IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c.S.5, AS AMENDED

AND IN THE MATTER OF PETER SBARAGLIA

FACTUM OF ROBERT KOFMAN
(MOTION HEARD FEBRUARY 8, 2013)

February 4, 2013

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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c.S.5, AS AMENDED

AND IN THE MATTER OF PETER SBARAGLIA

FACTUM OF ROBERT KOFMAN

INTRODUCTION

Summary

1. Robert Kofman, of Duff & Phelps Canada Restructuring Inc. (formerly, RSM Richter Inc.) ("D&P" or the "Receiver") moves to quash the summons (the "Summons") served on him by the Respondent, Peter Sbaraglia ("Sbaraglia"), on January 17, 2013. Pursuant to the Summons, Sbaraglia attempts to compel Kofman to produce documents that were obtained and created by D&P in its capacity as Court-appointed Receiver. This is Sbaraglia's third attempt to so compel this production. In October 2012, the Ontario Court of Appeal unequivocally held that, as a matter of law, the Receiver could not be compelled to produce documents to Sbaraglia.

2. As a result, Sbaraglia should not have had the Summons issued and the Summons must be quashed.

Background

3. In March 2010, D&P was appointed Receiver by the Ontario Superior Court of Justice (the "Court") over the assets, property and undertaking of Robert Mander ("Mander"), his company E.M.B. Asset Group Inc. ("EMB") and related companies as a result of a Ponzi scheme being operated by Mander (the "Receivership"). The Receiver was then directed to investigate Sbaraglia, his wife and companies. As a result of that investigation and one carried out by Staff

of the Ontario Securities Commission (the "OSC"), D&P was appointed Receiver over Sbaraglia in December 2010.

4. On February 24, 2011, the OSC issued a Notice of Hearing and Statement of Allegations against Sbaraglia alleging that, among other things, Sbaraglia was engaged in securities fraud and had misled the OSC.

5. On May 9, 2012, Sbaraglia brought a motion in the Court seeking an order compelling the Receiver to produce documents and information prepared and obtained by it in furtherance of its duties under the Receivership for use by Sbaraglia in this OSC proceeding.

6. The Motions Judge, while he denied Sbaraglia most of what he sought, ordered the Receiver to produce a limited number of documents to the Court for its review in order for the Court to determine whether and to what extent production of the documents should ultimately be ordered to Sbaraglia.

7. On October 10, 2012, the Court of Appeal for Ontario set aside the Motions Judge's Order and affirmed that the fruits of the Receiver's investigations are not producible for any purpose outside of the Receivership.

8. In spite of the Court of Appeal's final Order in the Receivership proceeding, the Summons purports to require Kofman, a senior representative of the Receiver, to bring and produce a significant number of documents – all of which were prepared and obtained in furtherance of the Receiver's duties under the Receivership – in this OSC proceeding. The Summons constitutes an abuse of process and is *res judicata* as it is an attempt to re-litigate an issue that has been fully determined by the Court of Appeal for Ontario. The documents sought

to be produced are essentially the same as those Sbaraglia sought in the Motion, and include all documents relevant to the Statement of Allegations, all documents provided to the Receiver by individuals with whom it met pursuant to its mandate, and all notes and recordings taken by the Receiver and/or the Receiver's lawyer during those interviews .

9. The Court of Appeal's decision is supported by a large body of case law that makes clear that documents prepared and obtained by a Court Officer in one proceeding are not producible for a collateral purpose.

10. Further, the scope of the Summons is overly broad and unfocused. It purports to require Kofman to produce documents that simply cannot be identified without the Receiver engaging in a full sweep of all documents. The case law is clear that in such circumstances, the request for production amounts to a "fishing expedition" and must be disallowed. Moreover and in any event, there is no evidence to suggest that any of the documents requested are relevant to the issues in this OSC proceeding. For these reasons, the Summons must be quashed.

SUMMARY OF FACTS

Background

11. In March 2010, a receivership proceeding was commenced against Mander and EMB after it was alleged that Mander was carrying on a 'Ponzi' scheme and that he had misappropriated tens of millions of dollars from investors in Ontario.

12. Pursuant to an Order of the Court (Commercial List) made on March 17, 2010, as amended by Orders the Court made thereafter (the "Receivership Orders"), D&P was appointed

Receiver over the assets, property and undertaking of Mander, EMB and other related entities (the "Mander Debtors") under section 101 of the *Courts of Justice Act*.

