinct Infrastructure Group Inc. (“**DIG**”) through its court appointed Receiver, Deloitte Restructuring Inc., claims as against the Defendant:
 - (a) damages for negligence and breach of duties in the principal amount of \$60,000,000.00;
 - (b) pre- and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
 - (c) the costs of this action on a partial indemnity basis, plus Harmonized Sales Tax; and
 - (d) such further and other relief as this Honourable Court deems just.

The Parties

2. The Plaintiff, DIG, is a corporation registered in the Province of Alberta with its former principal place of business in Ontario. It is the parent company of a group of companies that provided design, engineering, construction and maintenance services to telecommunication firms, utilities and government bodies across Canada. On August 24, 2015, DIG was publicly listed on the TSX Venture Exchange through a reverse takeover.
3. DIG operated primarily from Toronto, Ontario. It employed approximately 300 people across Canada, with the majority of its employees based in Ontario.

4. DIG and its subsidiaries are currently subject to a receivership Order of Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) dated March 11, 2019, whereby Deloitte Restructuring Inc. (“**Deloitte**”) was appointed as receiver and manager of DIG and its various subsidiaries (the “**Receivership Order**”). On March 22, 2021, the Honourable J. Douglas Cunningham Q.C. was appointed as Special Receiver over certain litigation assets of DIG, including this claim.
5. MNP LLP (“**MNP**”) is a national accounting, tax and business consulting firm in Canada. For the years ending December 31, 2015, 2016 and 2017, MNP acted as DIG’s auditor, conducting the statutorily required audit of DIG’s consolidated annual financial statements.
6. MNP also conducted regular interim review engagements in respect of DIG’s unaudited interim financial statements, reporting to DIG’s audit committee.

Overview

7. Since at least 2015, DIG made public representations about its financial position – particularly in its audited financial statements – that contained material misstatements and significant errors.
8. The scale of the misstatement of DIG’s true financial position is breathtaking. Accounts receivable and work in progress were overstated by at least \$12,965,000 or 54% in the 2015 audited financial statements, \$21,221,000 or 48% in the 2016 audited financial statements and \$36,811,000 or 58% in the 2017 audited financial statements.

9. As DIG's auditor, MNP had a duty to plan and conduct its audit work according to the applicable standards and to express an opinion on whether DIG's financial statements were free from errors or material misstatements. In each of the years 2015, 2016 and 2017 MNP provided a 'clean' audit opinion, expressing the view that DIG's financial statements presented fairly, in all material respects, DIG's financial position.
10. Over the course of three audit years, MNP failed to detect that DIG's most significant assets were overstated by 48% or more. The magnitude and repetition of the misstatements is evidence of the gross negligence of MNP in performing its audit work. Any audit conducted in accordance with the applicable standards would have uncovered the material misstatements in DIG's financial statements.
11. DIG's creditors and investors lent DIG money and invested in its shares in reliance on the misleading financial position presented by the financial statements.
12. Adjusting for the misstatements and other errors, DIG had been insolvent since at least 2015, and its liquidation deficit had been increasing. DIG survived only by spending its creditors' and investors' money – money that would not have been advanced if MNP had performed its duties, properly audited DIG's financial statements and disclosed DIG's true financial position.
13. Ultimately, the unsustainable debt burden taken on by DIG through the continued operation of its business led to its financial ruin and receivership. As a result of MNP's gross

negligence, DIG owes its creditors in excess of \$60 million that it has no ability to repay.

MNP is liable for the increase in DIG's liquidation deficit.

Factual Background

14. DIG is the parent company of a group of companies that provided design, engineering, construction and maintenance services to telecommunication firms, utilities and government bodies across Canada. It was publicly listed on the TSX Venture Exchange from August 24, 2015 (through a reverse takeover) until its shares were suspended from trading on February 19, 2019 as a result of a Cease Trade Order.
15. DIG was financed primarily by the Royal Bank of Canada (the "**Bank**"). The Bank began its relationship with DIG in 2010. As of December 31, 2015, the Bank had granted DIG a \$8.5 million revolving demand facility, a \$1 million revolving lease line of credit and a business credit card in the amount of \$50,000. DIG was required to provide the Bank with its annual audited financial statements
16. Pursuant to a credit facility agreement dated March 23, 2017 (as amended in writing by agreements dated November 21, 2017 and September 12, 2018), the Bank made available to DIG a non-revolving term loan in the aggregate principal amount of \$20 million and a revolving credit facility up to the aggregate principal amount of \$35 million (subject to DIG's borrowing base supporting the requested borrowings). The revolving credit facility was margined against DIG's accounts receivable and work in progress.

