No. CV-19-00615270-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

FACTUM OF THE MOVING PARTY, GIUSEPPE LANNI, ALSO KNOWN AS JOE LANNI AND ALEXANDER AGIUS, ALSO KNOWN AS ALEX AND AGIUS

July 29, 2020

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No. CV-19-00615270-00CL

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I. INTRODUCTION

1. The moving parties, Giuseppe Lanni ("**Lanni**") and Alexander Agius ("**Agius**"), bring this motion for an order to convert the motion of Deloitte Restructuring Inc., in its capacity of court appointed receiver, to an action. Lanni and Agius (collectively, the "**CEOs**") are the former co-chief executive officers of Distinct Infrastructure Group Inc. ("**DIG**").

2. In March 2019, Deloitte was appointed receiver and manager of DIG and others. The CEOs were not parties to the receivership application and are strangers to the underlying receivership proceeding.

3. In December 2019, the receiver brought a motion against the CEOs. The motion effectively seeks summary judgment against the CEOs and asks the court to grant an order directing the CEOs to repay the receiver the collective sum of $241,687.

4. The motion is derived from the receiver's allegations that the CEOs, while co-chief executive officers of DIG, improperly used their DIG corporate credit cards and misappropriated funds from DIG for their personal benefit. The misdeeds allegedly spanned 2015 to 2018.

5. Under the rules of the *Bankruptcy and Insolvency Act*, the receiver may commence an application by way of motion. The *Rules of Civil Procedure* mandate, however, that summary judgment is not available on an application and, further, that applications are not proper when material facts are in dispute.

6. The CEOs deny all of the receiver's allegations. They have sworn affidavits and given evidence on cross-examination that all of the expenses incurred on the corporate credit cards were proper and approved by DIG in a transparent and independent process. At no point during 2015 to 2018, did anyone at DIG question Lanni or Agius on the corporate expenses submitted. The receiver's mandate under the appointment order does not entitle it to question DIG's previously approved decisions.

7. If the receiver seeks to challenge the CEOs on their corporate expenses, then it should do so by way of an action, with the exchange of pleadings, documentary production, and examinations for discovery. A judge must determine live issues of credibility and intent. The forum for a judge to make these determinations is in an action.

II. FACTS

A. Parties

8. The CEOs are DIG's former co-chief executive officers.[1] DIG was a public company listed on the TSX Venture Exchange. DIG had ownership interests in operating subsidiaries engaged in businesses that included, among other things, aerial and underground construction. The CEOs founded DIG.[2]

9. The Royal Bank of Canada ("**RBC**") is the largest secured creditor of DIG and the applicant in the underlying receivership proceeding.[3]

10. Deloitte was initially retained by RBC as a consultant and, subsequently, it became the court appointed receiver (the "**Receiver**"), of all of the assets, undertakings, and properties of DIG and its subsidiaries.[4]

B. Background

11. In December 2018, Deloitte was engaged by RBC as its consultant to perform a business review of DIG and other related corporate entities. Following Deloitte's engagement, DIG appointed a new chief financial officer on January 14, 2019, to replace DIG's interim chief financial officer. Subsequently, a special committee (the "**Special Committee**") of the board of directors was formed to investigate certain financial irregularities. Thereafter, the Special Committee decided it best to terminate the interim chief financial officer and the vice president of finance. The new chief financial officer and the Special Committee then commenced an investigation into, among other things, the previously approved corporate expenses (the "**Expenses**") incurred by Lanni and Agius.[5]

12. On February 18, 2019, DIG's board of directors (the "**Board**") sent the CEOs letters terminating their consulting agreements and positions as co-chief executive officers.[6] The

