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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF Section 101 of the *Courts of Justice Act,* 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

RESPONDING FACTUM OF THE RECEIVER
(Motion to Convert to Action, returnable August 12, 2020)

August 5, 2020

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PART I - INTRODUCTION

1. Giuseppe Lanni and Alexander Agius (the "**Former CEOs**") were directors and co-CEOs of Distinct Infrastructure Group Inc., a publicly-traded company ("**DIG**").

2. Prior to the appointment by the Court of Deloitte Restructuring Inc. ("**Deloitte**") as receiver of DIG (in such capacity, the "**Receiver**"), Lanni and Agius spent hundreds of thousands of public company funds on landscaping services, ski clubs, florists, meals, cruises, air travel and holidays for themselves and family to New York and Hawaii. In their capacity as the Former CEOs of DIG, they claimed these amounts as corporate expenses payable by DIG.

3. Contrary to the repeated assertion in the Former CEOs' factum that they "deny all of the Receiver's allegations", it is undisputed that these expenses were, in fact, incurred. Rather, the Former CEOs claim that these expenses (i) were properly incurred in connection with their roles as Former CEOs and are therefore permissible expenses under the consulting agreements pursuant to which they provided their services to DIG, or (ii) that they repaid DIG through deductions taken from their monthly remuneration.

4. The issue for determination on the Receiver's underlying motion is simple and narrow: were the expenses incurred by the Former CEOs properly chargeable to DIG as reimbursable corporate expenses? The position of the Receiver, the Special Committee of the Board of Directors of DIG and the CFO that was retained prior to the appointment of the Receiver and uncovered significant financial irregularities in the company, is that they are not.

5. The Receiver has been authorised by an Order of this Court to take all steps necessary to recover property of DIG, including amounts that may be payable to or recoverable by DIG. The Receiver seeks the reimbursement of these amounts from the Former CEOs by way of motion, in accordance with the process that has been specifically proscribed by the *Bankruptcy and Insolvency General Rules* (the "**Bankruptcy Rules**" as defined below).

6. The Bankruptcy Rules specifically provide for all matters being brought before the Court by way of motion, in recognition of the very nature of insolvency proceedings where insufficient funds are the foundational principle of the insolvency, and summary (and timely) determinations are addressed by specialized Commercial List judges.

7. Requiring the determination of matters to be addressed by way of entirely separate actions being commenced by a court officer of an insolvent company would add substantial and unnecessary cost and delay. The issue can and should be determined in a manner proportionate to the simple nature of the issue in dispute and the relatively small amount at issue.

PART II - THE FACTS

8. Giuseppe Lanni and Alexander Agius were directors and co-CEOs of DIG, a publicly listed company.[1]

[1] Special Report of the Receiver dated November 28, 2019 (the "**Special Report**"), Appendix B at para. 10 and 14.

9. Royal Bank of Canada (the "**Bank**") is DIG's first secured creditor and operating lender, and is the Applicant in the receivership proceedings.[2] In December of 2018, it engaged Deloitte as its consultant to review DIG's business.[3]

10. Shortly after Deloitte's engagement, a special committee of the board of directors (the "**Special Committee**") was formed to investigate financial irregularities uncovered by a newly-appointed CFO of DIG.[4]

11. In the course of those investigations, the Special Committee analysed the expense accounts of the Former CEOs to determine whether expenses incurred by them were appropriate, incurred in the course of their duties and for the benefit of DIG.[5]

12. The Special Committee identified a number of expenses that did not appear to be for the benefit of DIG. It terminated the employment of the Former CEOs for (amongst other reasons) "Misuse of company funds for personal gain" and demanded that they repay DIG for all expenses that the Special Committee deemed as personal.[6]

13. These expenses included airline tickets for Agius' family holiday to Hawaii, numerous trips to New York, tens of thousands of dollars in expenses at Beaver Valley Ski Club and approximately $420 per business day at Chop Restaurant, a steakhouse near DIG's office.[7]

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[2] Special Report, para. 1.
[3] Special Report, para. 9.
[4] Special Report, para. 12.
[5] Special Report, para. 14.
[6] Special Report, paras. 15 to 17 and Appendices D and E.
[7] Special Report, pages 11 and 12.

