Court File No. CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 TACORA RESOURCES INC.

BOOK OF AUTHORITIES OF CARGILL, INCORPORATED AND CARGILL INTERNATIONAL TRADING PTE LTD.

(Comeback Motion of Tacora Resources Inc. for an Amended and Restated Initial Order, and Cross-Motion of the Ad Hoc Group of Noteholders, returnable October 24, 2023)

October 23, 2023

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I N D E X

Tab No.	Description
1.	*Elfe Juvenile Products Inc. v. Bern*, 1994 CarswellOnt 1065 (Ont. Gen. Div.)

1994 CarswellOnt 1065
Ontario Court of Justice (General Division) [Divisional Court]

Elfe Juvenile Products Inc. v. Bern

1994 CarswellOnt 1065, [1994] O.J. No. 2840, 35 C.P.C. (3d) 117, 52 A.C.W.S. (3d) 25, 6 W.D.C.P. (2d) 41, 76 O.A.C. 54

ELFE JUVENILE PRODUCTS INC. v. ROSLYN BERN

White J.

Heard: September 19, 1994
Judgment: December 12, 1994
Docket: Doc. RE 2745/93

Counsel: *J.R. Sproat* , for appellant (nonparty) Sam Bern.
M.L. Solmon , for respondent Elfe Juvenile Products Inc.
C. Coulter , for respondent Roslyn Bern.

***White J.*:**

1 This is an appeal by Sam Bern ("Sam") from an order of Master Peppiatt dated May 20, 1994.

2 The operative parts of Master Peppiatt's order dated May 20, 1994, are as follows:

> 1. THIS COURT ORDERS that Sam Bern reattend in the City of Montreal at his own expense to provide answers to his undertakings and questions arising from answers to undertakings as set out in Schedule "A" hereto given on his examination of December 17th, 1993.
>
> 2. THIS COURT ORDERS that Sam Bern reattend in the City of Montreal at his own expense to provide answers to those questions objected and questions arising from those answers to refusals as set out in Schedule "B" hereto objected on his examination of December 17th, 1993.
>
> 3. THIS COURT ORDERS that the Respondent and Sam Bern are jointly and severally liable to pay the costs of this motion in the amount of $1,000.00 but are equally liable for the costs as between themselves.
>
> 4. THIS COURT ORDERS that the issue as to the costs of the reattendance is reserved to the Judge hearing the motion to stay proceedings.

3 I reproduce the following schedules to the order of Master Peppiatt:

SCHEDULE "A" -- UNDERTAKINGS

Page	Line
50	7
58	8
62	20
88	12
115	7
	-

SCHEDULE "B" -- REFUSALS

Page	Line	Refusal
Sam Bern's involvement with Roslyn Bern		
40	8	Ask counsel and advise as to what documents, if any, Mr. Bern's counsel or solicitors have given to either Ms. Bern's counsel, Ms. Bern's solicitors or Ms. Bern directly.
146	25	Does Mr. Bern directly or indirectly pay Ms. Bern's legal fees.
Identification of signatures by Sam Bern		
109	15	Confirmation that Mr. Bern signed Ivan Bern signature on a guarantee to the Toronto-Dominion Bank for Puritan Products on behalf of Cowall. Exhibit D to the Examination of Sam Bern on December 17, 1993.
136	22	Whether the signature on the bottom of the page of Exhibit "H" of the Examination of Sam Bern on December 17, 1993, is, in fact, Roslyn Bern's signature.
139	14	Does Mr. Bern know who signed Sheldon Bern's name to the June, 1985 document. Exhibit I to the Examination of Sam Bern on December 17, 1993.
141	16	Is the signature on the August, 1985 Toronto-Dominion Bank form Sheldon Bern's signature. Exhibit K to the Examination of Sam Bern on December 17, 1993.
142	8	Does Mr. Bern know who signed Ivan Bern's

name to the Bank Resolution dated August 1, 1985, with regard to Cowall. Exhibit L to the Examination of Sam Bern on December 17, 1993.

143 7 Does Mr. Bern know who signed the Bank Resolution dated April 23, 1986, setting out who the directors were. Exhibit M to the Examination of Sam Bern on December 17, 1993.

