

Court File No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

SA CAPITAL GROWTH CORP.

Applicant

and

**CHRISTINE BROOKS AS EXECUTOR OF THE ESTATE OF ROBERT MANDER,
DECEASED AND E.M.B. ASSET GROUP INC.**

Respondents

and

PETER SBARAGLIA

Moving Party/Appellant

and

RSM RICHTER INC. AND ONTARIO SECURITIES COMMISSION

Responding Parties/Respondents

NOTICE OF APPEAL

THE MOVING PARTY, PETER SBARAGLIA, APPEALS to the Court of Appeal from the Order of The Honourable Justice Pattillo dated May 23, 2012 (the "Order"), made at Toronto, Ontario.

THE APPELLANT ASKS that the Order be set aside and that the following relief be granted:

1. The Receiver be compelled to prepare the Index (as defined below) and deliver to Sbaraglia all of the Requested Documents (as defined below);
2. Costs of this Appeal and the Motion below; and
3. Such further and other relief as counsel may advise and this Honourable Court Permit.

THE GROUNDS OF APPEAL are as follows:

1. Robert Mander (“Mander”) was a fraudster that killed himself when his Ponzi scheme was uncovered in March, 2010;
2. In March, 2010, Justice Morawetz appointed the Respondent, Duff & Phelps Canada Restructuring Inc. (formerly RSM Richter Inc.) as receiver over the assets, property and undertaking of Mander (and then his Estate) and one of his companies (the “Receiver”), and the Receiver began an investigation into their affairs;
3. In July, 2010, Justice Morawetz authorized the Receiver to also investigate the affairs of the Appellant, Peter Sbaraglia (“Sbaraglia”), and several other related persons;
4. Trained as a dentist, Sbaraglia was one of a number of persons that invested funds with Mander and subsequently became a victim of the Ponzi scheme;
5. During the course of the Receiver’s investigation, interviews were conducted and documents obtained that were relied upon by the Receiver in preparing and delivering reports to the Court below;

6. On February 24, 2011, the Respondent, Ontario Securities Commission (the “OSC”), issued a Statement of Allegations that, among other things, alleges that Sbaraglia was engaged in securities fraud and misled the OSC. In issuing the Statement of Allegations, the OSC relied on the reports of the Receiver and disclosure provided to Sbaraglia by the OSC contains multiple reports of the Receiver;

7. On January 24, 2012, Sbaraglia’s motion before the OSC seeking the production of certain documents from the Receiver was dismissed on jurisdictional grounds;

8. On April 23, 2012, Sbaraglia brought a motion on the Commercial List seeking to obtain the following documents from the Receiver (the “Requested Documents”):

- a) Transcripts, recordings and/or notes of interviews conducted by the Receiver of the following individuals:
 - i. Maria Zurini, Grant Walton, Colleen Auriemma, Tascha Fluke, Deryl Ward, Terri Oldfield, Heather Shantora, Davide Amato, Bradley Ivanchuk, Thomas J. Obradovich, Christine Brooks and Mehran Shahviri (the “Non-Professionals”);
 - ii. Julia Dublin (“Dublin”), Michael Miller (“Miller”), Peter Welsh (“Welsh”) and Peter Tonin (“Tonin”) (collectively, the “Professionals”);
- b) Documents provided by these individuals to the Receiver in connection with their interviews, and documents produced to the Receiver by Tonin and Welsh pursuant to Court order;
- c) Certain deleted e-mails referred to in a report by the Receiver to the Court below (the “Deleted E-mails”); and
- d) Any further documents requested by Sbaraglia once he reviewed an index of the materials in the Receiver’s power, possession and/or control (the “Index”);

9. In support of his request for relief, Sbaraglia raised two related but independent principles:

- a) Sbaraglia has a right to make full answer and defence before the OSC and his motion was analogous to an *O'Connor* application; and
- b) Sbaraglia is an “interested person” to whom the Receiver owes an obligation to make full disclosure of relevant information;

10. On April 30, 2012, Sbaraglia’s OSC hearing was adjourned from June 4, 2012 to October 22, 2012 on a partially peremptory basis;

11. On May 9, 2012, Justice Pattillo heard Sbaraglia’s motion seeking to obtain documents from the Receiver. The OSC did not oppose the motion but the Receiver did;

12. On May 23, 2012, Justice Pattillo granted some of the relief sought by Sbaraglia and, in particular:

- a) Found that Sbaraglia was an “interested party” but declined to compel the Receiver to produce the Requested Information on that basis;
- b) Found that the principles set forth in *O'Connor* and *McNeil* apply to receivers and that the Receiver was required to produce some or all of the Requested Documents if they were “likely relevant” and the balancing of the competing interests at stake favours disclosure to Sbaraglia;
- c) Found that Sbaraglia had failed to establish that the following Requested Documents were “likely relevant”:
 - i. Interviews of the Non-Professionals as well as any documents provided by them to the Receiver;
 - ii. Certain documents provided by the Professionals;

- iii. Notes of discussions with two of the Professionals (Welsh and Tonin);
 - iv. The Index;
- d) Found that Sbaraglia had established that the following Requested Documents were “likely relevant”:
- i. Certain documents provided by the Professionals;
 - ii. Interviews of Miller and Dublin;
 - iii. The Deleted E-mails;
- e) Ordered the Receiver to deliver the “likely relevant” documents by no later than June 10, 2012 to permit their review in connection with a determination of whether some or all of them should be produced to Sbaraglia;

13. Notwithstanding His Honour’s recognition that the principles set forth in *O’Connor* and *McNeil* apply to receivers, Justice Pattillo committed a number of errors that warrant the intervention of this Honourable Court. In particular, Justice Pattillo erred by:

- a) Failing to compel the Receiver to produce the Requested Documents on the basis that Sbaraglia is an “interested party”;
- b) Failing to find that all of the Requested Documents are relevant or, in the alternative, likely relevant;
- c) Considering matters extraneous to the relevance analysis, including:
 - i. the potential availability of the Requested Documents (or information contained therein) from persons other than the Receiver;
 - ii. the prior cross-examinations of some of the Non-Professionals;
 - iii. whether or not a particular Requested Document can be used to impeach credibility;

d) Failing to compel the Receiver to prepare and produce an Index so that Sbaraglia can request additional relevant documents;

14. Sbaraglia seeks an expedited hearing of the within Appeal; and

15. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The Order appealed from is a final Order of a Judge of the Superior Court of Justice;

2. Sections 6(1)(b) and 134 of the *Courts of Justice Act* and Rule 61 of the *Rules of Civil Procedure*;

3. Leave to appeal is not required with respect to the Order appealed from; and

4. Such further and other bases of appellate jurisdiction as counsel may advise and this Honourable Court permit.

Date: June 8, 2012

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