14. Deloitte was appointed as Receiver of DIG by Order of Justice Hainey dated March 11, 2019 (the "**Appointment Order**").[8] The Receiver was specifically authorized "to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies" and was further "authorized and empowered to apply to any court… for assistance in carrying out the terms of this Order."[9]

15. As of December 31, 2018, DIG's indebtedness to its creditors was approximately $82.4 million.[10] The Bank, DIG's first priority secured creditor, is anticipated to incur losses of up to $44 million.[11]

16. Justice Hainey issued an Order expanding the Receiver's investigative powers on May 3, 2019 (the "**Investigate Powers Order**"). Under the Investigative Powers Order, the Receiver was authorized to exercise the powers of a trustee in bankruptcy, which includes the power to bring any legal proceeding relating to the property of the bankrupt under, *inter alia*, Section 30(1)(d) of the *Bankruptcy and Insolvency Act*.[12]

17. Since its appointment, the Receiver has reviewed the demands for payment in respect of expenses that was made by the Special Committee of DIG and the Special Committee's assessment that such expenses were not for the benefit of DIG. It seeks repayment only of

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[8] Special Report, para. 1.
[9] Appointment Order, paras. 3(f) and 32; Response to Questions arising from the First Supplemental Report dated July 27, 2020 ("**Response to Supplemental Report Questions**"), Response to Question 1.
[10] Special Report, Appendix B, para. 19.
[11] Special Report, Appendix M, page 8.
[12] Special Report, para. 4 and Appendix C, para. 11; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("***BIA***").

the amounts where it concurs with the Special Committee and it is clear and obvious to the Receiver that the expenses were personal in nature, rather than for the benefit of DIG.[13]

PART III - THE ISSUE

18. There is only one narrow issue for determination on the *underlying* motion brought by the Receiver: were the expenses incurred by the Former CEOs appropriately chargeable to DIG as reimbursable corporate expenses?

19. The issue for determination on *this* motion is whether the above question requires the full machinery of a trial to determine. The Receiver does not believe a trial is a necessary, proportionate or just process to determine the issue. The Court is capable of making summary determinations on amounts owing to insolvent companies on a motion.

PART IV - LAW AND ARGUMENT

The Receiver has Capacity to Bring its Underlying Motion

20. The Receiver is not an ordinary litigant. It is an officer of the Court and has no economic interest in the outcome of any dispute. It has obligations to be neutral and objective.[14] It is entitled to present evidence to the Court by way of Report.[15] It may bring motions in accordance with the powers granted to it by Order of the Court for the benefit of the creditors of the insolvent company, as their respective interests may appear.

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[13] Special Report, paras. 24 and 25.
[14] *Bell Canada International Inc., Re*, 2003 CarswellOnt 4537 ("***Bell Canada***") at para. 8.
[15] *Martellacci, Re*, 2014 ONSC 5188 ("***Martellacci, Re***") at paras. 19 and 24.

21. The Receiver is empowered by the Appointment Order and the Investigative Powers Order to bring the underlying motion[16], and is required by Rule 11 of the *Bankruptcy and Insolvency General Rules* to do so by way of motion.[17]

22. Rule 11 of the Bankruptcy Rules reads as follows:

> *Subject to these Rules, every application to the court must be made by motion unless the court orders otherwise.*[18]

23. The Former CEOs rely on the wording of this rule to suggest that the Receiver's motion is in fact an Application within the meaning of the Ontario *Rules of Civil Procedure*. This is incorrect. The Bankruptcy Rules do not define 'application'. The word 'application' as used in the federal Bankruptcy Rules does not have the same meaning as in the Ontario *Rules of Civil Procedure*.