17. The closing of the 2017 credit agreement and the continued access to credit facilities from the Bank was conditional on the receipt of the annual audited financial statements.
18. DIG's obligations to the Bank were secured, *inter alia*, pursuant to a general security agreement over all of the real and personal property of DIG and its subsidiaries.
19. DIG was also financed by the issuance of shares from its treasury. In November 2017, Seafort Capital Inc. purchased 6,800,000 common shares of DIG for \$9,180,000 pursuant to a private placement.
20. DIG was also financed by the sale of debentures. On September 12, 2018, DIG announced the closing of a \$10 million private placement offering of unsecured convertible debenture units to Rogers Financial Management Limited, consisting of unsecured subordinated convertible debt and common share purchase warrants.

MNP Audits DIG's Financial Statements

21. MNP was engaged as DIG's auditor between 2015 and 2018, and audited DIG's financial statements for the financial years ending December 31, 2015, 2016 and 2017. MNP also conducted regular review engagements in respect of DIG's unaudited interim financial statements.
22. MNP agreed to conduct its audits in accordance with Canadian generally accepted auditing standards ("**Canadian GAAS**") and was required to obtain reasonable assurance that the financial statements were free of material misstatements (whether caused by fraud or error).

23. For each financial year, MNP issued unqualified audit reports expressing MNP's opinion that the consolidated financial statements presented fairly, in all material respects, the consolidated financial position of DIG.
24. In June of 2018, DIG announced that it was restating its previously audited and publicly issued financial statements for its fiscal year 2016. MNP required the restatement as a condition of providing a clean audit report. DIG's explanation for the misstated 2016 financial statements (which MNP accepted) was that DIG had: (i) included certain goods and services, project scope and consumable amounts in the determination of revenue which were not recoverable, and (ii) recorded certain amounts of work in progress (referred to as 'unbilled revenue' in DIG's financial statements) as accounts receivable, when it ought to have been recorded as work in progress.
25. The restated accounts amended DIG's revenue, work in progress, accounts receivable and net income as follows:
 - (e) \$13,364,537 was removed from accounts receivable, and \$8,893,363 of this amount was reclassified as unbilled revenue;
 - (f) As a result, unbilled revenue and total revenue decreased by \$4,471,174;
 - (g) As a result of the decrease in revenue, tax expenses decreased by \$512,800.

As a result of the adjustments, net income for 2016 went from a net gain \$810,589 to a net loss of \$3,147,785.

26. The notes to the restatement of the 2016 financial statements admit that, as a result of the restatement, DIG would have been in breach of its banking covenants and that its long-term debt was therefore due on demand.

The Misstatements are Discovered

27. In November 2018, the Bank became concerned with DIG's financial performance. The Bank and DIG agreed to appoint Deloitte as a consultant to review DIG's operations and assess its financial position.
28. In January of 2019, DIG appointed John Nashmi as its new Chief Financial Officer to, among other things, assist Deloitte in its review of DIG's operations and financial position.
29. Mr. Nashmi conducted investigations into DIG's financial position, and discovered that there were current and historical misstatements in DIG's annual audited financial statements (as well as its quarterly unaudited financial statements and in its financial disclosures to the Bank). In particular, and amongst other irregularities described in more detail below, Mr. Nashmi discovered that DIG's accounts receivable and work in progress amounts were substantially overstated. He ultimately wrote down a total of \$56.8 million from DIG's accounts receivable and work in progress in DIG's internal accounts
30. On February 13, 2019, DIG announced that its audited financial statements for the year ending December 31, 2017, and its unaudited financial statements for the first three quarters of 2018, should no longer be relied upon. In response, the Ontario Securities

Commission issued a Notice of Temporary Order and Hearing, which ceased all trading in shares of DIG as of February 15, 2019.

