

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

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicants

-and-

**PETER SBARAGLIA, MANDY SBARAGLIA, CO CAPITAL GROWTH CORP.
and 91 DAYS HYGIENE SERVICES INC.**

Respondents

APPLICATION UNDER Section 129 of the *Securities Act*

**FACTUM OF SA CAPITAL GROWTH CORP.
(Motion Returnable September 7, 2011)**

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Tab 1

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

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicants

-and-

**PETER SBARAGLIA, MANDY SBARAGLIA, CO CAPITAL GROWTH CORP.
and 91 DAYS HYGIENE SERVICES INC.**

Respondents

APPLICATION UNDER Section 129 of the *Securities Act*

**FACTUM OF SA CAPITAL GROWTH CORP.
(Motion Returnable September 7, 2011)**

OVERVIEW

1. SA Capital Growth Corp. is a creditor in the receivership of Robert Mander, E.M.B. Asset Group Inc. and certain related entities (the “**Mander Debtors**”).
2. RSM Richter Inc. is the receiver (in such capacity, the “**Mander Receiver**”) of all of the assets, undertakings and properties of the Mander Debtors pursuant to an order of the Ontario Superior Court of Justice dated March 17, 2010, as amended.
3. RSM Richter Inc. is the receiver (in such capacity, the “**Receiver**”) of all of the assets, undertakings and properties of Peter Sbaraglia, Mandy Sbaraglia, CO Capital Growth Corp. (“**CO**”) and 91 Days Hygiene Services Inc. (collectively, the “**CO Debtors**”).

4. The Receiver seeks authorization to use the net proceeds of the CO Debtors' assets (the "CO Assets") to reimburse the Mander Debtors for fees incurred by the Receiver and its counsel relating to the CO Debtors and paid by the Mander Debtors.

5. SA Capital Growth Corp. supports the relief sought by the Receiver. The Receiver is and was entitled to a first charge on all of the assets of the CO Debtors. The Receiver elected to pre-fund the CO Debtors' receivership from assets of the Mander Debtors (the "Mander Assets"). The Mander Debtors' estates should stand in no worse position for having provided funding to the Receiver than the Receiver would itself. To do otherwise would inequitably deliver the benefits of the CO Debtors' receivership to the CO Debtors' creditors, without the burden of the attendant costs.

THE FACTS

6. In the Mander Receiver's fourth report to Court dated July 2, 2010 (the "**Fourth Report**"), it advised, as an officer of the Court, that an investigation should be undertaken of the CO Debtors. Based on the evidence provided in the Fourth Report, this Court issued an order on July 14, 2010 authorizing and directing the commencement of an investigation into the affairs of the CO Debtors.

Twelfth Report of RSM Richter Inc., as Receiver, dated August 17, 2011
(the "Twelfth Report") at page 4.

7. On or about September 8, 2010, the Ontario Securities Commission ("OSC") filed an application seeking the appointment of a receiver over the assets, properties and undertakings of the CO Debtors.

Twelfth Report at Page 4.

8. On September 9, 2010, the Mander Receiver filed a report to Court (the "**Seventh Report**") summarizing its findings from its ongoing investigation of the CO Debtors. It recommended that a Receiver be appointed over the CO Debtors. The Seventh Report was an important item of support for the OSC's receivership application.

Twelfth Report at Page 4.

9. Over the course of several months from September to December, various steps were taken in support of the application for a receiver over CO. The CO Debtors vigorously opposed the receivership application. Further time consuming investigations and cross-examinations were required to be undertaken by the OSC, the CO Receiver, and its counsel in connection with the OSC's application. A further report to this Court was also drafted by the Mander Receiver, dated November 12, 2010 (the "**Ninth Report**").

Twelfth Report at Page 4 and 5.

10. In the period prior to the Receiver taking action against the CO Debtors, the assets of the CO Debtors were being steadily depleted. Significant portions of the assets of the CO Debtors were used to fund the personal expenses of Peter and Mandy Sbaraglia, to the prejudice of their creditors.

Ninth Report at page 9, Appendix "D" to the Twelfth Report.

11. This Court granted an order appointing the Receiver on December 24, 2010 (the "**CO Receivership Order**"), more than three months after the OSC's application was made. The CO Receivership Order was based on, among other things, the evidence in the Seventh and Ninth Reports.

Justice Morawetz's Reasons For Judgment, Appendix "E" to the Twelfth Report

12. The CO Receivership Order states, at paragraph 16, that:

the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person.

13. During the period from July 14, 2011 to December 23, 2011, the CO Receiver's and its counsel's aggregate fees and costs amounted to approximately \$696,000 in respect of the CO Debtors' receivership proceedings (the "**CO Receivership Costs**") for, among other things:

- (a) cross-examinations of at least four parties;
- (b) attending at court on multiple occasions;
- (c) drafting the Seventh Report and the Ninth Report used in support of the application for the CO Receivership Order; and
- (d) other investigations.

Twelfth Report at Page 4 and 5.

14. The creditors of the Mander Debtors have effectively borne the CO Receivership Costs to date as those costs have been funded by the assets of the Mander Debtors. The claims of the creditors of the Mander Debtors far exceed the assets of the Mander Debtors.

Twelfth Report at Page 6.