24. Motions are regularly brought under Rule 11 for a variety of purposes, including to commence appeals.[19] That does not mean such motions brought within an insolvency proceeding are required to comply with all of the provisions of the Ontario *Rules of Civil Procedure* (or their equivalent in other provinces) which are applicable to applications.[20]

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[16] Appointment Order, paras. 3(f) and 32; Special Report, Appendix C, para. 11.
[17] *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368, s. 3. (the "***Bankruptcy Rules***").
[18] Rule 11, Bankruptcy Rules.
[19] See *Friedland, Re*, 2012 BCCA 381 at para. 23 where the British Columbia Court of Appeal held "[a]n appeal to the court under the *BIA* is an application to the court by motion."
[20] For example, Receivers bringing motions are not required to commence their motion by notice of application in accordance with Rule 14.05 of the Ontario *Rules of Civil Procedure*, and Rule 38 of the Ontario *Rules of Civil Procedure* does not necessarily govern the procedure of a Receiver's motion.

25. There is no restriction on motions brought under Rule 11 being adjudicated summarily. In *National Telecommunications Inc., Re,* the Court held that a trial was not necessary to determine the issues raised in a motion to declare a transfer at undervalue, despite the credibility issues raised.[21] The Court found that it could exercise powers to weigh evidence and draw inferences in a manner analogous to the approach under Rules 20.04(2.1) and 20.04(2.2) under the *Rules of Civil Procedure*.[22]

26. In the analogous circumstances of proceedings under the *Companies' Creditors Arrangement Act*,[23] courts have recognised that a motion is an appropriate way for an insolvent company to recover amounts owing by an alleged debtor. In *Fraser Papers Inc., Re*,[24] the insolvent applicant brought a motion for an order that a debtor pay it the amounts the debtor owed for the sale of wood pulp. The debtor (as respondents to the motion) raised the defence of equitable set-off. Justice Pepall (as she then was) recognised that "claims of set-off must be carefully scrutinized."[25] Nevertheless, she held that she was "able to determine the availability of set-off by way of a summary determination"[26] and ordered that the debt be paid.

27. Justice Pepall (as she then was) followed the decision in *Stelco Inc., Re*, where Justice Farley ordered on a motion that a corporate account debtor pay to Stelco amounts owing,

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[21] *National Telecommunications Inc., Re*, 2017 ONSC 1475 ("***National Telecommunications***") at paras. 33, 34 and 39.
[22] *National Telecommunications* at para. 37.
[23] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("***CCAA***").
[24] *Fraser Papers Inc., Re*, 2009 CarswellOnt 7893 ("***Fraser Papers Inc., Re***").
[25] *Fraser Papers Inc., Re*, para. 13.
[26] *Fraser Papers Inc., Re*, para. 15.

and granted the applicants a declaration that neither legal nor equitable set-off was available to the debtor.[27]

28. To question the Receiver's ability to bring this motion is to indirectly seek to challenge the Orders already made in this proceeding. It is also an attempt to cause the officer of the Court to take steps and incur costs as if it was an ordinary litigant outside of an insolvency proceeding, in circumstances where it is not required or reasonable for it to do so. The issue has already been determined: Justice Hainey has empowered the Receiver to bring this motion.

A Trial is Neither Necessary Nor Proportionate

The Issue for Determination is Simple

29. The issue raised on the underlying motion is simple. The Receiver seeks repayment of expenses which the Former CEOs charged to DIG as reimbursable corporate expenses. The Former CEOs accept that the expenses were in fact incurred.[28] Under the consulting agreements pursuant to which they provided their services to DIG, they are entitled to be reimbursed for expenses only if they are "actually and properly incurred… in connection with providing the Services hereunder."[29]

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[27] *Stelco Inc., Re*, 2005 CarswellOnt 5905; *Fraser Papers Inc., Re*, para. 15.
[28] Transcript of the Cross-Examination of Alexander Agius dated July 15, 2020 (the "**Agius Transcript**"), page 6, q. 15; Transcript of the Cross-Examination of Giuseppe Lanni dated July 15, 2020 (the "**Lanni Transcript**"), page 7, q. 20.
[29] First Supplement to the Special Report of the Receiver dated July 3, 2020 (the "**Supplemental Report**"), Appendices A and B, Section 1.6.