31. At a meeting of the board of directors on February 18, 2019, Mr. Nashmi presented his preliminary findings on the financial position of DIG. Based on his investigations to date, Mr. Nashmi reported that as of September 30, 2018, DIG's interim financial statements:
 - (a) overstated accounts receivable by approximately \$22.7 million (reducing them to approximately \$15 million from \$37.7 million reported);
 - (b) overstated work in progress by approximately \$34 million (reducing it to approximately \$1.7 million from the \$35.7 million reported);
 - (c) overstated inventory by approximately \$2.1 million (reducing it to approximately \$0.1 million from the \$2.2 million reported);
 - (d) overstated prepaid expenses by approximately \$2.2 million (reducing it to approximately \$1.1 million from the \$3.3 million reported); and
 - (e) overstated shareholders' equity by approximately \$63.4 million (reducing it to a deficit of approximately \$38 million from the \$25.4 million surplus reported).

32. The misstatements began in at least 2015 (and possibly earlier) and continued (and accumulated) throughout the period of MNP's tenure as DIG's auditor without detection. Accounts receivable and work in progress were overstated by at least \$12,965,000 or 54% in the 2015 audited financial statements, \$21,221,000 or 48% in the 2016 audited financial

statements, \$36,811,000 or 58% in the 2017 audited financial statements, and \$49,636,000 or 69% in the third quarter 2018 interim statements.

33. By court Order dated March 11, 2019, Deloitte was appointed as receiver of DIG on the application of the Bank.
34. At the time of the receivership, DIG owed its creditors approximately \$82.4 million, of which approximately \$52.7 million was owed to the Bank. Recoveries in the receivership will be less than \$10 million, and DIG's creditors (including the Bank) and shareholders will suffer substantial losses.

Duty of Care Owed by MNP to DIG

35. MNP owed a duty of care in contract and in tort to DIG to exercise reasonable care and skill in discharging its responsibilities as an auditor. MNP was required by law and through its contractual obligations in its annual engagement letter with DIG to comply with the standards in the Handbook of the Chartered Professional Accountants of Canada, including Canadian GAAS and Canadian generally accepted accounting principles ("**Canadian GAAP**").
36. Specifically, MNP was required to:
 - (a) adequately plan and properly execute its work, exercise reasonable care with an objective state of mind, and seek to obtain reasonable assurance that DIG's 2015,

2016 and 2017 audited statements were free of material misstatement whether caused by fraud or error;

- (b) design the nature, scope, and timing of its audit procedures so that the risk of not detecting material misstatements in DIG's financial statements was reduced to an appropriately low level;
- (c) maintain the appropriate level of professional scepticism throughout its audit processes taking into account the risks inherent in DIG's business, including, but not limited to:
 - (i) the difficulty in confirming the value of DIG's WIP and accounts receivable which were based on management estimates of total revenue and costs on each construction project;
 - (ii) the lack of appropriate financial controls and reporting processes;
 - (iii) the difficulty in obtaining appropriate audit evidence from DIG's responsible employees and officers; and
 - (iv) the lack of qualifications and competencies held by certain key personnel at DIG, including its interim Chief Financial Officer during the 2017 audit, William Nurnberger;
- (d) obtain sufficient appropriate audit evidence to afford a reasonable basis to support the content of MNP's 2015, 2016 and 2017 unqualified auditor's reports;

- (e) if MNP encountered circumstances during the course of its audits that (either on their own or when combined with all information known to MNP from its prior audit and other work for DIG) made MNP suspect, or should have made it suspect, that DIG's financial statements were materially misstated, to perform appropriate procedures to confirm or dispel that suspicion;
- (f) assess DIG's internal controls over financial reporting (including the individuals responsible for such controls) and to form an opinion on the effectiveness and sufficiency of those internal controls. To the extent that MNP believed the internal controls to be inadequate, MNP had a responsibility to report such insufficiency to the appropriate level of management at DIG and to its board of directors, to make recommendations for their improvement and to assess the underlying financial performance of DIG without reliance on such controls; and,
- (g) assess the reliability of key DIG personnel and the information they provided to MNP. To the extent that MNP had doubts about the reliability of information provided by DIG personnel or the reliability of the DIG personnel themselves, MNP owed DIG a duty to obtain additional assurances from sources it reasonably deemed to be trustworthy and to report its concerns about DIG personnel to the appropriate level of management at DIG and to its board of directors.

