

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

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

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

Respondents

**SPECIAL REPORT OF THE RECEIVER
(Appointment of Special Receiver)**

March 17, 2020

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INTRODUCTION AND PURPOSE OF THIS SPECIAL REPORT

1. On March 11, 2019, Deloitte Restructuring Inc. (“**Deloitte**”) was appointed by the Court as Receiver (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties of Distinct Infrastructure Group Inc. (the “**Company**”) and its subsidiaries set out in Appendix “**A**” (collectively with the Company, “**DIG**”) pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”). The application for the appointment of the Receiver was brought by Royal Bank of Canada (the “**Bank**”) in respect of secured indebtedness owing by DIG of approximately CDN\$53 million as at that time.
2. An overview of the business of DIG, its stakeholders and its financial position was contained in the Pre-Filing Report of Deloitte.
3. On April 26, 2019, the Receiver issued its second report (the “**Second Report**”) to the Court to provide information about a number of items, and sought an expansion of the Receiver’s powers to include the powers of a licensed insolvency trustee acting in a bankruptcy proceeding. The purpose of the expansion of the Receiver’s powers was to further investigate financial irregularities that had been previously identified to and by the Receiver.
4. The Court issued an Order expanding the Receiver’s investigative powers on May 3, 2019 (the “**Investigative Powers Order**”). A copy of that Order is attached as Appendix “**B**”.
5. The Pre-Filing Report, the Appointment Order, the Investigative Powers Order, the Second Report, and other orders, reports and information filed in connection with the receivership proceedings can be accessed on the Receiver’s case website at www.insolvencies.deloitte.ca/en-ca/dig.

PURPOSE

6. This Special Report has been prepared by the Receiver to provide information to the Court on the Receiver's motion for an order appointing a Special Receiver (as defined below) and authorizing the Special Receiver to continue the Claims (as defined below).

TERMS OF REFERENCE

7. In preparing this Special Report, Deloitte has been provided with, and has relied upon unaudited, draft and/or internal financial information, DIG's books and records and information from third-party sources (collectively, the "**Information**"). Except as described in this Special Report:
 - a. Deloitte has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, Deloitte has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards ("**CAS**") pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance contemplated under CAS in respect of the Information;
 - b. As noted in prior reports of the Receiver, the Company has issued press releases and guidance to the financial markets advising that its financial statements are misstated and should not be relied upon. DIG has made material write downs to its accounts receivable, work in progress, and inventory balances, and accordingly, Deloitte cautions that any financial information reported herein is subject to further verification and may require material revision; and

- c. Deloitte has prepared this Special Report in its capacity as Receiver solely for the purposes noted herein. Parties using the Special Report other than for the purposes outlined herein are cautioned that it may not be appropriate for their purposes.
8. Unless otherwise stated, all dollar amounts contained in this Special Report are expressed in Canadian dollars.

BACKGROUND

9. In December, 2018, Deloitte Restructuring Inc. (“**Deloitte**”) was engaged by the Bank as its consultant to perform a business review of the Company. Pursuant to its engagement by the Bank, Deloitte undertook the following activities:
 - a. A review of the Company’s business plan and financial forecast;
 - b. An analysis of the value of the Bank’s security position;
 - c. A review of the Company’s borrowing base as provided to the Bank; and
 - d. Other items as directed by the Bank.
10. Deloitte began its review after the execution of its engagement letter and reported to the Bank on January 31, 2019.
11. Shortly after Deloitte’s engagement by the Bank as consultant, the Company appointed a new chief financial officer (the “**New CFO**”). The New CFO was appointed on January 14, 2019 to replace the Company’s interim chief financial officer.
12. Shortly after the New CFO’s appointment, and as a result of financial irregularities that were discovered by him, a special committee (the “**Special Committee**”) of the board of directors (the “**Board**”) was formed to investigate the irregularities and determine the best course of action.

13. As set out in further detail in the Pre-Filing Report and the Second Report, the financial irregularities uncovered at DIG were significant. Much of DIG's accounts receivable and work in progress lacked appropriate support, and Deloitte identified various duplicate invoices for identical amounts issued over a short period of time and for which DIG's management could not provide a satisfactory explanation.
14. As a result of the discovery of these financial irregularities, the DIG Board of Directors terminated the employment of the Interim CFO, the Vice President of Finance and the co-CEOs. DIG also announced that its financial statements should not be relied upon.
15. Deloitte was appointed as Receiver by Order dated March 11, 2019. In order to further investigate and pursue the irregularities identified herein, the Receiver sought and was granted all the investigative and other rights and remedies available to a trustee in bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, in the Investigative Powers Order.