13. After its appointment and in accordance with the Receivership Orders, the Receiver conducted an investigation of Mander, pursuant to which the Receiver compelled production of documents from certain parties who appeared to have a relationship with Mander, including the Mander Debtors' lawyers and accountant (the "Professionals"). Also in accordance with the Orders, the Receiver requested and held interviews with several individuals who the Receiver had reasons to believe had knowledge of the Mander Debtors, including certain of the Professionals.

14. In its Fourth Report to Court, the Receiver advised the Court that numerous issues identified by the Receiver as part of its investigation of the Mander Debtors suggested that an investigation should be undertaken of Peter Sbaraglia, his wife Mandy Sbaraglia, and their companies, CO Capital Growth Corporation and 91 Days Hygiene Inc. (the "CO Capital Debtors"). On July 14, 2010, the Court authorized and directed the Receiver to commence such an investigation.

15. On September 8, 2010, following an investigation pursuant to s. 11(1) of the *Securities Act*, R.S.O. 1990 c.S.5, as amended, which began in July 2008, the OSC filed an application on the Commercial List seeking the appointment of a receiver over the business, assets and undertakings of the CO Capital Debtors.

16. On September 9, 2010, the Receiver filed its Seventh Report to Court, wherein it recommended that a receiver be appointed over the CO Capital Debtors and that the CO Capital Debtors should not oppose the appointment of a receiver, as the evidence strongly suggested

improper conduct on behalf of the CO Capital Debtors, including Sbaraglia, and because contested proceedings would most certainly result in the appointment of a receiver and would be very expensive and to the detriment of the investors and creditors.

17. Notwithstanding the Receiver's advice, the CO Capital Debtors strenuously opposed the appointment of a receiver.

18. On November 12, 2010, the Receiver filed its Ninth Report to Court which set out the results of the Receiver's further investigations and cross-examinations.

19. By Order of Justice Morawetz dated December 23, 2010, the Receiver was appointed as receiver over the CO Capital Debtors. In His Honour's Decision, several critical findings were made, including that:

(a) Sbaraglia and his counsel misled the OSC during the OSC's investigation in 2009, including by misleading statements made by Sbaraglia under oath;

(b) CO Capital used funds received from one investor to repay amounts owing to other investors (i.e. conducted a Ponzi scheme);

(c) the Sbaraglias used investor monies to fund their lifestyle and the business expenses of CO Capital; and

(d) of the $21 million received by the CO Capital Debtors from investors, $6 million was retained by the CO Capital Debtors to fund personal expenses, business expenses and trading losses.

The OSC Proceeding

20. On February 24, 2011, the OSC issued a Notice of Hearing and Statement of Allegations against Sbaraglia alleging that, among other things, Sbaraglia was engaged in securities fraud and had misled the OSC.

21. The Receiver is not a party to the OSC's proceedings against Sbaraglia.

Sbaraglia's Motion in the Ontario Superior Court of Justice

22. On May 9, 2012, Sbaraglia brought a motion in the Court (the "Motion") seeking an order compelling the Receiver to produce documents and information prepared and obtained by the Receiver in furtherance of its duties and the Receivership Orders for use by Sbaraglia in this OSC proceeding. Specifically, Sbaraglia sought an order requiring the Receiver to:

(a) produce the Receiver's own notes of interviews with individuals, including the Professionals (the "Individuals") who met with the Receiver pursuant to the terms of the Receivership Orders;

(b) produce documents provided to the Receiver by Individuals as required by the Receivership Orders;

(c) prepare an index of all of the documents in the Receiver's possession (being thousands of documents); and

(d) produce any other documents in the Receiver's possession that Sbaraglia says are relevant to the OSC proceedings.

23. The Receiver opposed the Motion, arguing that it would be contrary to the role of a Court Officer, contrary to a large body of case law, contrary to good practice and contrary to policy if

the Receiver was required to produce the requested documents and prepare the requested index for Sbaraglia's use in another proceeding.

24. On May 23, 2012, Justice Pattillo of the Court held that, "given the law relating to receiverships", Sbaraglia was not entitled to production of the information he sought on the Motion.[1] While the Motions Judge denied Sbaraglia most of what he sought, the Receiver was ordered to produce to the Court for its review transcripts of the Receiver's interviews with the Mander Debtors' lawyers as well as certain documents obtained by the Receiver pursuant to the Receivership Orders for the Court's review, in order for the Court to determine whether and to what extent production of the transcripts and documents should ultimately be ordered to Sbaraglia for use by Sbaraglia in his OSC proceeding.

Appeal and Cross-Appeal in the Court of Appeal for Ontario

25. On June 8, 2012, Sbaraglia filed a Notice of Appeal with the Court of Appeal for Ontario asking that the Order of Justice Pattillo be set aside and that an Order be granted compelling the Receiver to prepare and produce all of the documents requested by Sbaraglia in the Motion (the "Appeal").