MNP's Breaches of its Duty of Care

37. MNP conducted the audits of DIG's financial statements in 2015, 2016 and 2017 negligently and in breach of its duties to DIG. MNP ought to have: (i) detected the misstatements described in this Claim in the course of its audits; (ii) accounted for the misstatements in the audited financial statements; (iii) refused to issue a clean audit opinion; (iv) reported the misstatements to DIG's management and board of directors; and (v) considered resigning as auditor of DIG if DIG refused to correct the misstatements.
38. The misstatements were primarily the result of the two following practices.
39. First, DIG manipulated its work in progress and accounts receivable so as to inflate the value of its assets (and revenue) far beyond what they actually were.
40. From time to time, outstanding work in progress amounts would be incorrectly invoiced and moved to accounts receivable. This was for work that had never been done (or which had been inflated in value). As the invoice remained unpaid and aged (and approached the point where it would no longer be factored into DIG's borrowing base), the invoice would be reversed out of accounts receivable and moved back into work in progress. Further work in progress amounts for non-existent and/or inflated work would then be invoiced to replace the reversed invoices.
41. As a result of this scheme, fictitious invoices were cancelled and then re-issued, maintaining a non-existent asset base for margin borrowing purposes. This allowed DIG

to continue to borrow from its creditors, which it did, increasing its creditors' loss (and ultimate liquidation deficit).

42. MNP ought to have noticed that invoices were being re-categorized and ultimately credited in this manner, and refused to include these amounts in DIG's financial statements. Its failure to do so was grossly negligent. Appropriately designed audit procedures should have detected ongoing material misstatements.
43. Second, certain invoice amounts were recorded multiple times in DIG's accounts. As a result, DIG regularly had multiple outstanding invoices with identical invoice amounts.
44. The effect of this duplication was to overstate DIG's revenue, work in progress, and net income.
45. Ultimately, DIG wrote off \$34 million of its reported \$35.5 million work in progress (as at September 30, 2018) and \$23.2 million of DIG's reported \$36.7 million accounts receivable.
46. In respect of the restatement of the 2016 audited financial statements referred to in paragraph 24 above, MNP failed to detect that the restatement suffered from two fundamental errors:
 - (a) The amounts reclassified from accounts receivable to work in progress did not exist. MNP correctly assessed that the amounts should not be included in accounts receivable, but then failed to consider whether the amounts existed at all and whether a reclassification to work in progress was appropriate.

- (b) Second, the actual amount of the exaggeration of DIG's assets was at least \$21,221,000 in 2016 and not the \$4,471,174 reported in the restatement. MNP failed to carry out reasonable and sufficient audit procedures to satisfy itself that the reclassified work in progress actually existed or to detect the balance of the inflation of accounts receivable and work in progress in 2016.
47. MNP ought to have detected the above practices, refused to include the misstated amounts in DIG's financial statements and put in place systems to detect similar misstatements. Its failure to do so was grossly negligent.
48. MNP was grossly negligent further in that:
- (a) MNP failed to conduct the 2015, 2016 and 2017 audits in accordance with Canadian GAAS;
 - (b) MNP failed to ensure that DIG's consolidated financial statements presented fairly the financial position of DIG in accordance with International Financial Reporting Standards;
 - (c) MNP failed to exercise the skill, care and caution of a reasonably competent, careful and cautious auditor;
 - (d) MNP rendered unqualified audit opinions with respect to DIG's financial statements in 2015, 2016 and 2017, when those financial statements did not present fairly, in all material respects, the financial position of DIG as at the end of such fiscal years;