THE CLAIMS

The Director and Officer Claim

16. Deloitte has issued two Statements of Claim in connection with the financial irregularities that have been discovered.
17. By Statement of Claim dated July 20, 2020, Deloitte issued a claim against various directors and officers of DIG (the "**D&O Claim**"). A copy of that Statement of Claim is attached as Appendix "**C**".
18. The D&O Claim alleges that the directors and officers either made or directed misstatements in DIG's financial disclosure (both in its public financial statements and in its borrowing base reports provided to the Bank), or failed to detect that DIG's financial disclosure contained material misstatements, in a negligent breach of the duties the directors and officers owed to DIG. Detailed particulars are included in the Statement of Claim.

19. The D&O Claim, together with other related claims arising out of the insolvency of DIG, has been ordered to mediation by Order of Justice Hainey dated November 25, 2020. It is anticipated that a mediation before the Honourable Dennis O'Connor will take place in the summer of 2021.

The MNP Claim

20. By Statement of Claim dated October 2, 2020, Deloitte issued a claim against MNP LLP (the "**MNP Claim**"). A copy of that claim is attached as Appendix "**D**".
21. The MNP Claim alleges that, for each of the financial years 2015 to 2017, during which MNP audited DIG's financial statements, MNP failed to detect that DIG's assets were substantially overstated. Had MNP's audits been conducted in accordance with all applicable standards, the material misstatements would have been detected, and MNP would have been unable to provide an opinion expressing the view that DIG's financial statements presented fairly, in all material respects, DIG's financial position.
22. However, in negligent breach of its duties to DIG, MNP gave a clean audit opinion for each of the financial years 2015 to 2017. Detailed particulars are included in the Statement of Claim.
23. The MNP Claim has been issued but has yet to be served on MNP pending the appointment of a Special Receiver.

THE NEED FOR A SPECIAL RECEIVER

24. The D&O Claim and the MNP Claim (together, the "**Claims**") are a potential asset of DIG's estate. The Receiver's view is that the Claims should be pursued.
25. The Receiver believes that the appropriate next step is to identify and appoint an independent third party (the "**Special Receiver**") with experience in evaluating, managing and pursuing claims similar to the Claims.

26. As one of the 'Big Four' accounting firms, Deloitte's parent firm (Deloitte LLP) has occasion to defend auditor negligence actions that are brought against it. The Receiver wishes to avoid any possible appearance that it would be less rigorous in its pursuit of the MNP Claim as a result. The Receiver has therefore determined that it would be more appropriate for the MNP Claim to be pursued by an independent party.
27. The Receiver is of the opinion that pursuit of the Claims will be aided by the involvement of someone with significant experience in the assessment and quantification of complex commercial claims. The Receiver is also of the opinion that the D&O Claim and the MNP Claim ought to be managed and advanced by the same party, to ensure that the Claims are prosecuted efficiently and with a consistent strategy.

THE PROPOSED SPECIAL RECEIVER

28. The proposed Special Receiver is the Honourable J. Douglas Cunningham, Q.C. He has acted in this role previously, most recently as litigation trustee of Sears Canada Inc. and its affiliates, where his powers were similar to the powers proposed for the Special Receiver in the current proceedings. In particular, Mr. Cunningham as litigation trustee of Sears Canada Inc. was empowered to (i) to pursue claims identified; (ii) to settle or compromise any such proceedings which in his judgment should be settled or compromised; and (iii) to retain experts and counsel as considered necessary or desirable to assist with the exercise of his powers and duties.
29. A copy of Mr. Cunningham's resume is attached as Appendix "E" and a copy of the Order appointing Mr. Cunningham as Litigation Trustee in the Sears Canada Inc. matter is attached as Appendix "F".
30. The proposed Special Receiver requires certain protections in connection with his acceptance of that position. The proposed form of Order provides that the Special Receiver shall incur no liability or obligation as a result of his appointment or as a result of performing his duties or carrying out the

engagement, save and except as a result of any willful misconduct on the part of the Special Receiver. No proceedings shall be commenced against the Special Receiver as a result of, or relating in any way to his duties or engagement, except with leave of the Court.

Limitations in Scope

31. The Special Receiver's mandate will be limited to realizing the value of the Claims. He will not deal with any disputes as to the priority or entitlement of the creditors of DIG to the proceeds of the Claims.