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[1] Motion Record ("**MR**") of the moving parties, Giuseppe Lanni and Alexander Agius, Tab 3, Affidavit of Giuseppe Lanni ("**Lanni Affidavit**"), sworn February 14, 2020, para. 4, p. 15 (all page numbers correspond to the PDF version of the MR)
[2] Special Report of the Receiver (the "**Special Report**") Appendix "B", First Report of the Receiver, dated February 28, 2019, paragraphs 10-14, MR, Tab 5, p. 44.
[3] Special Report, paragraph 1, MR, Tab 5, p. 41.
[4] Special Report, paragraph 1, MR, Tab 5, p. 41.
[5] Special Report, paragraphs 10-15, MR, Tab 5, p. 41-42.
[6] Special Report, Appendix D and E, MR, Tab 5, pp. 84-89.

letters allege that the CEOs misappropriated funds from DIG through their misuse of the company credit cards. The misuse of the company credit cards allegedly related to previously approved expenses from 2015 to 2018. The letters further requested that the CEOs return all company property, including all documents, computers, and devices.[7]

13. Following receipt of the termination letters, the CEOs met with Jay Vieira, DIG's vice-president of corporate and legal affairs, to discuss the return of the documents and personal devices. Mr. Vieira instructed the CEOs to return the information in their possession and to wipe the electronic devices.[8]

C. The Receiver's Appointment

14. On March 11, 2019, RBC obtained an order for the Receiver's appointment.[9] The CEOs were not named parties to the receivership and are strangers to DIG's ongoing receivership proceeding.[10]

15. Pursuant to the appointment order, the Receiver can carry on DIG's business and use its property in carrying out the business, but the Receiver's mandate does not extend to corporate governance issues.[11] Corporate governance continues to reside with the Board. In addition, the Receiver's powers do not extend to "undoing" what DIG, including the chief financial officer (the "**CFO**"), the audit committee, and the Board, approved in the normal course of business.[12]

16. On May 3, 2019, the court granted an order (the "**Investigative Order**") to the Receiver. The Investigative Order authorizes the Receiver to exercise all of the available investigative powers and other rights and remedies that are available to a trustee in

[7] Special Report, Appendix D and E, MR, Tab 5, pp. 84-89.
[8] Cross-examinations of Joe Lanni ("**Lanni Cross**"), on July 15, 2020, qq. 96-99; Cross-examinations of Alex Agius ("**Agius Cross**"), on July 15, 2020, qq. 79-84.
[9] Special Report, para. 1, MR, Tab 5, p. 41.
[10] *Ibid*.
[11] Lanni Affidavit, para. 8, MR, Tab 3, p. 16; Affidavit of Alexander Agius ("**Agius Affidavit**"), dated February 14, 2020, para. 8, MR, Tab 2, p. 9.
[12] *Ibid*.

bankruptcy under the *BIA*.[13] The Investigative Order stipulates that the Receiver's rights and remedies must be available under the *BIA*.[14]

D. The Motion for Repayment of Corporate Expenses

17. In December 2019, the Receiver served the CEOs with a motion record that seeks an order requiring the CEOs to repay the Receiver, for the benefit of DIG's creditors, the sum of $241,687.[15] The Receiver alleges that the CEOs misappropriated these funds from DIG through their misuse of DIG's corporate credit cards and claiming improper Expenses.[16]

18. The Receiver's notice of motion makes no reference to any section of the *Bankruptcy and Insolvency Act,* any Rule of the *Rules of Civil Procedure,* or any statute that allows it to proceed by way of motion or application or authorizes the relief sought on the motion.[17]

19. The Receiver filed a report (the "**Special Report**") in support of its motion. The Special Report notes:

    a) the Receiver relies on third-party information (the "**Information**"), including information from DIG's management;

    b) the Receiver has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards ("**CAS**"); and

    c) the Receiver cannot express an opinion or form the assurances contemplated under CAS in respect of the Information.[18]

20. The Special Report does not disclose what steps, if any, the Receiver took to verify the accuracy or completeness of the Information. The Special Report fails to disclose the names of the management parties, the third parties, or whoever specifically spoke to the Receiver and what, if anything, these parties communicated or provided to the Receiver.[19]