30. The Receiver, as an officer of the Court, has satisfied itself that there is no basis upon which certain expenses could have been for the benefit of DIG. DIG derived no value from landscaping services in Etobicoke, tens of thousands of dollars spent at ski clubs and hundreds of thousands of dollars spent on travel, including to Hawaii and New York City, for Agius' family members.[30]

31. In the 303 days (210 business days) between January 1, 2018 and October 31, 2018, the Former CEOs along with two other officers of DIG spent $85,178 on 200 receipts at Chop Restaurant, an average of $426 per receipt.[31] There is no credible basis for suggesting that there was a benefit to DIG for its Former CEOs to spend on average $420 every single business day at a steakhouse.

32. Indeed, the Special Committee of the DIG Board of Directors, with the benefit of outside legal advice, has already concluded that these expenses did not benefit DIG. It dismissed the Former CEOs for, *inter alia*, their misuse of company funds.[32]

33. If there is a legitimate corporate purpose to these expenses, Lanni and Agius have had every opportunity to put forward an explanation. If, after cross-examination, that explanation is deemed credible by the motions judge, the Receiver will not succeed on its motion. Such a determination can confidently be made on a motion.

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[30] Special Report, pages 10 and 11.
[31] Special Report, pages 10 and 11.
[32] Special Report, paras. 15 to 17 and Appendices D and E.

Documents Allegedly in the Receiver's Possession Not Needed to Determine the Issue on the Underlying Motion

34. Upon its appointment, the Receiver took possession of 1,452 boxes of documents which it collected from DIG's offices. The Receiver has not reviewed the entirety of those records, as to do so would be prohibitively expensive and out of proportion to the amounts sought in the underlying motion ($69,623 and $172,064 respectively).[33]

35. The Former CEOs argue that they require documentary discovery and production of various documents which they allege are within the control of the Receiver in order to advance their defence. They claim they require "expense reports, audit reports, Board meeting minutes, ledgers, and receipts" to advance their defence.

36. In response to a question received for the first time on July 15, 2020, the Receiver has committed to make a reasonable review of the "type of documents contained" in 1,452 boxes recovered from DIG's offices and to produce anything relevant to the motion.[34] This is a proportionate and reasonable means of addressing and satisfying the Former CEOs' concern.

37. In any event, it is difficult to see how such documents could advance the Former CEOs defence.

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[33] Supplemental Report, paras. 7 and 8.
[34] Response to Supplemental Report Questions, Answer to Question 7.

38. First, the Former CEOs admit that the expenses were in fact incurred.[35] Information as to the purpose of the expenses is in the possession of the Former CEOs. There is nothing to suggest that the Receiver has any documents regarding the *purpose* of the expenses.

39. The Former CEOs claim in their factum that the Receiver has not identified who prepared the list of expenses or what steps were taken to verify the information.[36] That is incorrect: the list was prepared by Christina Leighton under the direction of John Nashmi and the process by which the information was verified is explained in the Response to Supplemental Report Questions and the Special Report itself.[37]

40. Second, while in their affidavits the Former CEOs claim that the expenses were approved by the Board,[38] their answers on cross-examination show that the approval process they refer to did not specifically consider the expenses.