Counsel to the Special Receiver

32. The Receiver will provide litigation and forensic support for the prosecution of the Claims but will not be involved in instructing counsel in the conduct of the Claims. However, the Receiver is of the view that it would be beneficial for Mr. Cunningham to also use Thornton Grout Finnigan LLP ("TGF"), counsel to the Receiver, in order to pursue the Claims. TGF was involved with the drafting of the Claims, is currently involved with advancing the mediation of the D&O dispute and has a detailed understanding of the background to the Claims. TGF's continued involvement will result in efficiencies and cost savings to DIG's creditors. Mr. Cunningham has advised the Receiver that, if appointed by the Court as Special Receiver, he would like to use TGF as his counsel.

CONCLUSION AND RECOMMENDATIONS

33. The Claims are a potential asset of DIG. The Receiver's view is that the Claims ought to be pursued, and the appointment of the Special Receiver to provide instructions to TGF to pursue the Claims is the most appropriate and efficient manner of doing so.
34. The protections provided to the Special Receiver are appropriate, customary and necessary for the Special Receiver to accept this role.

35. For the reasons set out above, the Receiver respectfully requests that the Court approve the Receiver's request for an Order appointing Mr. Cunningham as Special Receiver.

All of which is respectfully submitted at Toronto, Ontario this 17th day of March, 2021.

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

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

Appendix “A”

List of Subsidiaries

Distinct Infrastructure Group West Inc.

DistinctTech Inc.

iVac Services Inc.

iVac Services West Inc.

Crown Utilities Ltd.

Appendix "B"

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



ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.)
JUSTICE HAINEY)
FRIDAY, THE 3RD
DAY OF MAY, 2019

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

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

INTERIM DISTRIBUTION, EXPANSION OF POWERS AND FEE APPROVAL
ORDER

THIS MOTION, made by Deloitte Restructuring Inc., in its capacity as the Court-appointed receiver (the "**Receiver**") of the undertaking, property and assets of each of Distinct Infrastructure Group Inc., Distinct Infrastructure Group West Inc., DistinctTech Inc., iVac Services Inc., iVac Services West Inc. and Crown Utilities Ltd. (collectively, the "**Debtors**"), for an Order, *inter alia*, (i) approving the Auction Services Agreement (as defined below); (ii) approving the Second Report of the Receiver dated April 26, 2019 (the "**Second Report**"), and

the conduct and activities of the Receiver set out therein; (iii) authorizing and directing the Receiver to make an interim distribution to Royal Bank of Canada (the “**Bank**”) on account of the Debtors’ secured indebtedness owing to the Bank; (iv) approving the fees and disbursements of the Receiver and its legal counsel, Aird & Berlis LLP (“**A&B**”) and Thompson Dorfman Sweatman LLP (“**TDS**”); (v) approving the Receiver’s interim Statement of Receipts and Disbursements as at April 19, 2019 (as appended to the Second Report); and (vi) an expansion of the Receiver’s powers was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Receiver, including the Second Report and the appendices thereto, the affidavit of Jordan Sleeth sworn April 26, 2019, the affidavit of Shakaira John sworn April 26, 2019 and the affidavit of Ross McFadyen sworn April 10, 2019, and on hearing the submissions of counsel for the Receiver, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Rachel Bengino sworn April 29, 2019 filed:

SERVICE

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

APPROVAL OF AUCTION SERVICES AGREEMENT

2. THIS COURT ORDERS that the execution of the Auction Services Agreement dated April 22, 2019 between the Receiver and Maynards Industries Canada Ltd. (the “**Auction Services Agreement**”) is hereby authorized and approved.

3. THIS COURT ORDERS that the sale of the Debtors’ assets subject to the Auction Services Agreement (collectively, the “**Auction Assets**”), is hereby approved. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the sale of the Auction Assets and for the conveyance of the Auction Assets to the respective purchaser(s).

4. THIS COURT ORDERS that the net sale proceeds from the Auction Assets shall stand in the place and stead of the Auction Assets, and that all claims and encumbrances shall attach to

the net proceeds from the sale of the Auction Assets with the same priority as they had with respect to the Auction Assets immediately prior to the sale, as if the Auction Assets had not been sold and remained in the possession or control of the Receiver immediately prior to the sale.

APPROVAL OF THE SECOND REPORT

5. THIS COURT ORDERS that the Second Report and the conduct and activities of the Receiver described therein be and are hereby approved; provided, however, that only the Receiver, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

APPROVAL OF FEES AND DISBURSEMENTS

6. THIS COURT ORDERS that the activities of the Receiver and the professional fees and disbursements of the Receiver in the amounts set out in the Second Report are hereby authorized and approved and the Receiver is authorized to pay all such fees and disbursements from available funds.

7. THIS COURT ORDERS that the professional fees and disbursements of A&B, as independent legal counsel to the Receiver, in the amounts set out in the Second Report are hereby authorized and approved and the Receiver is authorized to pay all such fees and disbursements from available funds.