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[13] Special Report, Appendix C, May 3, 2019, Order of the Honourable Justice Hainey (the "**Investigative Order**"), MR, Tab 5, pp. 77-83.
[14] Special Report, Appendix C, Investigative Order, para. 11, MR, Tab 5, p. 81.
[15] Special Report, para. 6 (b), MR, Tab 5, p. 42.
[16] Special Report, Appendix "E" and "F", MR, Tab 5, pp. 87-96.
[17] Receiver's Notice of Motion, MR, Tab 4, p. 24; Special Report, MR, Tab 5, p. 48.
[18] Special Report, para. 7, MR, Tab 5, pp. 43-44.
[19] Special Report, para. 7, MR, Tab 5, pp. 43-44.

21. The Receiver also cannot identify who from DIG prepared Appendices "F" and "G" to the Special Report. Appendices which summarize the alleged misappropriated Expenses that the Receiver seeks to challenge.[20]

E. The Approval of the Corporate Expenses

22. The CEOs have sworn affidavits and given evidence on cross examination in support of their underlying motion to convert and in response to the allegations in the Receiver's motion. The CEOs attest that:

a) the Expenses were entirely properly approved without issue in a transparent process through 2015 to 2018;[21]

b) DIG, the CFO, the audit committee, and the Board all participated in the approval of the Expenses;[22]

c) no one at DIG raised issues about the Expenses during the years they were submitted;[23]

d) flight passes were used for proper business purposes;[24]

e) any personal expenses were accounted for through two separate shareholder loan accounts that DIG created or through payroll deductions;[25] and

f) the Expenses were incurred for proper corporate purposes, including hosting clients, investment bankers, employees, and members of the Board.[26]

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[20] Lanni Cross, qq. 21-29; Letter from Speigel Nichols Fox LLP, dated July 15, 2020, to Thornton Grout Finnigan LLP, enclosing questions for the Receiver, MR, Tab 7, p 247, questions 11-15; Letter from legal counsel to the Receiver, Thornton Grout Finnigan LLP, to Spiegel Nichols Fox, (the "**Receiver's Letter**") dated July 27, 2020, enclosing answers to written question, MR, Tab 8, pp. 256-261.
[21] Lanni Affidavit, paras. 11-16, MR, Tab 3, pp. 16-17; Agius Affidavit, paras. 11-16, MR, Tab 2, pp. 9-10; Lanni Cross, qq. 76-89; and Agius Cross, qq. 65-76.
[22] Lanni Affidavit, paras. 11-16, MR, Tab 3, pp. 16-17; Agius Affidavit, paras. 11-16, MR, Tab 2, pp. 9-10; Lanni Cross, qq. 76-89; and Agius Cross, qq. 65-76.
[23] Lanni Affidavit, paras. 11-16, MR, Tab 3, pp. 16-17; Agius Affidavit, paras. 11-16. MR, Tab 2, pp. 9-10; Lanni Cross, qq. 76-89; and Agius Cross, qq. 65-76.
[24] Lanni Cross, q. 55; Agius Cross, qq. 44-45.
[25] Lanni Affidavit, para. 35, MR, Tab 3, p. 19; Lanni Cross. qq. 60-62 and 67; Agius Affidavit, para. 35, MR, Tab 2, p. 12; Agius Cross, qq. 44-49.
[26] Lanni Affidavit, paras. 36 and 37, MR, Tab 3, pp. 19-20; Lanni Cross, qq. 45 and 50; Agius Affidavit, paras. 36-37, MR, Tab 2, pp. 12-13; Agius Cross, qq. 32-35.

