

Litigation - Canada

Production of documents from court-appointed receivers

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Introduction

In its recent decision in *SA Capital Growth Corp v Mander Estate*⁽¹⁾ the Ontario Court of Appeal considered whether the appellant, who was facing proceedings before the Ontario Securities Commission (OSC), was entitled to production of documents and information from the court-appointed receiver that had been appointed to investigate a Ponzi scheme in which the appellant was allegedly involved. Justice Pattillo, the application judge, ordered production of some, but not all, of the documents sought by the appellant, Peter Sbaraglia.⁽²⁾ Sbaraglia appealed, seeking further production, while the receiver cross-appealed, arguing that no production should have been ordered.

The Ontario Court of Appeal dismissed Sbaraglia's appeal and granted the receiver's cross-appeal. In doing so, the court considered two important issues:

- the circumstances in which a party involved in a receivership can obtain production of documents from a court-appointed receiver; and
- the appropriateness (or lack thereof) of seeking an order from the Ontario Superior Court, tantamount to an interlocutory procedural order in an ongoing regulatory proceeding.

This update outlines the court of appeal's reasons on these two issues, after providing a brief background on the relevant facts.

Receivership and OSC proceeding

On March 17 2010 RSM Richter Inc was appointed by the court as receiver over the assets and property of EMB Asset Group Inc and Robert Mander. It was alleged that Mander, through EMB, had operated a Ponzi scheme which defrauded investors of tens of millions of dollars. As a result of its preliminary investigations, the receiver recommended to the court that Sbaraglia, his wife and their companies, CO Capital Growth and 91 Days Hygiene Inc, also be investigated. On July 14 2010 the receiver obtained an order authorising it to conduct such further investigation. The receiver subsequently reported, among other things, that Sbaraglia and his companies knew or ought to have known that they were not generating returns sufficient to repay their obligations to investors, and that they had misled the OSC.

The OSC subsequently commenced proceedings against Sbaraglia, alleging that he had breached the Ontario Securities Act by committing fraud and had misled OSC staff. During the OSC proceeding, Sbaraglia sought to obtain production of documents and information from the receiver, which it had obtained during its investigations. Sbaraglia's OSC motion was heard by a single commissioner, who ruled that the OSC had no authority to order production from the receiver, an independent officer of the court.

Sbaraglia subsequently sought to obtain production of documents from the receiver via other means. He applied to the Ontario Superior Court for an order requiring the receiver to produce the materials, which he argued were necessary for him to make full answer and defence to the OSC proceeding against him. While Sbaraglia was partially successful at first instance, the Ontario Court of Appeal held that he was not entitled to any production from the receiver.

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Production by court-appointed receivers

The court recognised that in some circumstances, a party involved in a receivership can insist on the production of documents and materials that have been obtained by a court-appointed receiver, and that a receiver owes a duty to make full disclosure of information to all interested persons.

However, the term 'interested person' does not include parties that seek production of documents for a purpose unrelated to the receivership itself, even where that person has an interest in the subject matter of the receivership. A court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate for some collateral purpose, including for use in separate proceedings (in this case, for use in proceedings before the OSC).

The OSC proceedings against Sbaraglia were, in the court's view, "clearly separate and distinct from the receivership", and the appellant did not seek production for the purpose of advancing any legal claim or interest in the receivership.⁽³⁾ Rather, Sbaraglia sought such documents and information for the purpose of his defence before the OSC, which the court considered to be a collateral purpose. Accordingly, Sbaraglia was not considered to be an interested person and, as a consequence, was not entitled to production from the receiver in this instance.

The court commented that if production were granted, it could lead to "serious mischief", undermining the ability of the receiver to perform its functions and duties as an officer of the court.⁽⁴⁾

Not the right forum

The court of appeal also considered Pattillo's application of *R v O'Connor*,⁽⁵⁾ which stands for the proposition that a criminally accused may compel production from third parties not involved in a criminal prosecution in order to make full answer and defence to criminal allegations. Sbaraglia argued that he was similarly entitled to production from the receiver in order to make full answer and defence in the OSC proceeding.

The court of appeal held that Pattillo had erred in his application of *R v O'Connor* on the facts of the case and in ordering production by the receiver, on the basis that Sbaraglia was entitled to the material in order to make full answer and defence to the allegations he faced before the OSC. That said, however, it noted that, in fairness, it had not been clearly articulated before Pattillo that the OSC had already determined that Sbaraglia was not entitled to the documents and information requested.

The court of appeal held that it was "inappropriate for the superior court to make what amounted to an interlocutory procedural order in relation to a proceeding pending before the OSC".⁽⁶⁾ Procedural issues (eg, disclosure, third-party production and other matters relating to procedural fairness within the context of the OSC proceeding) were matters to be dealt with by the OSC in that particular proceeding. The OSC has the final say over such procedural issues, and it does not lie with the superior court to intervene.

The court of appeal emphasised the importance of orderly decision making by the tribunal. Sbaraglia's approach in this case – to apply to the superior court upon being unsuccessful on his motion before the OSC – was disruptive of such orderly decision making. The court of appeal noted that Sbaraglia had not challenged the OSC commissioner's ruling by way of an appeal, but instead commenced his superior court application for third-party production from the receiver.

The Court of Appeal also addressed the argument that Rule 30.10 of the Rules of Civil Procedure⁽⁷⁾ entitled Sbaraglia to the production sought. The court held, however, that Rule 30.10 could have no application to Sbaraglia's request. That rule provides orders for third-party production "on motion by a party" for a document that is "relevant to a material issue in the action". The rule does not confer jurisdiction on the superior court to make freestanding production orders for production of documents sought in relation to proceedings before agencies or tribunals such as the OSC.⁽⁸⁾

Comment

This case is important because of the protection it affords both to court-appointed receivers and to the procedural integrity of regulatory tribunals. Receivers are to be protected from requests for information and documents for purposes collateral to the receivership, and the orderly decision making of tribunals is to be protected from collateral attacks.

The court of appeal's decision is particularly important for those facing allegations before the OSC that seek production from court-appointed officers. Those facing proceedings before the OSC are not entitled to rely on the obligation of a court-appointed receiver to produce documents and information to those interested in a receivership. Rather, they should pursue such production within the OSC proceeding itself, and should take steps to appeal any unfavourable decision. As the court of appeal has made clear in the *Mander Estate Appeal*, an application to the superior

court is not the proper avenue for obtaining such production.

For further information on this topic please contact [Norm Emblem](#) or [Chloe Snider](#) at Fraser Milner Casgrain LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (norm.emblem@fmc-law.com or chloe.snider@fmc-law.com).

Endnotes

- (1) 2012 ONCA 681 [*Mander Estate Appeal*].
- (2) *SA Capital Growth Corp v Brooks*, 2012 OSNC 2800.
- (3) *Mander Estate Appeal*, *supra* note 1 at para 9.
- (4) *Mander Estate Appeal*, *supra* note 1 at para 10.
- (5) [1995] 4 SCR 411.
- (6) *Mander Estate Appeal*, *supra* note 1 at para 13.
- (7) RRO 1990, Reg 194.
- (8) *Mander Estate Appeal*, *supra* note 1 at 30.

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