26. On June 15, 2012, the Receiver filed a Notice of Cross-Appeal with the Court of Appeal for Ontario asking that the Order of Justice Pattillo be set aside in its entirety and that the Motion brought by Sbaraglia be dismissed in its entirety (the "Cross-Appeal").

27. On October 10, 2012, the Court of Appeal for Ontario dismissed Sbaraglia's Appeal, allowed the Receiver's Cross-Appeal, and set aside the Order of Justice Pattillo requiring the

[1] *SA Capital Corp. v. Mander Estate*, 110 O.R. (3d) 765, 2012 ONSC 2800 at para. 29.

Receiver to produce materials.[2] The Court of Appeal affirmed that the fruits of the Receiver's investigations are not producible for any purpose outside of the Receivership[3]:

> In our view the application judge correctly found that a court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate in the receivership to be used in a separate proceeding.
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> [...]
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> The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.
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> We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

28. On November 6, 2012, the Court of Appeal ordered Sbaraglia to pay $50,000 in costs to the Receiver. Sbaraglia has refused to do so, in breach of the Court of Appeal's Order.

The Summons on Robert Kofman

29. On January 17, 2013, Sbaraglia had the OSC issue a Summons for Kofman.

30. In direct contravention of the Court of Appeal's Order in the Receivership proceedings, the Summons purports to require the Receiver to bring and produce a significant number of documents – all of which were prepared and obtained in furtherance of the Receiver's duties and the Receivership Orders – in this OSC proceeding, currently scheduled to commence on March

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[2] *SA Capital Corp. v. Mander Estate*, 112 O.R. (3d) 16, 2012 ONCA 681 ("*SA Capital* (C.A.)").
[3] Ibid at paras. 6; 9-10.

18, 2013. The documents sought to be produced in the Summons are essentially the same as those Sbaraglia sought to be produced in the Motion, and include:

(a) Copies of all documents relevant to the Statement of Allegations;

(b) Copies of all documents provided to the Receiver by the Individuals (including the Professionals) who met with the Receiver pursuant to the terms of the Receivership Orders;

(c) Copies of all notes taken by the Receiver and/or the Receiver's lawyer during the interviews by the Receiver of the Individuals;

(d) Copies of all recordings of any interviews; and

(e) Copies of all documents provided by the Receiver and/or the Receiver's lawyer to the OSC.

31. On January 24, 2013, Kofman served a Notice of Motion for an order quashing the Summons.

STATEMENT OF ISSUES, LAW & AUTHORITIES:

32. The only issue in this motion is whether the Summons should be quashed.

The Summons Should be Quashed

33. It is respectfully submitted that the Summons should be quashed, for three reasons:

(a) First, the attempt to compel the Receiver to produce documents to Sbaraglia for this proceeding is *res judicata* by issue estoppel, as it is an attempt to re-litigate an

issue that has been fully determined by the Court of Appeal for Ontario and therefore constitutes an abuse of process;

(b) Second, the law is clear that the Receiver, as a Court officer, cannot be compelled to produce documents obtained in carrying out Court ordered obligations, for use in another proceeding or for a collateral purpose; and

(c) Third, the scope of the Summons is overly broad and therefore amounts to an abuse of process. The Summons does not describe the documents sought to be produced by Kofman with enough particularity that they may be retrieved without a full sweep of all documents. Moreover and in any event, the documents requested are not relevant to the issues in this OSC proceeding. As a result, the Summons amounts to a fishing expedition and thus constitutes a further abuse of process.

(a) The Issues Regarding the Summons are Res Judicata

34. The decision of the Court of Appeal determined, with finality, the issue that was before it and that is presently before the Commission on this motion – whether a Court Officer can be compelled to produce documents, prepared and obtained in furtherance of the Officer's duties under orders granted in one proceeding, for use by an individual in another proceeding or for other collateral purposes. The Court of Appeal has determined that the answer is 'no'. By serving the Summons on Kofman in this proceeding and thereby seeking to compel Kofman to produce essentially the same documents as those sought to be produced in the Motion and on the Appeal, Sbaraglia is attempting to re-litigate an issue that has already been finally determined.

35. In *Toronto (City) v. C.U.P.E., Local 79*[4], the Supreme Court of Canada examined the concept of "issue estoppel", a branch of *res judicata*. The Supreme Court held that in order for issue estoppel to apply, three requirements must be satisfied: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies.