23. The CEOs are at a distinct disadvantage because they returned all of the documents that evidences the approval of the Expenses, including expense reports, the audit committee minutes, and their Outlook calendars.[27]

F. The Receiver is in Possession of Information

24. The Receiver filed a supplemental report (the "**Supplemental Report**") in response to the affidavits. The Supplemental Report acknowledges that the Receiver is in possession of 1,454 bankers boxes of documents, but simply comments that it would be impractical to have the Receiver review the boxes and produce the relevant information and documentation.[28]

25. The Supplemental Report further suggests that the CEOs and their legal counsel failed to immediately ask questions of the Receiver or seek production of the relevant documents.[29]

26. The Receiver's comments fail to reconcile that it is the Receiver who must prove that the CEOs misappropriated DIG's funds and establish they committed fraud against DIG.[30]

27. The Receiver, in response to written questions, advises: [31]

a) it has not been able to answer questions about the Special Report;[32]

b) verification and assurances of the Information is not necessary;[33]

c) its authority to bring the motion is derived from the appointment order, the Investigative Order, Rule 11 of the *BIA, and* Section 30(1)(d) of the *BIA*;[34]

d) it has not reviewed all documents in its possession;[35]

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[27] Lanni Affidavit, paras. 25 and 26, MR, Tab 3, p. 18; Lanni Cross, qq. 94-95 and 146-147; Agius Affidavit, para. 25 and 26, MR, Tab 3, p. 11; Agius Cross, qq. 77-78 and qq. 124-126.
[28] Supplemental Report of the Receiver (the "**Supplemental Report**"), dated July 3, 2020, paras. 7 and 8, MR, Tab 6, p. 211.
[29] Supplemental Report, paras. 9 and 10, MR, Tab 6, p. 212.
[30] Lanni Cross, q. 130.
[31] Receiver's Letter, MR, Tab 8, pp. 256-261.
[32] *Supra*, note 30, MR, Tab 8, p. 253.
[33] *Supra*, note 30, MR, Tab 8, p. 254.
[34] *Supra*, note 30, MR, Tab 8, p. 253-255.
[35] *Supra*, note 30, MR, Tab 8, p. 255.

e) it relies on Appendices F and G to the Special Report, but could not advise who from DIG prepared the spreadsheets;[36] and

f) it has not reviewed the expense reports filed by Lanni and Agius.[37]

28. The CEOs challenge the matters at issue in the Receiver's motion. All relevant documentation has not been produced. The material facts are entirely in dispute. The CEOs have raised issues of credibility, intent, and note that more than two years have passed since DIG approved the Expenses.[38] In the circumstances, the matter should proceed by way of action.[39]

III. LEGAL ISSUES TO BE DETERMINED

A. Is the Receiver's Motion an Application?

29. The Receiver's motion relies on Rule 11 of the *BIA Rules*, which provides that any application to the bankruptcy court is to be brought by way of motion.[40]

30. Courts have noted that Rule 11 cannot be:

a) interpreted or construed as meaning that the procedure provided under the authority of the *BIA* is exclusive and inconsistent with the ordinary procedures of the court, including those found in the *Rules of Civil Procedure*;[41] and

b) relied upon to bring a summary proceeding in which the trustee and receiver attempt to seek relief against a stranger to the underlying bankruptcy or receivership.[42]

31. The Receiver further cites the underlying appointment order, Investigative Order, and section 30(1)(d) of the *BIA* as authority that it may commence the motion without the formalities of an action.[43]

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[36] *Supra*, note 30, MR, Tab 8, p. 255.
[37] *Supra*, note 30, MR, Tab 8, p. 256.
[38] Lanni Affidavit, paras. 30-33 and 38-39, MR, Tab 3, pp. 19-21; Agius Affidavit, paras. 30-33 and 38-39, MR, Tab 2, pp. 12-14.
[39] Lanni Affidavit, para. 40, MR, Tab 3, p. 21; Agius Affidavit, para. 40, MR, Tab 2, p. 14.
[40] Rule 11 of the *Bankruptcy and Insolvency Act*, Canada Reg. 368, *Bankruptcy and Insolvency General Rules*.
[41] *Re Westam Dev. Ltd.* (1967), 10 C.B.R. (N.S.) 61, 59 W.W.R. 65, 61 D.L.R. (2d) 421 (B.C.C.A.) at paras. 20-32 "***Westam***").
[42] *Westam, ibid,* para. 19.
[43] Receiver's Letter, MR, Tab 8, pp. 253-255.