8. THIS COURT ORDERS that the professional fees and disbursements of TDS, as legal counsel to the Receiver in the Province of Manitoba, in the amounts set out in the Second Report are hereby authorized and approved and the Receiver is authorized to pay all such fees and disbursements from available funds.

APPROVAL OF INTERIM RECEIPTS AND DISBURSEMENTS

9. THIS COURT ORDERS that the Receiver's Interim Statement of Receipts and Disbursements for the period of March 11, 2019 to April 19, 2019, as set out in Appendix "B" to the Second Report, be and is hereby approved.

INTERIM DISTRIBUTIONS

10. THIS COURT ORDERS that the Receiver is hereby authorized and directed to distribute to the Bank all funds and receipts currently held by the Receiver in relation to Crown Utilities Ltd. and Distinct Infrastructure Group West Inc., on account of the secured indebtedness owing by the Debtors to the Bank as outlined in the Second Report, in each case subject to the Crown WEPPA Reserve and the Crown Expense Reserve (as each term is defined in the Second Report).

INVESTIGATIVE POWERS

11. THIS COURT ORDERS that Deloitte Restructuring Inc., in its capacity as either the Trustee of the Estate of DistinctTech Inc., a bankrupt, or as Receiver of the Debtors, is hereby authorized to exercise all of the available investigative and other rights and remedies that are available to a trustee in bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

SEALING

12. THIS COURT ORDERS that the unredacted Auction Services Agreement, attached as Confidential Appendix “1” to the Second Report, is hereby sealed until six months after the date of this Order or further order of the Court and shall not form part of the public record.

13. THIS COURT ORDERS that the unredacted Receiver’s Interim Statement of Receipts and Disbursements for the period of March 11, 2019 to April 19, 2019, attached as Confidential Appendix “2” to the Second Report, is hereby sealed until six months after March 27, 2019 (being the closing date of the Crown Transaction (as defined in the Second Report)) or further order of the Court and shall not form part of the public record.

GENERAL

14. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Receiver in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such

assistance to the Receiver as may be necessary or desirable to give effect to this Order or to assist the Receiver in carrying out the terms of this Order.

Hainey J

SUPERIOR COURT OF JUSTICE
ENTERED
MAY 03 2019
RW
COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

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

INTERIM DISTRIBUTION, EXPANSION OF POWERS AND FEE
APPROVAL ORDER

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Lawyers for the Receiver



Electronically issued : 20-Jul-2020
Délivré par voie électronique : 20-Jul-2020
Toronto

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DISTINCT INFRASTRUCTURE GROUP INC. by its
Receiver, DELOITTE RESTRUCTURING INC.

Plaintiff

and

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

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

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

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

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

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

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

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LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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

Date July 20, 2020 Issued by _____
Local Registrar

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

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

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

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

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

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

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

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

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

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

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

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

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

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CLAIM

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

The Parties

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

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

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

Facts

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

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

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

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

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

The Defendants' Misstatements are Discovered

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

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

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

Duties of the Inside Directors and Officers

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

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

Duties of the Outside Directors

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

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

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

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

Breaches of the Duty of Care: Inside Directors and Officers

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

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

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

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- (b) inflated work in progress for certain projects without any apparent commercial justification. Particularly, as part of the 2017 audit, the external auditors restated the 2016 work in progress (unbilled revenue) amount by decreasing revenue and unbilled revenue by \$4.5M to account for amounts deemed not to be recoverable. In addition, for many projects, the work in progress amounts are greater than the total amounts ever invoiced to the client for the respective project, resulting in an overstatement of work in progress balances.
- (c) made routine adjustments of up to 40% per purchase order without any commercial justification.

52. Second, since at least 2015, some or all of the Inside Directors and Officers misstated DIG's accounts receivable in the following manner:

- (a) individual invoice amounts were recorded multiple times in DIG's accounts, such that DIG had multiple outstanding invoices with identical invoice amounts without any apparent commercial justification, and the invoices were ultimately cancelled through credit memos; and
- (b) from time to time, work in progress amounts (which did not correspond to work actually in place) were invoiced and moved to accounts receivable. As there was no apparent underlying work, these invoices remained unpaid and would age until, when the invoice approached the point where it would no longer be eligible for margining into DIG's borrowing base, the invoice would be credited in DIG's financial system, and work in progress amounts would be recorded to replace the

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

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

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

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

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

Breaches of the Duty of Care: Outside Directors

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

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

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

Consequences of the Breaches of Duty of Care

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

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

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

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

Damages

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

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

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

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July 20, 2020

THORNTON GROUT FINNIGAN LLP

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Lawyers for the Plaintiff, Distinct Infrastructure
Group Inc.