36. In this case, all three requirements are met. The issue on this motion is the same issue as the one decided by the Court of Appeal; the Court of Appeal's decision is final; and the parties are the same. As a result, the Court of Appeal's findings render *res judicata* the Summons and therefore the issue presently before the OSC on this motion. The Summons is an abuse of process and must be struck.

(b) Summons is Contrary to Common Law

37. The issue raised in this motion is whether the Receiver should be compelled to produce documents obtained in the exercise of its mandate in the Receivership to be used in a separate proceeding. This issue has been fully determined by the Court of Appeal for Ontario.

38. The Court of Appeal's decision in the Appeal and Cross-Appeal leaves no doubt that documents prepared and obtained by a Court Officer in one proceeding are not producible for a collateral purpose, nor can an officer be compelled to produce the documents for any collateral use. In its reasons, the Court of Appeal explained the policy considerations underlying its decision: "Officers of the court should be left to perform their functions and duties without the

[4] [2003] 3 S.C.R. 77 at para. 23.

distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation."[5]

39. In finding that a court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate in a receivership to be used in a separate proceeding, and in finding that Sbaraglia was seeking production for a purpose collateral to the Receivership, the Court of Appeal relied on a large body of case law that uniformly holds that documents obtained or created by Court Officers are not to be produced or used for collateral purposes. The following principles are the bedrock of that body of law:

(a) A receiver is an officer of the Court, appointed to discharge specific duties prescribed by a specific appointment order;[6]

(b) A receiver's duties and obligations, as referred to in Orders of the Court, deal only with the receivership proceeding in which the Orders are made. The receivership Orders do not give the receiver any authority to act nor do they impress any obligations on the receiver with respect to matters outside the receivership;

(c) Court Officers, including receivers, file reports with the Court for the purpose of providing information regarding the proceeding to the Court and interested parties. The reports, as filed, stand as the Officer's "evidence". While the Officer may be asked to clarify or expand on information in its report, it is not required to

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[5] *SA Capital* (C.A.) at para. 10.
[6] *Ravelston Corp. (Re)*, (2007), 29 C.B.R. (5th) 1, [2007] O.J. No. 414 (Ont. S.C.J. [Commercial List]) at para. 60; *Anvil Range Mining Corporation (Re),* (2001), 21 C.B.R. (4th) 194, [2001] O.J. No. 1125 (Ont. S.C.J. [Commercial List]) ("*Re Anvil Range*") at paras. 3-4; *Bell Canada International Inc. (Re)*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]) ("*Re Bell Canada*") at paras. 6-8.

produce documents from its investigation.[7] Its report – an official statement made under official authority – is to be accepted;[8] and

(d) As a result of its status as a Court Officer, a receiver is not generally subject to cross-examination of its reports in its own receivership proceedings, save for in "exceptional or unusual" circumstances. The case law is clear that "exceptional or unusual" circumstances include situations where a receiver refuses to cooperate in clarifying a part of its report, for example by failing to expand upon some element in the report as may reasonably be requested.[9]

40. As referred to above, in October 2012 the Court of Appeal for Ontario ruled on these very facts that the Receiver could not be compelled to produce documents to Sbaraglia.

41. These principles, as applied by the Court of Appeal in that decision, have been applied in numerous cases with circumstances similar to those at issue here. In those cases, Courts have consistently held that a Court Officer is not a regular litigant and therefore documents obtained by Court Officers cannot be used for purposes outside of the proceeding in which they were obtained, and that Court Officers cannot be compelled to produce the documents for a collateral purpose.

42. In the 2006 decision *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould Inc. (Interim Receiver of)*, the Court of Appeal for Ontario considered whether it could and should restrict the ability of a trustee in bankruptcy, a Court Officer, to provide the inspectors and creditors of the bankrupt with access to or information from the bankrupt's documents when

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[7] *Battery Plus Inc. (Re)*, (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) ("*Battery Plus*").
[8] *Impact Tool & Mould (Re)*, (2007), 41 C.B.R. (5th) 112 (Ont. S.C.J.) affirmed (2008) 41 C.B.R. (5th) 1 (C.A.); leave to appeal refused [2008] S.C.C.A. No. 220 ("*Re Impact Tool*") at para. 15; *Re Bell Canada* at para. 6.
[9] *Re Impact Tool* at para. 15; *Re Bell Canada* at para. 8; *Re Anvil Range* at paras. 3-4.

there was a concern that the information may be used for purposes collateral to the administration of the bankrupt estate.[10] The Court made clear that documents obtained by the Court Officer could be used only for the purpose of the insolvency proceeding and no other purpose. Justice Blair, for a unanimous Court of Appeal, held that the trustee should provide the documents to the inspectors and creditors of the estate, but that the inspectors and creditors would be prohibited from using the documents obtained for any purpose other than in connection with the administration of the estate. As a result, the Court of Appeal granted an order that prohibited the use of the debtor's documents for purposes "other than those relating to the administration of the bankrupt estate and the affairs of the Bankrupt".[11]