B. The Receiver Cannot Obtain Summary Judgment on an Application

32. The Receiver's motion attempts to bring a summary judgment motion against the CEOs without first complying with the requirements of Rule 20. Rule 20 provides that summary judgment is only available in an action and after a statement of defence is filed.[44]

33. The *Rules* further confirm that summary judgment cannot be brought in an application.[45]

34. The Ontario Court of Appeal in *Maurice v. Alles,*[46] noted that a motion for summary judgment is not available to adjudicate issues raised on an application. The court reiterated that summary judgment is available in the context of an action and not on an application and noted that the drafters of the summary judgment rule made a deliberate choice to restrict its availability to actions.[47]

35. An application is also a summary process, but its use is restricted to situations enumerated by Rule 14.05(3).[48] An application may be used if no material fact is in dispute or if the issues to be determined do not go beyond the interpretation of a document.[49] When issues of credibility are involved, conflicting evidence is raised, and serious allegations of honesty and good faith are directed at the respondents, then courts have noted the application should be converted to an action.[50]

36. The Receiver's motion does not seek to resolve a simple matter of contractual interpretation, but instead raises allegations of misappropriation against the CEOs. These allegations are akin to fraud and levied on material facts that the CEOs entirely dispute and based on a limited evidentiary record.

37. The issues raised by the Receiver raise both factual and legal questions that as a matter of procedural fairness and as a matter of substantive justice requires the full evidentiary record of an action.[51]

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[44] Rule 20, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[45] Rule 20 and Rule 14.05(3).
[46] 2016 ONCA 287 at para. 2 ("***Maurice***").
[47] *Maurice*, *ibid*, para. 32.
[48] Rule 14.05(3); *Maurice*, *ibid*, para 32.
[49] *Seabrook v. Pantrust*, 2018 ONSC 5471 at paras. 4 and 9 ("***Seabrook***").
[50] *Seabrook, ibid*, para. 17.
[51] *Seabrook, ibid*, para. 17; *Allied Systems (Canada) Co. v. Honda Canada Inc.*, 2012 ONSC 3142 (Ont. S.C.J.) at para. 20-21 ("***Allied***").

C. The Receiver's Motion does not Fall Within the BIA

38. The Receiver argues that it does not need to comply with the *Rules* and commence an action because the Investigative Order authorizes the Receiver to proceed in the summary fashion chosen. The Investigative Order requires, however, that the Receiver's rights and remedies be available under the *BIA*.[52] The notice of motion and the reports the Receiver filed make no reference to any section of the *BIA* that allows the Receiver to bring a summary judgment motion, without commencing an action, and to proceed in a summary fashion as against two strangers to the receivership.

39. The Receiver also comments that section 30(1)(d) of the *BIA* authorizes it to bring the summary proceeding against Lanni and Agius. Section 30(1)(d) provides that a trustee and receiver may bring, institute, or defend any *action* or other legal proceeding relating to the property of the bankrupt.[53] The section does not contemplate or authorize the Receiver to circumvent the requirements of the *Rules of Civil Procedure,* but instead signals that an action is the preferred method to recover the property of the bankrupt.

40. In addition, the Receiver's motion fails to fall within sections 91 to 101 of the *BIA*.[54] These sections specifically outline the special bankruptcy procedures that can be brought by way of a summary proceeding. The sections cover motions that attack fraudulent conveyances, fraudulent preferences, and fraudulent transfers. The Receiver has not structured its motion as an attempt to recover a preference, conveyance, or transfer as against the CEOs and, accordingly, cannot proceed by way of application.