41. Agius admitted that there was no board vote regarding his expenses, that the minutes of the Board meetings did not show that the expenses had been approved and "[t]he fact that they were added to the quarterly financials is the only understanding I had that they were actually approved."[39] He also admitted that his corporate expenses would be "consolidated with all other management."[40]

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[35] Agius Transcript, page 6, q. 15; Lanni Transcript, page 7, q. 20.
[36] Factum of the Moving Party, paras. 20 and 21.
[37] Response to Supplemental Report Questions, Answers to Questions 8 and 12; Special Report, para. 25.
[38] Affidavit of Alexander Agius sworn February 13, 2020 (the "**Agius Affidavit**"), Motion Record of the Responding Parties, Guiseppe Lanni and Alexander Agius (the "**Former CEOs' Motion Record**") at paras. 11 to 13; Affidavit of Giuseppe Lanni sworn February 14, 2020 (the "**Lanni Affidavit**"), Former CEOs' Motion Record at paras. 11 to 13.
[39] Agius Transcript, page 20, questions 63 and 64.
[40] Agius Transcript, page 23, question 75.

42. Similarly, Lanni admitted that the only approval of the expenses was the approval of the quarterly financial statements: "whenever the board approved the financials of the business, they were in essence approving all the expenses that were reported as part of the financials."[41]

43. The Former CEOs have confused the Board's approval of DIG's financials with the Board's approval of the Former CEOs' specific expense claims. There is nothing to suggest that information with any degree of granularity about the Former CEOs' expenses was provided to the Board, or that the Board had adequate information to properly assess and approve the expenses.

44. The quarterly financial statements do not itemise the Former CEOs expenses. The minutes of the Audit Committee and Board meetings that the Receiver has reviewed show that neither the Audit Committee nor the Board ever considered or discussed the Former CEOs' expenses.[42]

45. In any event, the Board subsequently dismissed the Former CEOs for misuse of company funds. It is not credible to suggest that they approved the very same expenses that they subsequently dismissed the Former CEOs for incurring.

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[41] Lanni Transcript, page 27 to 28, question 78.
[42] Response to Supplemental Report Questions, Answer to Questions 8.

The Former CEOs Have Not Searched Their Own Records for Relevant Documents

46. On cross-examination, the Former CEOs admitted that they may have various documents relating to their employment and the expenses, including shareholder loan reconciliation statements, amounts paid personally to credit card companies and records of the amounts deducted from their monthly payments.[43]

47. The Former CEOs have not produced these records or attached them to their affidavits in this motion or the underlying motion. They have not even produced the publicly available quarterly and annual financial statements that they claim show their expenses being approved. They further admit that they have not searched their records for relevant documents, and have not asked parties they may have provided such documents to (such as their accountant) to search for and provide them with such documentation.[44]

48. The Former CEOs' evidence indicates that they have the documents available to them to deliver their response, should they choose to search for them. That they have not searched for those documents and not produced them suggests that either they do not exist, or that the Former CEOs want the Receiver to conduct those searches to run up the Receiver's expenses and make the underlying motion impractically expensive.

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[43] Agius Transcript, page 28, questions 91 and 92, page 29, question 96, page 30, question 101; Lanni Transcript, page 37, question 105 and 106, page 42, line 8 to page 43, line 13, page 45, question 116 to 118, pages 50 to 52, questions 127 to 129.
[44] Agius Transcript, page 33, question 110; Lanni Transcript, page 29, questions 82 to 84; page 46, question 120.

49. Mr. Lanni gave an undertaking to search for records of his own personal payments to the credit card companies, which he claimed he made.[45] His answer to the undertaking was that he could find no such records.