43. In the 2002 decision of the Superior Court of Justice (Commercial List), *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.*[12], Justice Farley considered whether a trustee/interim receiver could obtain documents from Deloitte & Touche ("D&T") to consider potential litigation, on behalf of the estate against D&T. D&T argued that it should not be required to produce such documents to the trustee as the documents could be used by others to commence an action against D&T. Justice Farley ordered production to the trustee because the documents were relevant to the administration of the estate, but explicitly held that the documents could be used only for the bankruptcy proceeding by the trustee and not for any purpose outside of the bankruptcy. His Honour stated:

> **In any event in my view the inspection of those 'estate books, records and documents' relating to the administration of the estate is to be done by creditors in their capacity as creditors of a bankrupt and not with a view as to advancing their claims outside of bankruptcy.**

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[10] *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould Inc. (Interim Receiver of)*, [2006] O.J. No. 958 (C.A.)
[11] Ibid at paras. 34-45; 51.
[12] *GMAC Commercial Credit Corporation. – Canada v. TCT Logistics Inc.*, (2002), 37 C.B.R. (4th) 267, [2002] O.J. No. 4210 (Ont. S.C.J. [Commercial List]) ("*GMAC*").

...

> **In my view it would be inappropriate to allow these creditors here in their individual personal capacities to piggyback upon the Trustee's s. 164 examination to get a leg up in non-bankruptcy litigation. This would be indirectly an improper compulsory order which would be contrary to the right to privacy as discussed in *Goodman v. Rossi, VitaPharm* and *Lac d'Amiante.*** The fact that there is compulsion takes it out of the 'as found exception' as discussed in *VitaPharm.* [13] (emphasis added)

44. Similarly, in *Taylor Ventures Ltd. (Re)*, the British Columbia Supreme Court considered an application by a trustee for directions as to whether the trustee was entitled to provide the Inspectors unrestricted access to the bankrupt's files so that certain documents could be used by the Inspectors to pursue personal claims against the bankrupt's solicitors. The Court held that the Inspectors would not be given access to the materials to allow them or others to commence proceedings against the solicitors. Specifically, the Court ruled that the Trustee and Inspectors would only be given access to the documents and records obtained from the former solicitors for the purpose of the "affairs of the bankrupt" and "not in relation to any other purposes".[14]

45. In *Thomson Kernaghan & Co. (Re)*,[15] Justice Farley held a request to examine a trustee to obtain information for use in purposes outside of the proceeding to be impermissible:

> ...[I]t would appear to me that the U.S. Plaintiffs may be wishing to examine the Trustee for impermissible collateral reasons connected with their lawsuits in the United States. [...] In these circumstances, I do not see that it [sic] necessary or desirable that I exercise my discretion pursuant to s. 163(2) to have the Trustee examined under oath. In my view, nothing of substance in the circumstances would be added by such examination. The Trustee has responded in writing to the various concerns of the U.S. Plaintiffs via Trustee's counsel.[16]

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[13] *GMAC* at paras. 8; 13.
[14] *Taylor Ventures Ltd. (Re)*, (1999), 9 C.B.R. (4th) 136 (B.C.S.C.) at paras. 24-34.
[15] 50 C.B.R. (4th) 287, [2003] O.J. No. 5300 (Ont. S.C.J. [Commercial List]).
[16] Ibid. at para. 12.

46. In *Hickman Equipment (1985) Ltd. (Re)*, the Newfoundland and Labrador Supreme Court (In Bankruptcy and Insolvency) considered whether it should restrict documents obtained by the trustee/interim receiver from being used by people for purposes outside of the bankruptcy proceeding. The Court ordered that the trustee would be entitled to obtain the requested documents but that it was not to release any of the documents or information contained therein to anyone other than a specific group of individuals for use in the bankruptcy proceeding only.[17]

47. In *Re Raven*, the Registrar in Bankruptcy refused to allow an application to examine the trustee when it became clear that the moving party's application was driven, not by a desire to investigate the administration of the estate by the trustee, but by a need to gather information for her defence in the criminal Court:[18]

> The subject matter of a Section 163(2) examination is not the bankrupt's pre-bankruptcy dispositions but the trustee's administration. It is clear then that the examination is for a collateral purpose and not for one authorized by *The Bankruptcy Act* and since the bankrupt is not shown cause, the examination cannot be allowed.