DISTINCT INFRASTRUCTURE GROUP INC.

and

GIUSEPPE LANNI also known as JOE LANNI et al.

Plaintiff

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at **Toronto**

STATEMENT OF CLAIM

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Toronto ON M5K 1K7

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Lawyers for the Plaintiff, Distinct Infrastructure Group Inc.



Electronically issued : 02-Oct-2020
Délivré par voie électronique : 02-Oct-2020
Toronto

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

B E T W E E N:

DISTINCT INFRASTRUCTURE GROUP INC. by its
Receiver, DELOITTE RESTRUCTURING INC.

Plaintiff

and

MNP LLP

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

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

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

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

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

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

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

Date October 2, 2020 Issued by _____
Local Registrar

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

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

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CLAIM

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

The Parties

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

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

Overview

7. Since at least 2015, DIG made public representations about its financial position – particularly in its audited financial statements – that contained material misstatements and significant errors.
8. The scale of the misstatement of DIG’s true financial position is breathtaking. Accounts receivable and work in progress were overstated by at least \$12,965,000 or 54% in the 2015 audited financial statements, \$21,221,000 or 48% in the 2016 audited financial statements and \$36,811,000 or 58% in the 2017 audited financial statements.
9. As DIG’s auditor, MNP had a duty to plan and conduct its audit work according to the applicable standards and to express an opinion on whether DIG’s financial statements were

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free from errors or material misstatements. In each of the years 2015, 2016 and 2017 MNP provided a 'clean' audit opinion, expressing the view that DIG's financial statements presented fairly, in all material respects, DIG's financial position.

10. Over the course of three audit years, MNP failed to detect that DIG's most significant assets were overstated by 48% or more. The magnitude and repetition of the misstatements is evidence of the gross negligence of MNP in performing its audit work. Any audit conducted in accordance with the applicable standards would have uncovered the material misstatements in DIG's financial statements.
11. DIG's creditors and investors lent DIG money and invested in its shares in reliance on the misleading financial position presented by the financial statements.
12. Adjusting for the misstatements and other errors, DIG had been insolvent since at least 2015, and its liquidation deficit had been increasing. DIG survived only by spending its creditors' and investors' money – money that would not have been advanced if MNP had performed its duties, properly audited DIG's financial statements and disclosed DIG's true financial position.
13. Ultimately, the unsustainable debt burden taken on by DIG through the continued operation of its business led to its financial ruin and receivership. As a result of MNP's gross negligence, DIG owes its creditors in excess of \$60 million that it has no ability to repay. MNP is liable for the increase in DIG's liquidation deficit.

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Factual Background

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

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

MNP Audits DIG's Financial Statements

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

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

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

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

The Misstatements are Discovered

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

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

31. At a meeting of the board of directors on February 18, 2019, Mr. Nashmi presented his preliminary findings on the financial position of DIG. Based on his investigations to date, Mr. Nashmi reported that as of September 30, 2018, DIG's interim financial statements:
- (a) overstated accounts receivable by approximately \$22.7 million (reducing them to approximately \$15 million from \$37.7 million reported);
 - (b) overstated work in progress by approximately \$34 million (reducing it to approximately \$1.7 million from the \$35.7 million reported);
 - (c) overstated inventory by approximately \$2.1 million (reducing it to approximately \$0.1 million from the \$2.2 million reported);
 - (d) overstated prepaid expenses by approximately \$2.2 million (reducing it to approximately \$1.1 million from the \$3.3 million reported); and
 - (e) overstated shareholders' equity by approximately \$63.4 million (reducing it to a deficit of approximately \$38 million from the \$25.4 million surplus reported).
32. The misstatements began in at least 2015 (and possibly earlier) and continued (and accumulated) throughout the period of MNP's tenure as DIG's auditor without detection. Accounts receivable and work in progress were overstated by at least \$12,965,000 or 54% in the 2015 audited financial statements, \$21,221,000 or 48% in the 2016 audited financial

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

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

Duty of Care Owed by MNP to DIG

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

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

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

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

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MNP's Breaches of its Duty of Care

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

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

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

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- (b) Second, the actual amount of the exaggeration of DIG's assets was at least \$21,221,000 in 2016 and not the \$4,471,174 reported in the restatement. MNP failed to carry out reasonable and sufficient audit procedures to satisfy itself that the reclassified work in progress actually existed or to detect the balance of the inflation of accounts receivable and work in progress in 2016.
- 47. MNP ought to have detected the above practices, refused to include the misstated amounts in DIG's financial statements and put in place systems to detect similar misstatements. Its failure to do so was grossly negligent.
- 48. MNP was grossly negligent further in that:

 - (a) MNP failed to conduct the 2015, 2016 and 2017 audits in accordance with Canadian GAAS;
 - (b) MNP failed to ensure that DIG's consolidated financial statements presented fairly the financial position of DIG in accordance with International Financial Reporting Standards;
 - (c) MNP failed to exercise the skill, care and caution of a reasonably competent, careful and cautious auditor;
 - (d) MNP rendered unqualified audit opinions with respect to DIG's financial statements in 2015, 2016 and 2017, when those financial statements did not present fairly, in all material respects, the financial position of DIG as at the end of such fiscal years;

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

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

Consequences of the Breaches of Duty of Care

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

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

50. In particular:

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

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

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

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

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

Damages

55. DIG has suffered damages by reason of MNP's negligence as described herein.

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

57. This claim may be served on MNP outside of Ontario without leave pursuant to Rules 17.02(f) and 17.02(g) of the *Rules of Civil Procedure*.

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

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October 2, 2020

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Lawyers for the Plaintiff, Distinct Infrastructure
Group Inc. through its court appointed Receiver,
Deloitte Restructuring Inc.

DISTINCT INFRASTRUCTURE GROUP INC.

and

MNP LLP

Plaintiff

Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at **Toronto**

STATEMENT OF CLAIM

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Lawyers for the Plaintiff, Distinct Infrastructure Group Inc.
through its court appointed Receiver, Deloitte
Restructuring Inc.

Appendix "E"

The Honourable J. Douglas Cunningham, Q.C. was appointed to the Ontario Superior Court in 1991 and in his more than two decades of distinguished judicial service, he presided over hundreds of complex, high-stake trials. From 2000-2002, he was the Regional Senior Judge for the East Region, based in Ottawa, Canada. In 2002, Mr. Cunningham was appointed Associate Chief Justice of the court based in Toronto, Canada, a position he held until his early retirement from the Court in September 2012.

While on the court, Mr. Cunningham was a member of the Canadian Judicial Council where he served as a member of the Executive Committee and chaired the Administration of Justice Committee. He was also a member of the Court Martial Appeals Court and the Pension Appeals Board.

Throughout his judicial career, Mr. Cunningham focused on complex civil litigation matters and as well was regularly called upon to mediate challenging high-stakes cases. His reputation for success in settling cases is well known throughout the Ontario bar and beyond.

In 2012, Cunningham Dispute Resolution Services Ltd. was founded and since 2016, Mr. Cunningham has been a resident arbitrator and mediator at Arbitration Place based in Toronto and Ottawa with retainers across Canada and internationally. In this role, he leverages his extensive experience in the service of counsel and parties looking for fair, creative and efficient resolution of their disputes.

Mr. Cunningham has a unique ability to not only understand the legal issues but also to quickly appreciate the dynamics and the interests of the parties involved in a dispute. A quick study, he is a patient, thoughtful listener whose creativity in fashioning results in complex cases is well known and appreciated.

In addition to his busy arbitration and mediation practice, Mr. Cunningham has regularly been called upon by both the Federal and Provincial governments to conduct important and timely assignments. These include the Mississauga Judicial Inquiry, the review of Tarion Corporation, a review of the dispute resolution mechanisms under the *Insurance Act*, a review of elevator availability problems in Ontario, and most recently as a member of a three-person panel reviewing issues within the Ontario Provincial Police force.

Mr. Cunningham is a graduate of Western University (Huron College) and Queen's University Law School. Called to the bar in 1969, he was appointed a Queen's Counsel in 1980 and designated a specialist in civil litigation in 1990. In 2013, he received an honorary LL.D. from the Law Society of Upper Canada. Mr. Cunningham as well has attended the Harvard and Cornell universities mediation programs.

Mr. Cunningham has arbitrated and mediated a wide variety of cases since 2012. These include business/commercial disputes (including high-tech), class action litigation, employment, construction, estates, insurance, professional liability (legal, medical and accounting), securities, serious personal injury and entertainment/sports disputes. As well, Mr. Cunningham has successfully mediated a number of clergy abuse cases across Canada.

In addition to being available for arbitrations and mediations, Mr. Cunningham is often called upon by counsel as a consultant in trial strategy, appellate reviews and neutral evaluation.