50. The Former CEOs have already shown either that they do not know the contents of the documents they allege are exculpatory, or that they are willing to mislead as to their contents. In their affidavits on this motion, each of the Former CEOs claims that payment for storage of their *personal* vehicle was included as part of their compensation. A review of their consulting agreements shows that only reasonable expenses relating to a *company* vehicle could be claimed.[46]

A Motion is an Appropriate Method to Resolve the Underlying Issue

51. The *Rules of Civil Procedure* are to be construed "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."[47] Courts are to make orders "that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."[48]

52. It has been described as trite law that the *Bankruptcy and Insolvency Act* is a "businessperson's statute", with a particular focused "on efficiency and affordability." The

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[45] Lanni Transcript, page 43, lines 5 to 13.
[46] Supplemental Report, Appendices A and B, Section 1.12.
[47] Ontario *Rules of Civil Procedure*, Rule 1.04(1).
[48] Ontario *Rules of Civil Procedure*, Rule 1.04(1.1).

goals of "timeliness, affordability, and proportionality" are the goals of the bankruptcy process[49] and are advanced by summary determinations.

53. The general practice in Ontario is that a Receiver is to proceed by way of motion (where authorised to exercise such powers by Court Order), and may advance evidence by way of court report. If the responding party has questions, it may ask those to the Court officer – cross-examination is not necessary.[50] Only in unusual circumstances may a court officer be cross examined.[51]

54. It is submitted that it is only in rare circumstances where a court officer is required to proceed by way of action.

55. In the present circumstances, commencing a new action is unnecessary. The issue for determination is narrow, the Former CEOs have access to all the information they need to explain the alleged purpose of the corporate expenses and a court can easily assess the credibility (or lack thereof) of their responses in a timely and proportionate manner on a motion.

56. By contrast, an action would be time consuming and prohibitively expensive. It could require the Receiver to search 1,452 boxes to find documents which the Former CEOs cannot state even exist and have not searched their own records for. This is not

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[49] *National Telecommunications* at paras. 33 and 37.
[50] *Martellacci, Re* at para. 21.
[51] *Bell Canada* at para. 8, followed by Justice Newbould in *Martellacci, Re* at para. 21.

proportionate to the amounts in dispute, the complexity of the issue in dispute and not in accordance with the goals of the *BIA*.

57. If a Receiver is required to bring an action in these circumstances, and as part of that action conduct a search of the entire records of a company, a whole category of proceedings will become prohibitively expensive for receivers to bring, to the detriment of creditors of insolvent companies across Canada. Former directors and officers of insolvent companies may escape liability solely because it is not efficient to pursue them for debts owed to the company.

PART V - RELIEF REQUESTED

58. The Receiver requests that the Court dismiss the Former CEOs' motion and grant the Receiver its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of August, 2020.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bell Canada International Inc., Re*, 2003 CarswellOnt 4537.
2. *Martellacci, Re*, 2014 ONSC 5188.
3. *Friedland, Re*, 2012 BCCA 381.
4. *National Telecommunications Inc., Re*, 2017 ONSC 1475.
5. *Fraser Papers Inc., Re*, 2009 CarswellOnt 7893.
6. *Stelco Inc., Re*, 2005 CarswellOnt 5905.

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

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

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

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

APPLICATIONS – BY NOTICE OF APPLICATION

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).

Information for Court Use

(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).

Application under Statute

(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).

Application under Rules

(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);

RULE 38 APPLICATIONS — JURISDICTION AND PROCEDURE

APPLICATION OF THE RULE

38.01 (1) Rules 38.02 to 38.12 apply to all proceedings commenced by a notice of application under rule 14.05, subject to subrules (2) and (3).

(2) Rules 38.02 and 38.09 do not apply to applications to the Divisional Court.

(3) Rules 38.02 to 38.12 apply to an application made under subsection 140 (3) of the *Courts of Justice Act*, unless otherwise provided in rule 38.13 and subject to any modifications set out in that rule.

APPLICATIONS — TO WHOM TO BE MADE

38.02 An application shall be made to a judge.

PLACE AND DATE OF HEARING

Place of Commencement

38.03 (1) The applicant shall, in the notice of application, name the place of commencement in accordance with rule 13.1.01.

Place of Hearing

(1.1) The application shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise.

Hearing date where no practice direction

(2) At any place where no practice direction concerning the scheduling of applications is in effect, an application may be set down for hearing on any day on which a judge is scheduled to hear applications.