41. By falling outside of these key sections of the *BIA*, and section 30(1)(d), the Receiver is at odds with the Investigative Order and cannot avoid the requirements of the *Rules of Civil Procedure*, which requires that every proceeding in the court shall be by way of action.[55]

42. Even if the Investigative Order granted the Receiver authority to proceed in a summary manner, courts have noted that trials are especially preferable where the receiver has no

[52] Special Report, Appendix "C", Investigative Order, para. 11, MR, Tab 5, p. 81.
[53] Section 30(1)(d), *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3.
[54] Sections 91 to 101 of the *BIA.*
[55] Section 30(1)(d) of the *BIA* and Rule 14.02.

first hand knowledge and there are issues of credibility and intent to defraud to be determined.[56]

43. The Receiver suggests that the CEOs perpetrated a fraud against DIG. These allegations are serious and the CEOs should be afforded the opportunity to test the Receiver's case, be provided with the documentation to properly defend themselves, and cross-examine the Receiver's witnesses.

D. The Test to Convert an Application to an Action

44. In *University Health Network v. Made In Japan Japanese Restaurants Ltd*., the court confirmed that Rule 1.04, read in conjunction with Rule 38.10 of the *Rules of Civil Procedure*, allows a judge to convert an application into an action before the hearing of the application.[57]

45. In determining whether to convert an application into an action, a court will consider the following factors:

a) whether material facts are in dispute;

b) the presence of complex issues that require expert evidence or a weighing of the evidence;

c) whether there is a need for pleadings and discoveries; and

d) the importance and impact of the application and of the relief sought.[58]

46. The evidence before the court demonstrates that:

a) all material facts are in dispute;

b) a court needs to weigh the evidence and determine issues of credibility, intent to misappropriate, intent to defraud, limitation periods, and the process of approving the Expenses;

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[56] *Durocher Simpson v. Memento Granite Memorials Ltd. (Trustee of)* (2003), 2003 CarswellAlta 1095, 45 C.B.R. (4th) 199 (Alta. C.A.), paras. 13-14; *Taylor Ventures Ltd. (Trustee of) v. 545959 B.C. Ltd.* (2000), 18 C.B.R. (4th) 289, at para. 20-22.
[57] *University Health Network v. Made In Japan Japanese Restaurants Ltd.* [2003 CarswellOnt 1939 (Ont. S.C.J. [Commercial List])], 2003 CanLII 46976, para. 10
[58] *Przysuski v. City Optical Holdings*, 2013 ONSC 5709, at para. 10.

c) the Receiver has key documents in its possession, including expense reports, audit reports, Board meeting minutes, ledgers, and receipts, which it has withheld and which are critical to determine whether the Expenses were properly approved and whether the CEOs misappropriated funds for their personal benefit; and

d) the Receiver has alleged the CEOs committed a fraud against DIG, but seek judgment on a limited paper record.

47. The Receiver cannot simultaneously raise allegations of misappropriation and then avoid compliance with the *Rules* or the *BIA*. The Receiver will suffer no prejudice if the matter is converted to an action and it is required to comply with its discovery obligations.

48. Conversely, the CEOs will be deprived of their fundamental right to properly defend themselves against the allegations of misappropriation, which are akin to fraud. Courts have noted that applications are not appropriate where there is conflicting evidence and complex and disputed questions of fact or credibility. In these types of instances, procedural fairness dictates that the matter should proceed as an action with a full evidentiary record.[59]

IV. RELIEF SOUGHT

49. The CEOs request the court grant them an order:

a) converting the Receiver's motion to an action;

b) directing the Receiver to issue and serve a statement of claim;

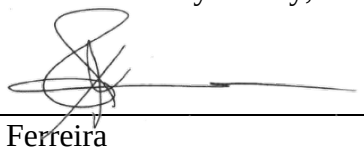
c) directing the CEOs to serve and file a statement of defence within the period prescribed by the *Rules of Civil Procedure*;

d) directing the parties to agree to a timetable for the balance of the steps in the action, failing which the parties are to attend on a case conference before a judge of the Commercial List; and

e) costs of the motion to convert.