Appendix "F"

Court File No. CV-17-11846-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) MONDAY, THE 3RD
)
MR. JUSTICE HAINEY) DAY OF DECEMBER, 2018

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUEBEC INC., 191020 CANADA INC., THE CUT INC.,
SEARS CONTACT SERVICES INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR
COVERING CENTRES INC., 173470 CANADA INC., 2497089
ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA
INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

**AMENDED AND RESTATED ORDER
(APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)**

THIS MOTION, made by the Litigation Investigator, for an Order pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”) and Rule 6.01 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194, as amended (the “**Rules**”) for an order, among other things, appointing a Litigation Trustee to pursue certain claims on behalf of the Applicants and/or any creditors of the Applicants and providing for the process by which a

common issues trial will be heard, was heard this day at 330 University Avenue, 8th Floor, Toronto, Ontario.

ON READING the Monitor's 27th Report to the Court dated November 5, 2018, the Litigation Investigator's First Report to the Court dated November 5, 2018 (the "**First Report**"), and the Order of the United States Bankruptcy Court (Southern District of New York) *In re: Sears Holdings Corporation, et al.* (Case No. 18-23538 (RDD)) granted on May 23, 2019, and on reading and hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Litigation Investigator, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service.

SERVICE

1. THIS COURT ORDERS that this motion is properly returnable today and hereby dispenses with further service thereof.

TERMINATION OF LITIGATION INVESTIGATOR APPOINTMENT

2. THIS COURT ORDERS that the appointment of the Litigation Investigator pursuant to the Amended Litigation Investigator Order dated April 26, 2018 (the "**Amended Litigation Investigator Order**"), is hereby terminated, effective immediately.

CONTINUATION AND EXTENSION OF LITIGATION CREDITORS' COMMITTEE

3. THIS COURT ORDERS that the Creditors' Committee established pursuant to the Amended Litigation Investigator Order dated April 26, 2018 shall continue as currently constituted thereunder to consult with and provide input to the Litigation Trustee Parties in respect of the claims brought by the Litigation Trustee in accordance with this Order.

4. THIS COURT ORDERS that the Litigation Trustee Parties shall meet with the Creditors' Committee on a monthly basis unless otherwise agreed for a particular month by said parties, and which meetings shall be subject to confidentiality and that privilege shall be maintained.

APPOINTMENT OF LITIGATION TRUSTEE

5. THIS COURT ORDERS that the Honourable J. Douglas Cunningham, Q.C. is hereby appointed as an officer of this Court to be the Litigation Trustee over and in respect of the Applicants' claims identified in the First Report of the Litigation Investigator (the "**Litigation Assets**" or the "**Claims**") on the terms described herein.

LITIGATION TRUSTEE'S POWERS

6. THIS COURT ORDERS that the Litigation Trustee is hereby empowered, authorized and directed to do all things and carry out all actions necessary to prosecute the Claims, including:

- (a) to engage, give instructions and pay counsel as well as consultants, appraisers, agents, advisors, experts, auditors, accountants, managers and such other persons from time to time on whatever basis the Litigation Trustee may agree, in consultation with the Monitor, to assist with the exercise of his powers and duties. Notwithstanding such authority, the Litigation Trustee shall be under no obligation to consult with its counsel, consultants, appraiser, agents, advisors, experts, auditors, accountants, managers and its good faith determination not to do so shall not result in the imposition of liability on the Litigation Trustee, unless such determination is based on gross negligence or willful misconduct;

- (b) to execute, assign, issue and endorse documents of whatever nature in the name of and on behalf of Sears Canada for any purpose in connection with the Claims or otherwise pursuant to this Order; and
- (c) to pursue the Claims, defend any counter claim, third party claim or other claim brought against Sears Canada, and subject to further Order of the Court, and in consultation with the Monitor, to settle or compromise, abandon, dismiss or otherwise dispose of such proceeding. The authority hereby conferred shall extend to any appeals or applications for judicial review in respect of any order or judgment pronounced in such proceeding.

7. THIS COURT ORDERS that, notwithstanding the generality of paragraph 6(c) above, the Litigation Trustee is hereby authorized and empowered to commence claims, in his own name or on behalf of the Applicants, against ESL Investments Inc. (and certain affiliates), Edward Lampert, William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney, Douglas Campbell, and Sears Holdings Corporation.

8. THIS COURT ORDERS that the stay of proceedings provided for in paragraph 25 of the Initial Order dated June 22, 2017 (the “**Initial Order**”), is hereby lifted as against William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell for the purposes of permitting the claims referred to in the First Report, including those of the Litigation Trustee, to be commenced and pursued against those persons.