Exception, lengthy hearing

(3) If a lawyer estimates that the hearing of the application will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of application is served.

Urgent application

(3.1) An urgent application may be set down for hearing on any day on which a judge is scheduled to hear applications, even if a lawyer estimates that the hearing is likely to be more than two hours long.

Counter-Application

(4) If a notice of application has been served and the respondent wishes to make an application against the applicant, or against the applicant and another person, the respondent shall make the application at the same place and time to the same judge, unless the court orders otherwise.

CONTENT OF NOTICE

38.04 Every notice of application (Form 14E, 14E.1, 68A, 73A, 74.44 or 75.5) shall state,

(a) the precise relief sought;

(b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) the documentary evidence to be used at the hearing of the application.

ISSUING OF NOTICE

38.05 A notice of application shall be issued as provided by rule 14.07 before it is served.

SERVICE OF NOTICE

Generally

38.06 (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions.

Where Notice Ought to Have Been Served

(2) Where it appears to the judge hearing the application that the notice of application ought to have been served on a person who has not been served, the judge may,

(a) dismiss the application or dismiss it only against the person who was not served;

(b) adjourn the application and direct that the notice of application be served on the person; or

(c) direct that any judgment made on the application be served on the person.

Minimum Notice Period

(3) The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Ontario, in which case it shall be served at least twenty days before the hearing date.

Filing Proof of Service

(4) The notice of application shall be filed with proof of service at least seven days before the hearing date in the court office where the application is to be heard.

NOTICE OF APPEARANCE

38.07 (1) A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance (Form 38A).

(2) A respondent who has not delivered a notice of appearance is not entitled to,

(a) receive notice of any step in the application;

(b) receive any further document in the application, unless,

(i) the court orders otherwise, or

(ii) the document is an amended notice of application that changes the relief sought;

(c) file material, examine a witness or cross-examine on an affidavit on the application; or

(d) be heard at the hearing of the application, except with leave of the presiding judge.

(3) Despite subrule (2), a party who is served with a notice of application outside Ontario may make a motion under subrule 17.06 (1) before delivering a notice of appearance and is entitled to be served with material responding to the motion.

Exception, applications to pass accounts

(4) Subrules (1) and (2) do not apply to a notice of application to pass accounts under Rule 74.

38.07.1 Revoked:

ABANDONED APPLICATIONS

38.08 (1) The applicant may abandon an application by delivering a notice of abandonment.

(2) An applicant who fails to appear at the hearing shall be deemed to have abandoned the application unless the court orders otherwise.

(3) Where an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise.

(4) If a party to an application is under disability, the application may be abandoned by or against that party only with leave of a judge, on notice to the party's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) to the Children's Lawyer, if the party is a minor; or

(b) to the Public Guardian and Trustee, in any other case.

MATERIAL FOR USE ON APPLICATION

Application Record and Factum

38.09 (1) The applicant shall,

(a) serve an application record, together with a factum consisting of a concise argument stating the facts and law relied on by the applicant, at least seven days before the hearing, on every respondent who has served a notice of appearance; and

(b) file the application record and factum, with proof of service, at least seven days before the hearing, in the court office where the application is to be heard.

(2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of application;

(c) a copy of all affidavits and other material served by any party for use on the application;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the application.

Respondent's Application Record and Factum

(3) The respondent shall serve on every other party, at least four days before the hearing, a factum consisting of a concise argument stating the facts and law relied on by the respondent.

(3.1) If of the opinion that the application record is incomplete, the respondent may serve on every other party, at least four days before the hearing, a respondent's application record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the respondent on the application and not included in the applicant's application record.

(3.2) The respondent's factum, and the respondent's application record, if any, shall be filed with proof of service in the court office where the application is to be heard, at least four days before the hearing.