[59] *Allied*, *supra* note 43, paras. 20-21.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of July, 2020.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Westam Dev. Ltd.* (1967), 10 C.B.R. (N.S.) 61, 59 W.W.R. 65, 61 D.L.R. (2d) 421 (B.C.C.A.).
2. *Maurice v. Alles,* 2016 ONCA 287 (Ont. C.A.).
3. *Seabrook v. Pantrust*, 2018 ONSC 5471 (Ont. S.C.J.).
4. *Allied Systems (Canada) Co. v. Honda Canada Inc.*, 2012 ONSC 3142 (Ont. S.C.J.).
5. *Durocher Simpson v. Memento Granite Memorials Ltd. (Trustee of)* (2003), 2003 CarswellAlta 1095, 45 C.B.R. (4th) 199 (Alta. C.A.).
6. *Taylor Ventures Ltd. (Trustee of) v. 545959 B.C. Ltd.* (2000), 18 C.B.R. (4th) 289 (BC S.C.J).
7. *University Health Network v. Made In Japan Japanese Restaurants Ltd.* [2003 CarswellOnt 1939 (Ont. S.C.J. [Commercial List])], 2003 CanLII 46976.
8. *Przysuski v. City Optical Holdings,* 2013 ONSC 5709 (Ont. S.C.J.).

SCHEDULE "B"

STATUES AND REGULATIONS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

PROCEEDINGS BY ACTION AS GENERAL RULE

14.02 Every proceeding in the court shall be by action, except where a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 14.02.

NOTICE OF APPLICATION

14.05 (1) The originating process for the commencement of an application is a notice of application (Form 14E, 14E.1, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30). R.R.O. 1990, Reg. 194, r. 14.05 (1); O. Reg. 484/94, s. 5; O. Reg. 43/14, s. 5 (1).

(1.1) Form 14F (Information for court use) shall be filed together with a notice of application in Form 14E, 14E.1, 68A or 73A. O. Reg. 260/05, s. 2; O. Reg. 43/14, s. 5 (2).

(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, r. 14.05 (2); O. Reg. 292/99, s. 1 (2).

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.

RULE 20 SUMMARY JUDGMENT

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

DISPOSITION OF APPLICATION

38.10 (1) On the hearing of an application the presiding judge may,

(a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give such directions as are just. R.R.O. 1990, Reg. 194, r. 38.10 (1).

(2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial. R.R.O. 1990, Reg. 194, r. 38.10 (2).

(3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 38.10 (3).

(4) Clause (1) (b) and subrules (2) and (3) do not apply to applications under Rule 74, other than applications under rule 74.18, and Rule 75. O. Reg. 484/94, s. 11; O. Reg. 193/15, s. 4.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3.

30 (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

> **(d)** bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt.

91 [Repealed, 2005, c. 47, s. 71]

92 and 93 [Repealed, 2000, c. 12, s. 12]

94 [Repealed, 2005, c. 47, s. 72]

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

(3) In this section,

> ***clearing house*** means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)
>
> ***clearing member*** means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

creditor includes a surety or guarantor for the debt due to the creditor; (*créancier*)

margin deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (*dépôt de couverture*)

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

(2) The expression ***adequate valuable consideration*** in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

98 (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.

98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

(3) Nothing in subsection (1) renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

(4) For the purposes of this section, ***assignment*** includes assignment by way of security, hypothec and other charges on book debts.

99 (1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

(2) For the purposes of this section, the receipt of any money, security or negotiable instrument from or by the order or direction of a bankrupt by his banker and any payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with his banker dealing with him for value.