INDEMNITY

9. THIS COURT ORDERS that the Litigation Trustee shall incur no liability or obligation as a result of his appointment or in carrying out of any of the provisions of this Order, save and except for any gross negligence or any willful misconduct. Sears Canada shall indemnify and hold harmless the Litigation Trustee and his designated agents, representatives and professionals with respect to any liability or obligations as a result of his appointment or the fulfillment of his duties in carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct. For clarity, in no event shall the Litigation Trustee be personally liable for any costs awarded against Sears Canada in the action. Any such costs awarded shall be a claim solely against Sears Canada estate. No action, application or other proceeding shall be commenced against the Litigation Trustee as a result of, or relating in any way to his appointment, the fulfillment of his duties or the carrying out of any Order of this Court except with leave of this Court being obtained. Notice of any such motion seeking leave of this Court shall be served upon Sears Canada, the Monitor and the Litigation Trustee at least seven (7) days prior to the return date of any such motion for leave.

10. THIS COURT ORDERS that the indemnity pursuant to paragraphs 5-9 above shall survive any termination, replacement or discharge of the Litigation Trustee. Upon any termination, replacement or discharge of the Litigation Trustee, on not less than 10 business days' notice, all claims against the Litigation Trustee, his designated agents, representatives and professionals for which leave of the Court has not already been sought and obtained shall be, and are hereby forever discharged, other than claims for which a party seeks leave prior to the discharge date to bring a claim against the Litigation Trustee and (i) such leave has been obtained; or (ii) the request for leave remains outstanding.

LITIGATION TRUSTEE'S ACCOUNTS

11. THIS COURT ORDERS that the Litigation Trustee and counsel to the Litigation Trustee (collectively, the "**Litigation Trustee Parties**") shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Sears Canada as part of the costs of these proceedings. Sears Canada is authorized and directed to pay the accounts of the Litigation Trustee Parties on a bi-weekly basis (or such other interval as may be mutually agreed upon) and, in addition, Sears Canada is hereby authorized to pay to the Litigation Trustee Parties retainers not exceeding \$50,000.00 each, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

12. THIS COURT ORDERS that the Litigation Trustee Parties shall pass their accounts from time to time, and for this purpose the accounts of the Litigation Trustee Parties are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

13. THIS COURT ORDERS that the Litigation Trustee Parties shall be entitled to the benefit of and are hereby granted a charge in the maximum amount of \$500,000.00 (the "**Litigation Trustee's Charge**") on the "**Property**" of Sears Canada as defined by paragraph 4 of the Initial Order, ranking *pari passu* with the Administration Charge (as defined in the Initial Order), in priority to all other security interests, trusts (statutory or otherwise), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, including all charges granted by the Initial Order (other than the Administration Charge) and all other Orders of this Court granted in these proceedings.

14. THIS COURT ORDERS that the filing, registration or perfection of the Litigation Trustee's Charge shall not be required, and that the Litigation Trustee's Charge shall be valid and enforceable for all purposes, notwithstanding any such failure to file, register, record or perfect.

15. THIS COURT ORDERS that the granting of the Litigation Trustee's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Litigation Trustee's Charge shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declaration of insolvency herein; (b) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) the provisions of any federal or provincial statutes, and notwithstanding any provision to the contrary in any agreement.

16. THIS COURT ORDERS that the payments made by Sears Canada pursuant to this Order and the granting of the Litigation Trustee's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. THIS COURT ORDERS that nothing herein contained shall require the Litigation Trustee to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the

disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the “**Environmental Legislation**”), provided however that nothing herein shall exempt the Litigation Trustee from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Litigation Trustee shall not, as a result of this Order or anything done in pursuance of the Litigation Trustee’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

PROCEDURE

18. THIS COURT ORDERS that a case management judge for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report will be appointed as soon as possible.

19. THIS COURT ORDERS that the procedure to be followed for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report shall be determined by the case management judge.

GENERAL

20. THIS COURT ORDERS that, without limiting any other provisions of this Order, the Litigation Trustee may from time to time apply to this Court for advice and directions in the discharge of his powers and duties hereunder.

21. THIS COURT ORDERS that the Monitor and the Litigation Trustee may report to the Court on their activities from time to time as any of them may see fit or as this Court may direct.

22. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Litigation Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Litigation Trustee and its agents in carrying out the terms of this Order.

23. THIS COURT ORDERS that the Litigation Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Litigation Trustee is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

24. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

HAINY, J.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA
INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA
INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

AMENDED AND RESTATED ORDER
(APPOINTMENT OF LITIGATION TRUSTEE,
LIFTING OF STAY, AND OTHER RELIEF)

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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

DISTINCT INFRASTRUCTURE GROUP INC. et al.

- and -

Applicant

Respondents

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

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

Proceedings commenced at Toronto

**SPECIAL REPORT OF THE RECEIVER
(Action Against Former Executives)**

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