48. In *Re Worlidge*, the Court denied an application for examination when it found that the purpose of the examination was "directed solely at the reason for and the circumstances surrounding an investigation being conducted by the superintendent,"[19] not for the purpose of investigating the administration of the estate of the bankrupt.

49. Each of the cases referred to above support the position affirmed and upheld by the Court of Appeal for Ontario in its decision on the Appeal and Cross-Appeal; namely, that documents

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[17] *Hickman Equipment (1985) Ltd. (Re)*, (2003), 44 C.B.R. (4th) 82 (S.C.T.D.) at paras. 8-9.
[18] *Re Raven* (1997), 50 C.B.R. (3d) 56 (Ont. Gen. Div.) at para. 11.
[19] *Re Worlidge* (1983), 46 C.B.R. (N.S.) 60 (S.C.O.) at para. 20

obtained or created by a Court Officer pursuant to and in furtherance of Court orders in one proceeding cannot be used by individuals for purposes outside of that proceeding.

50. It is respectfully submitted that this makes perfect sense and is completely appropriate for practical reasons. Court Officers must be able to perform their duties to the court, in the proceeding in which they were appointed, for the benefit of that proceeding only and without being distracted or having to consider collateral or external purposes. Court Officers' files must not be subject to disclosure to other parties for purposes outside of the proceeding in which the officer was appointed, so as not to put the Officer's ability to carry out its mandate at risk.

51. Therefore, the law is clear and consistent that a Court Officer cannot be compelled to produce documents to Sbaraglia for the purpose of this proceeding. Therefore, the Summons must be quashed.

(c) Abuse of Process: Summons is Overbroad and Requested Documents Irrelevant

52. In any event, the Summons ought to be quashed as there is no evidentiary basis for the relevance of the documents sought to be produced, and the summons is too broad and unfocused to be upheld. As a result, it would be an abuse of process to allow the Summons to stand.

53. In *Battery Plus*, supra, the Court dealt with a request for documents by a party in connection with a sale of the debtor's business in the insolvency proceeding. The documents sought were directly relevant to a motion in the proceeding and the moving party was not seeking to obtain documents for purposes outside of the receivership proceeding. Justice Greer confirmed that although a receiver should respond to parties' reasonable requests for information *regarding the receivership*, parties are not entitled to *all* of the documents in the receiver's

possession. Further, Her Honour confirmed that the receiver does not need to respond to a "fishing expedition".[20]

54. In *Ehman v. Saskatchewan (Attorney General)*,[21] Justice Halvorson quashed two summonses requiring two CBC reporters to attend and give evidence at a preliminary inquiry into a murder charge. The reporters had conducted extensive investigations into the case, including an interview with the accused. The impugned subpoenas required the reporters to "…bring all notes, books, records, reports, video tapes and documents related to this case with you." Justice Halvorson held that it would be "virtually impossible" for the reports to comply with the obligation to produce materials: "For instance, they could not be expected to know which are "documents related to this case"… This is a clear example of a standardized clause being squeezed into a subpoena where it does not fit. There will be an order quashing both subpoenas on the grounds they are too expansive in scope to permit compliance."[22]

55. In *Dietrich v. Home Hardware Stores Ltd.*, supra, the Defendant hardware company moved to quash two summons to witness issued three weeks prior to trial, questioning the scope of documentary productions sought in the summonses, which included requests for payroll records, time sheets, unedited employment files and copies of various notes, policies and memoranda. The Court quashed both summonses, finding that two of the three requests (for unedited employment records and memoranda) were too broad and unspecific, amounting to a fishing expedition, and therefore an abuse of process.[23]

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[20] *Battery Plus* at para. 21.
[21] [1994] S.J. No. 202 ("*Ehman*").
[22] *Ehman* at paras. 5-6.
[23] *Home Hardware* at paras. 11-12.

56. *Williams v. Mendez*[24] involved a motion by the President of IBM Canada Limited to quash a summons to witness served on him by the Plaintiff, Williams, requiring his attendance at the trial of the action to give evidence and produce certain specified documents. Williams' immediate supervisor had already testified on issues relevant to the claim, and the President of IBM Canada submitted that he did not know the Plaintiff and possessed no documents concerning her employment history, but could offer other employees to testify who did. The Court found that counsel for the Plaintiff was using the summons as either a "fishing expedition" or "retribution for what he perceived as a lack of co-operation by IBM to provide the type of evidence he required. Regardless of the motive, objectively viewed, this summons to witness is an abuse of the court process."[25]