Dispensing with Record and Factum

(4) A judge, before or at the hearing of the application, may dispense with compliance with this rule in whole or in part.

Material May be Filed as Part of Record

(5) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material.

Transcript of Evidence

(6) A party who intends to refer to a transcript of evidence at the hearing of an application shall file a copy of the transcript as provided by rule 34.18.

Exceptions, applications in estate matters

(7) Subrules (1) to (6) do not apply to applications under Rule 74.

(8) Subrules (1) to (6) apply to applications under Rule 75, but neither the applicant nor the respondent is required to serve a factum.

CONFIRMATION OF APPLICATION

Confirmation of Application

38.09.1 (1) A party who makes an application on notice to another party shall,

(a) confer or attempt to confer with the other party;

(b) not later than 2 p.m. three days before the hearing date, give the registrar a confirmation of application (Form 38B) by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(c) send a copy of the confirmation of application to the other party by fax or e-mail.

Effect of Failure to Confirm

(2) If no confirmation is given, the application shall not be heard, except by order of the court.

Duty to Update

(3) A party who has given a confirmation of application and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of application (Form 38B), by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of application to the other party by fax or e-mail.

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.

(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.

(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.

Exception, applications in estate matters

(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.

SETTING ASIDE JUDGMENT ON APPLICATION MADE WITHOUT NOTICE

38.11 (1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

(2) A motion under subrule (1) may be made,

(a) at any place, to the judge who granted the judgment;

(b) at a place determined in accordance with rule 37.03 (place of hearing of motions), to any other judge;

(c) to the Divisional Court, in the case of a judgment of that court.

(3) On a motion under subrule (1), the judgment may be set aside or varied on such terms as are just.

STRIKING OUT A DOCUMENT

38.12 Rule 25.11 applies, with necessary modifications, with respect to any document filed on an application.

APPLICATIONS UNDER S. 140 (3), COURTS OF JUSTICE ACT

38.13 (1) This rule applies to applications made under subsection 140 (3) of the *Courts of Justice Act*.

Written Hearing

(2) An application made under subsection 140 (3) of the *Courts of Justice Act* shall be heard in writing without the attendance of the parties, unless the court orders otherwise.

Commencement

(3) The application shall be commenced by filing both a notice of application, in Form 14E.1, and the application record described in subrule 38.09 (2).

Factum not Required

(4) A factum described in clause 38.09 (1) (a) is not required to be filed, but any factum that is filed shall be filed together with the notice of application and the application record.

Interpretation of Service of Notice Rule

(5) Subrules 38.06 (1) and (2) shall be read as if the reference to the notice of application includes reference to the application record and, if applicable, the applicant's factum.

Service on Attorney General

(6) In addition to serving the notice of application, application record and, if applicable, factum, on all parties under subrule 38.06 (1), the applicant shall serve the documents on the Attorney General of Ontario in the manner described in clause 16.02 (1) (h).

Timing of Service

(7) The notice of application, application record and, if applicable, factum shall be served within 15 days after the documents were filed or, if the service is on a person outside Ontario, within 25 days after the documents were filed.

Proof of Service

(8) Proof of service of the notice of application, application record and, if applicable, factum shall be filed immediately after they are served.

Non-application of Rules

(9) Subrules 38.03 (2), (3) and (3.1), 38.06 (3) and (4), rule 38.07, subrules 38.09 (1), (3), (3.1) and (3.2) and rule 38.09.1 do not apply to applications made under subsection 140 (3) of the *Courts of Justice Act*, unless the court orders otherwise.

Opportunity to Respond Before Making Order

(10) Despite subrule (9), the court shall not make an order under subsection 140 (4) of the *Courts of Justice Act* granting leave to institute or continue a proceeding, or rescinding an order made under subsection 140 (1) of that Act, without giving the other parties and the Attorney General of Ontario an opportunity to serve and file a respondent's application record and factum.

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

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(Motion to Convert to Action, returnable August 12, 2020)

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