- (e) MNP failed to maintain the appropriate level of professional skepticism throughout the audit process;
- (f) MNP failed to recognize weaknesses in DIG's internal checks and controls, and failed to ensure that adequate internal checks and controls were in place to reduce the risk of material misstatements;
- (g) MNP failed to obtain an understanding of DIG and its business environment, which impeded MNP's ability to adequately identify and assess the risk of material misstatements;
- (h) MNP failed to obtain adequate assurances from customers of DIG that the information MNP received from DIG was accurate. The majority of DIG's work in Ontario was for two large publicly traded customers, making this a reasonably simple task to undertake;
- (i) MNP failed to recognize that DIG's accounts receivable and work in progress were substantially overstated;
- (j) MNP acquiesced to misstatements and omissions contained in press releases and audited financial statements;
- (k) MNP missed red flags, that should have alerted it to potential misstatements and the need for a more diligent audit, including:
 - (i) the weak internal checks and controls in place at DIG;

- (ii) The lack of qualifications and competencies held by certain key personnel at DIG, including its interim Chief Financial Officer during the 2017 audit, William Nurnberger;
 - (iii) the failure to obtain appropriate assurances from DIG's customers; and
 - (iv) the need for DIG to re-state its 2016 financial statements;
- (l) MNP failed to adequately plan and properly execute the 2015, 2016 and 2017 audits in a manner that properly took into account the risks inherent in DIG's business and the red flags that existed;
- (m) MNP failed to investigate potential material omissions and misstatements and other warning signs of which MNP became aware or should have become aware. These included the receipt of confusing and contradictory explanations from DIG management and staff on the discrepancy in the accounts and the delays in providing what should have been readily available explanations for such discrepancies;
- (n) MNP failed to withdraw previously issued unqualified audit opinions on a timely basis or at all; and
- (o) MNP failed to resign as auditors on a timely basis and disclose the reason therefor.

Consequences of the Breaches of Duty of Care

49. As a consequence of MNP's failure to detect the misstatements and its further negligence described herein, creditors of DIG extended additional credit to DIG that they would not

have extended had they been aware of the true financial position of DIG. DIG took on debt that it could never repay and was doomed to fail.

50. In particular:
 - (a) the Bank continued to make available credit facilities to DIG and continued to advance funds under those credit facilities in reliance on the misstated financial position reported in DIG's audited annual financial statements;
 - (b) members of the public purchased debentures in DIG in reliance on DIG's audited financial statements; and
 - (c) members of the public purchased shares in DIG in reliance on DIG's audited financial statements.

51. Had MNP acted in accordance with its obligations to DIG, it would have detected the misstatements in DIG's 2015, 2016 and 2017 financial statements, and would have refused to provide an audit opinion on DIG's 2015, 2016 and 2017 financial statements. DIG would have been unable to raise the credit it needed to continue to fund its loss-making business, and it would have been forced to seek protection from its creditors, resulting in its liquidation.

52. If MNP had discharged its duties to DIG, it would have been revealed that DIG's financial disclosure was misstated and that DIG was in a substantially worse financial position than publicly reported.

53. But for the negligence of MNP, DIG would have been liquidated at an earlier date.

54. Instead, as a result of MNP's negligence described herein, DIG's operations continued, DIG continued to incur losses and DIG took on additional debt that it could never afford to repay. MNP are liable for the increase in DIG's liquidation deficit caused by the additional debts.

Damages

55. DIG has suffered damages by reason of MNP's negligence as described herein.
56. The measure of DIG's damages ought to be the increase in the liquidation deficit from the time when DIG would have been liquidated had MNP properly discharged its duties, to the time when DIG was in fact liquidated. This amount is currently estimated to be \$56.5 million.
57. This claim may be served on MNP outside of Ontario without leave pursuant to Rules 17.02(f) and 17.02(g) of the *Rules of Civil Procedure*.

DIG proposes that this action be tried in Toronto, Ontario on the Commercial List and managed with the receivership proceeding of DIG in Court File No. CV-19-00615270-00CL.

“October 2, 2020”

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DISTINCT INFRASTRUCTURE GROUP INC.

and

MNP LLP

Plaintiff

Defendant

Court File No.: CV-20-00648746-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at **Toronto**

AMENDED STATEMENT OF CLAIM

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through its court appointed Receiver, Deloitte
Restructuring Inc.

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 Special Receiver)

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