ISSUES TO BE DETERMINED

15. Should the estates of the Mander Debtors be required to fund the CO Receivership Costs without reimbursement, to the benefit of the creditors of the CO Debtors?

THE LAW

16. SA Capital Growth Corp.'s position is

- (a) the estates of the Mander Debtors have paid the CO Receivership Costs;
- (b) had the CO Receivership Costs not been paid by the Mander Debtors' estates, those costs would, in the normal course, be funded by the Receiver's Charge;
- (c) the Mander Debtors' estates should be subrogated to the rights of the Receiver under the Receiver's Charge; and
- (d) there is no principled basis to allow the creditors of the CO Debtors the benefit of the CO Assets without paying for the process needed to collect and preserve those assets.

The Receiver's Charge

17. The CO Receivership Costs, if left unpaid to date, would undoubtedly be subject to the Receiver's Charge.

18. The language of the CO Receivership Order in respect of the Receiver's Charge is clear. It states that security is provided "for such fees and disbursements, both before and after the making of this Order in respect of these proceedings¹, and that the Receiver's Charge." [emphasis added]

19. The principles governing receiverships establish that the purpose of a receiver's charge is to ensure that: (a) the receiver is fairly remunerated and adequately incentivized to undertake tasks that are for the benefit of all creditors; and (b) that all creditors bear their fair share of the costs of a court appointed receiver, who acts for the benefit of all such creditors.

20. The importance of recourse of a receiver to the property of the debtors over which the receiver is appointed as follows:

The true worth of the property [under] administration can rarely be determined at the time of appointment. The Court itself has no funds from which to pay the Receiver. If his fees cannot be [made] from assets under administration of the Court the Receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, has applied for the appointment. This could work a grave injustice on the Receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including the secured creditors, for the purpose of preserving the property? [emphasis added]

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 29 D.L.R. (3d) 373 (Man. C.A.) at para. 4 ("Braid").

¹ Commencement of a proceeding normally refers to the filing of an action or application. *Logan v. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (Ont. C.A.) at para. 21.

The words 'in respect of' have been held by the Supreme Court of Canada to be words of the broadest scope that convey some link between two subject matters. *Markevich v. Canada* (2003), 223 D.L.R. (4th) 17 at para. 26.

21. The evidence before the court indicates that all CO Receivership Costs were incurred in connection with the CO Debtors' receivership proceedings. Based upon the clear wording of the CO Receivership Order and upon the principles underlying the creation of the Receiver's Charge the CO Receivership Costs would have been subject to the Receiver's Charge if not funded by the Mander Assets.

Subrogation

22. By funding the CO Receiveship Costs, the funds of the Mander Assets have been used to discharge obligations that were subject to the Receiver's Charge. The Mander Debtors are therefore entitled to subrogation in respect of the Receiver's rights under the Receiver's Charge.

23. As set out by Justice Pepall in *Re Slater Steel Inc.*:

Subrogation is a broad and flexible equitable remedy...So by way of example...where a third party at the request of the mortgagor paid off the first mortgage, he became entitled in equity 'to stand as against the property, in the shoes of the first mortgagee.' The fundamental principle underlying the doctrine is one of fairness in light of all the circumstances.

In *N'Amerix Logistix Inc.*, Spence J. noted that subrogation is defined as 'the substitution of one person in place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities.'

Re Slater Steel Inc. (2009), 54 C.B.R. (5th) 52 (Ont. S.C.J.) at paras. 47 and 48 ("Slater").

24. The cause of action in a subrogated claim continues to belong to the subrogor, in this case the CO Receiver. Therefore, if the Mander Debtors' estates are entitled to subrogation, the Receiver's Charge remains available to allow recovery by the Mander Debtors' estates just as it would have been to the Receiver in the event that the Receiver were seeking to recover the CO Receivership Costs directly.

Slater at para. 50.

25. It is unfortunate that the CO Debtors engaged in consistent and sustained opposition to the receivership. Nevertheless, the CO Debtors' receivership was a collective proceeding by a court appointed officer intended for the benefit of all creditors of the CO Debtors. There is no


evidence from which the Court could conclude that assets would have been available absent a receivership of the CO Debtors. Moreover, the court will not use hindsight to affect a validly granted Receiver's Charge:

The true worth of the property [under] administration can rarely be determined at the time of appointment.

Braid at para. 4.

26. The creditors of the CO Debtors are not entitled to the benefits of this process without first paying the costs. Those costs are owed to the Mander Debtors. They are a reimbursement of administrative fees, just as they would be to the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September, 2011.



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Tab A

SCHEDULE "A"
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<u>Tab:</u>	<u>Cases:</u>
1	<i>Logan v. Canada (Minister of Health)</i> (2004), 71 O.R. (3d) 451 (Ont. C.A.).
2	<i>Markevich v. Canada</i> (2003), 223 D.L.R. (4 th) 17.
3	<i>Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.</i> (1972), 29 D.L.R. (3d) 373 (Man. C.A.).
4	<i>Re Slater Steel Inc.</i> (2009), 54 C.B.R. (5 th) 52 (Ont. S.C.J.).

ONTARIO SECURITIES COMMISSION

- and -

PETER SBARAGLIA, MANDY SBARAGLIA,
CO CAPITAL GROWTH CORP. and
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Court File No: CV-10-8883-00CL

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Proceeding commenced at Toronto

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