143 14 Whether Mr. Tan's printing is on the April 1986 Resolution. Exhibit M to the Examination of Sam Bern on December 17, 1993.

143 21 Does Mr. Bern know who signed Sheldon Bern's signature to this document. Exhibit M to the Examination of Sam Bern on December 17, 1993.

145 4 Did Mr. Bern sign Ivan Bern's signature to a document dated January 23, 1990, confirming Ivan Bern as secretary, and provide that document to the Bank. Exhibit N to the Examination of Sam Bern on December 17, 1993.

The location the corporate documents were prepared

141 20 Whether all of these were prepared in Mr. Bern's office.

141 25 All of the other documents were also prepared in Mr. Bern's office.

142 17 Was this Resolution dated August 1, 1985 prepared at Mr. Bern's offices. Exhibit K to the Examination of Sam Bern on December 17, 1993.

145 12 Was this document prepared in Mr. Bern's office. Exhibit M to the Examination of Sam Bern on December 17, 1993.

Regarding Cowall and its directors

138 17 Whether the document dated June 20, 1984 is a document that is provided to the Toronto-Dominion Bank, Cowall's bank.

138 24 Does the document dated June 28, 1984 show that Sheldon Bern and Yves Leduc are the

		signing.
139	7	Whether Mr. Bern can identify the document dated June, 1985 to the Toronto-Dominion Bank setting out who the directors are. Exhi I to the Examination of Sam Bern on December 17, 1993.
141	6	On an August, 1985 Toronto-Dominion Bank form, can Mr. Bern confirm that there are only two directors shown there. Exhibit J to the Examination of Sam Bern on December 17, 1993.
141	12	Was it accurate at that time (August, 1985) there were only two directors.
142	22	Did Mr. Tan know about the workings of Cowall and who was involved at Cowall.
143	17	Was Mr. Tan Mr. Bern's controller.
Regarding Consumer Can		
145	22	Request that Mr. Bern check the Consumer Can Minute Book and confirm that 99% was Ivan Bern's initially and then it was changed to 33%.
146	15	Did Mr. Bern feel he could deal with the shareholdings of Consumer Can as he wished.

4 The appellant Sam is a non-party witness whose examination under r. 39.03 was interrupted when he refused to answer certain questions. His refusal led to the motion before Master Peppiatt.

5 In order to comprehend the issues in the appeal from Master Peppiatt's order it is necessary to go into some detail on legal proceedings pending in Ontario, and other legal proceedings pending in Quebec.

Background

6 Sam Bern is a Quebec businessman. He has two sons, named Ivan Bern ("Ivan") and Sheldon Bern ("Sheldon"), and a daughter, Roslyn Bern ("Roslyn").

7 Elfe Juvenile Products Inc. ("Elfe") was incorporated under the *Canada Business Corporations Act* in 1985 by Sam as 129805 Canada Inc. The name was changed to Cowall Manufacturing Inc. ("Cowall") and the name was further changed in February 1992 to Elfe. The head office of Elfe

is in Cornwall, Ontario. On November 23, 1993, Elfe was reconstituted to be governed by the Ontario *Business Corporations Act* ("O.B.C.A.").

The Quebec Action

8 On October 19, 1992, Ivan and Sheldon commenced an action in Quebec against Sam and the companies under his control known as the CEVA Group. That action involves a dispute between Ivan and Sheldon on one hand, and Sam on the other, for control of the companies constituting the CEVA Group. In that action Ivan and Sheldon claim to be the only shareholders of Elfe.

9 On April 16, 1993, Ivan and Sheldon filed a partial desistment in the Quebec action. Ivan and Sheldon state that they discontinued that part of the Quebec action which dealt with the ownership of Elfe. Sam and Roslyn claim that the ownership of Elfe is still a live issue in the Quebec action. Roslyn filed an aggressive intervention claim in the Quebec action on May 26, 1993, disputing the claims of her brothers, Ivan and Sheldon, to ownership of the CEVA Group of corporations. On July 13, 1993, Mr. Justice Hurtubise of the Quebec Superior Court granted to Roslyn intervenor status in the Quebec action.