Previous Version
100 [Repealed, 2005, c. 47, s. 76]

101 (1) When a corporation that is bankrupt has paid a dividend, other than a stock dividend, redeemed or purchased for cancellation any of the shares of the capital stock of the corporation or has paid termination pay, severance pay or incentive benefits or other benefits to a director, an officer or any person who manages or supervises the management of business and affairs of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

(2) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the dividend or redemption or purchase price, with interest on the amount, that has not been paid to the corporation if the court finds that

(a) the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation insolvent; and

(b) the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent.

(2.01) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the termination pay, severance pay or incentive benefits or other benefits, with interest on the amount, that has not been paid to the corporation if the court finds that

(a) the payment

(i) occurred at a time when the corporation was insolvent or rendered the corporation insolvent,

(ii) was conspicuously over the fair market value of the consideration received by the corporation, and

(iii) was made outside the ordinary course of business; and

(b) the directors did not have reasonable grounds to believe that the payment

(i) occurred at a time when the corporation was not insolvent or would not render the corporation insolvent,

(ii) was not conspicuously over the fair market value of the consideration received by the corporation, and

(iii) was made in the ordinary course of business.

(2.1) In making a determination under paragraph (2)(b) or (2.01)(b), the court shall consider whether the directors acted as prudent and diligent persons would have acted in the same circumstances and whether the directors in good faith relied on

(a) financial or other statements of the corporation represented to them by officers of the corporation or the auditor of the corporation, as the case may be, or by written reports of the auditor to fairly reflect the financial condition of the corporation; or

(b) a report relating to the corporation's affairs prepared pursuant to a contract with the corporation by a lawyer, notary, accountant, engineer, appraiser or other person whose profession gave credibility to the statements made in the report.

(2.2) Where a transaction referred to in subsection (1) has occurred and the court makes a finding referred to in paragraph (2)(a), the court may give judgment to the trustee against a shareholder who is related to one or more directors or to the corporation or who is a director not liable by reason of paragraph (2)(b) or subsection (3), in the amount of the dividend or redemption or purchase price referred to in subsection (1) and the interest thereon, that was received by the shareholder and not repaid to the corporation.

(3) A judgment pursuant to subsection (2) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of the dividend or the redemption or purchase for cancellation of the shares of the capital stock of the corporation and had thereby exonerated himself or herself under that law from any liability therefor.

(3.1) A judgment under subsection (2.01) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of termination pay, severance pay or incentive benefits or other benefits and had exonerated himself or herself under that law from any resulting liability.

(4) Nothing in this section shall be construed to affect any right, under any applicable law governing the operation of the corporation, of the directors to recover from a shareholder the whole or any part of any dividend, or any redemption or purchase price, made or paid to the shareholder when the corporation was insolvent or that rendered the corporation insolvent.

(5) For the purposes of subsection (2), the onus of proving

(a) that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent, or

(b) that the directors had reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or that the transaction would not render the corporation insolvent

(5.1) For the purposes of subsection (2.01), a director has the onus of proving any of the following:

(a) that the payment

(i) occurred at a time when the corporation was not insolvent or did not render the corporation insolvent,

(ii) was not conspicuously over the fair market value of the consideration received by the corporation, or

(iii) was made in the ordinary course of business; or

(b) that the director had reasonable grounds to believe that the payment

(i) occurred at a time when the corporation was not insolvent or would not render the corporation insolvent,

(ii) was not conspicuously over the fair market value of the consideration received by the corporation, or

(iii) was made in the ordinary course of business.

(6) For the purposes of subsection (2.2), the onus of proving that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent lies on the shareholder.

***Bankruptcy and Insolvency General Rules*, Canada Reg. 368**

11 Subject to these Rules, every application to the court must be made by motion unless the court orders otherwise.

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., et al. Respondents	No. CV-19-00615270-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDINGS COMMENCED AT
TORONTO

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RCP-E 4C (May 1, 2016)