57. In *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*[26], in the context of a summons to examine a witness in aid of a motion, the Court of Appeal for Ontario described the test to be applied on a motion to quash a summons to a witness to attend on an examination pursuant to Rule 39.03 of the *Rules of Civil Procedure*[27]:

> The onus is on the party seeking to conduct the examination to show on **a reasonable evidentiary basis that the examination would be conducted on issues relevant to the pending application and that the proposed witness was in a position to offer relevant evidence.** (emphasis added)
>
> In the absence of a reasonable evidentiary foundation, therefore, permitting the applicants to examine the Premier and the Minister…would amount to sanctioning a fishing expedition.[28]

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[24] (2003), 2003 CarswellOnt 282, 37 C.P.C. (5th) 364 (S.C.J.).
[25] Ibid. at para. 17.
[26] [2002] O.J. No. 1445 ("*Anglers & Hunters*").
[27] R.R.O. 1990, Reg. 194.
[28] *Anglers & Hunters* at paras 30; 59.

58. These principles have been applied in a number of circumstances where one party is seeking to examine a party or have the party produce documents pursuant to Rule 39.03, and those cases have affirmed that the party seeking a summons must put together an appropriate evidentiary record to support its request, and the record must consist of more than just "speculation and allegations"[29]. Rather, the record must demonstrate that the examination is *likely* to produce evidence which enhances the record to be considered on the return of the motion, as opposed to constituting a "fishing expedition".[30] The opposing party may move to quash the summons on the ground that the evidence sought is not relevant to the motion or that the examination would amount to an abuse of process.[31]

59. In *Lauzon v. Axa Insurance,* the defendants brought a motion for, *inter alia*, an order quashing a summons requiring the defendant's appraiser to attend to be examined as a witness before the hearing of the motion for attendance at an examination. The summons required the appraiser to bring with him all written or electronic correspondence between him and the plaintiff's appraiser. Justice Glithero found that there was no adequate evidentiary basis to justify the summons: [32]

> In my assessment there is no adequate evidentiary basis shown to justify the summons. The plaintiff's appraiser will already have copies of the correspondence, and was a party to the telephone calls. Mr. Bedard's evidence as to what was written or said is unnecessary as the plaintiff can get that information from its own appraiser. **As to the claim for "all other documents", it signifies the very type fishing expedition which is an abuse of the rule**.

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[29] *Lauzon v. Axa Insurance Canada*, 2012 ONSC 6730 ("*Lauzon*") at para. 27
[30] *Agnew v. Ontario Assn. of Architects* (1988), 64 O.R. (2d) 8 (Div. Ct.); *Dietrich v. Home Hardware Stores Ltd.*, [2007] O.J. No 213 ("*Home Hardware*"); *Palms of Pasadena Hospital v. Royal and SunAlliance Insurance Co. of Canada*, [2008] O.J. No. 324 (S.C.J.))
[31] *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (C.A.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Gen. Div.).)
[32] *Lauzon* at para. 35.

60. *Payne v. Ontario Human Rights Commission*[33] concerned a notice of examination served by the appellant, Payne, on the registrar of the Ontario Human Rights Commission. The notice required he registrar to answer questions and produce all documents related to the case, including the contents of files and communications between Commission staff and its members who considered Payne's complaint. In its decision, the Court of Appeal for Ontario affirmed that a Rule 39.03 examination may not be used where the purpose is simply to conduct a general discovery: "That would amount to an "ulterior or improper purpose" … and should not be allowed."[34] The Court of Appeal found that the proposed scope of the examination requested by Payne ran afoul of that principle, as the list of documents sought to be produced and appended to the notice of examination was "…so sweeping and unfocused that it is apparent that the appellant is, in effect, insisting upon a general discovery of the Commission through its registrar, hoping to uncover something that will help her case. The proposed scope of the examination is simply too broad."[35]

61. Turning to the Summons at issue in this motion, the description in the Summons of the documents sought to be produced is so broad and sweeping that there is little doubt Sbaraglia is seeking to conduct a general discovery of Kofman. The law is clear that such attempts amount to an "ulterior or improper purpose" and should not be allowed. Moreover, Sbaraglia has failed to show, on the evidence, that the documents sought to be produced by Kofman are relevant to these OSC proceedings.

62. Simply, in his materials, Sbaraglia has failed to identify any material in Kofman's possession and relate it to the matters at issue in this proceeding. Sbaraglia has failed to explain

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[33] *Payne v. Ontario Human Rights Commission*, 192 D.L.R. (4th) 315, [2000] O.J. No. 2987 (C.A.) ("*Payne*").
[34] *Payne* at para. 165.
[35] *Payne*. at para. 166.

how any of the documents requested, including the documents provided to the Receiver by the Individuals, the notes or recordings taken by the Receiver and/or the Receiver's lawyer during the interviews by the Receiver of the Individuals, and all documents provided by the Receiver and/or the Receiver's lawyer to the OSC, are logically probative to any matter at issue in his OSC proceeding, or to the competency of a particular witness to testify. Indeed, Sbaraglia has even made the sweeping request for "copies of all documents relevant to the Statement of Allegations", a request so broad that clearly Sbaraglia cannot establish the relevance of the documents.

63. Conversely, the Receiver's evidence is unequivocal and unchallenged that the requested documents are irrelevant. In its Thirteenth Report, the Receiver noted that:

(a) Regarding the request for recordings or notes taken by the Receiver during its interviews with the Individuals, the Receiver conducted those interviews for the sole purpose of carrying out its obligations and authority under the Receivership Orders and did not tell any individual that it interviewed that the information obtained would be used for any other purpose. The primary purpose of the interviews was to gather background information regarding the Mander Debtors and much of the information obtained was "highly speculative, unsupported and anecdotal" and not useful. Further, the notes were prepared solely for the Receiver's internal purposes, were not intended to be relied on by other parties, were not reviewed by the individuals interviewed and were not prepared to be an accurate or complete review of what was discussed. Indeed, the Receiver's findings and reports leading to recommendations that a receivership order be issued with respect to the CO Capital Debtors were based on:

(i) its financial analysis performed of "bank statements, cancelled cheques, credit card statements and institution account statements"; and

(ii) transcripts of interviews performed by the OSC in July 2009 of Sbaraglia and Mander.

As a result, neither the notes taken by the Receiver nor the recordings, if any, can properly be relied upon for any purpose other than the receivership proceeding;

(b) Regarding the request for "all documents" relevant to the Statement of Allegations and "all documents" provided to the Receiver by the Individuals, such a request is too broad and cannot be complied with and, in any event, the Receiver obtained thousands of documents from a variety of sources and also has a significant volume of data and information in its possession in electronic form as a result of its investigations under the Receivership Orders. The Receiver does not have an index of these documents and to review them all for relevance would be time-consuming and costly; and

(c) Regarding the documents provided to the Receiver by the Individuals (which include the Professionals) who met with the Receiver pursuant to the terms of the Receivership Orders, there is no reason that Sbaraglia cannot and should not seek production from those parties directly.

64. Given the Receiver's uncontested evidence and Sbaraglia's failure to put together any evidentiary record to support his extremely broad request, the Panel ought to presume that Sbaraglia is engaging in a speculative, disruptive, unmeritorious and time-consuming request for

production – a fishing expedition. The law is clear that if the summonsing party cannot describe the documents requested with enough particularity that they may be individually retrieved without a full sweep of all documents, and /or cannot demonstrate their relevance to the issues in the case, then the court can infer that fishing is the purpose behind the summons, and the summons ought to be quashed as an abuse of process.

65. Given that both circumstances clearly apply here, the Summons should not be allowed to stand.

(d) Cost of Complying with Summons Abusive

66. In addition to the Summons being *res judicata* by issue estoppel, contrary to the common law, and requesting documents that Sbaraglia has failed to prove the relevance of, the Summons is also abusive to the CO Capital Debtors' investors as a result of the cost of compliance. Simply, to provide the information requested by Sbaraglia would be exceedingly costly and time consuming for the Receiver, and would not result in any further recoveries for stakeholders in the Estate. Rather, it would greatly reduce what has already been recovered.

67. Moreover, Sbaraglia was ordered by the Court of Appeal to pay costs to the Receiver in the amount of $50,000 as a result of D&P's success on the Appeal and Cross-Appeal, which finally determined the very issue presently before the Panel on this motion. This debt is in addition to the cost of Sbaraglia's action in opposing the Receivership proceeding against him, which cost the Estate approximately $700,000.

68. In these circumstances, the Summons should be quashed so as to ensure that the Receiver is not required to expend even more investor money to respond to this Summons, which is clearly not for the benefit of the creditors and investors of the insolvent Estate. Further, none of

the Receivership Orders in any way grant the Receiver authority to comply with Sbaraglia's request.

ORDER REQUESTED

69. Robert Kofman respectfully requests an order quashing the Summons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of February, 2013.

Matthew P. Gottlieb

Shannon Beddoe

February 4, 2013

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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c.S.5, AS AMENDED

AND IN THE MATTER OF PETER SBARAGLIA

ONTARIO SECURITIES COMMISSION

FACTUM OF ROBERT KOFMAN
(Motion heard February 8, 2013)

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