10 On May 12, 1994, Roslyn brought a separate and fresh action in the Superior Court of Quebec against Elfe. In that action she claimed some of the relief sought in her aggressive intervention claim. She accordingly filed a partial desistment of her aggressive intervention claim. So there are pending now in the Quebec Superior Court two actions in which Ivan, Sheldon, Roslyn, Sam, and a group of companies known as the CEVA Group (including Elfe) are involved.

The Ontario Application

11 Presumably, in response to Roslyn having brought a fresh action against Elfe in the Superior Court of Quebec, on May 27, 1993, Elfe brought an application under s. 250 of the O.B.C.A. in the Ontario Court, General Division (the Ontario application), claiming the remedy of an order confirming that Ivan and Sheldon are the only shareholders of Elfe, and for a further order declaring that Roslyn is not a shareholder of Elfe. Roslyn, as respondent in the Ontario application, asserts that she is a shareholder of Elfe. Sam is not a party to the Ontario application.

12 Roslyn brought a motion in the Ontario application to stay that application, either permanently or on an interim basis. Her ground was that the issues at large in the Ontario application were included in those at large in the Quebec actions, so the Ontario application should be stayed pending disposition in the Quebec actions. Roslyn's motion to stay the Ontario application has not been heard yet.

13 Elfe obtained ex parte, from Master McBride, an order dated June 10, 1993, under which Elfe was granted letters of request to examine some seven witnesses in the city of Montreal in furtherance of the Ontario application. One of the seven witnesses was Sam.

14 Roslyn moved to set aside Master McBride's order. By order dated June 21, 1993, Mr. Justice Grossi ordered that Master McBride's order be stayed and that it be dealt with at the return of Roslyn's motion to stay the application. Mr. Justice Grossi ordered that if Roslyn's motion to stay was unsuccessful, the timetable for the examination of witnesses could then be dealt with.

15 Ivan and Sheldon then brought a motion before Master Peppiatt, and then on appeal to Mr. Justice Farley, for the issuance of letters of request, and permission to permit the examination of Sam as a non-party witness, on the pending motion to stay. They took the position that many of the facts asserted by Roslyn in her affidavit sworn July 9, 1993, were within Sam's direct knowledge, and not Roslyn's direct knowledge. Mr. Justice Farley, on September 10, 1993, gave an order, the operative parts of which were as follows:

> 1. THIS COURT ORDERS that Sam Bern is to be examined by the solicitor for the Applicant before Susan Rothschild-Kepman at the offices of Phillips and Vineberg commencing at 10:00 o'clock in the forenoon on the 17th day of December, 1993 to give evidence on a pending motion, Court file No. RE2745/93
>
> 2. THIS COURT ORDERS that Sam Bern is to be provided with at least three days' notice prior to his scheduled examination.
>
> 3. THIS COURT ORDERS that Sam Bern is to produce all documentation in his power, possession and control related to the issues raised in the Affidavit of Roslyn Bern sworn July 9, 1993, the Affidavit of Roslyn Bern sworn July 21, 1993 and all books, accounts, invoices, contracts, letters, telegrams, statements, records, bills, notes, securities, vouchers, plans, photographs and copies of the same in Sam Bern's possession or control that in any way relates to the matters which are within the scope of the Respondent's motion to stay the Application herein or have any reference.

16 On his examination pursuant to the order of Farley J., which examination was held in the city of Montreal on December 17, 1993, Sam refused to answer certain undertakings and questions, which undertakings and questions are documented in Schedule "A" and Schedule "B" to the order of Master Peppiatt above.

17 As is evident, from perusal of the operative parts of Master Peppiatt's order, Elfe was successful in persuading Master Peppiatt that Sam should answer certain undertakings and refusals, arising out of Sam's examination as a non-party witness on December 17, 1993.

Issue

18 The issue on this appeal is what is the scope of allowable questions in the particular circumstances of the matter at hand on the examination of Sam, a non-party, whose examination is for the purpose of being of assistance to the court on a motion to stay the Ontario application.

The Reasons of Master Peppiatt

19 The relevant passage of Master Peppiatt's reasons is as follows:

> The scope of cross-examination (and by virtue of R. 39.03(2) this is a cross-examination) is very wide and the test is semblance of relevancy: see *Re Lubotta* . This is particularly so where the order sought in the pending motion is discretionary — which an Order to stay is. There is bound to be an overlap between what is relevant on the Application and what is relevant on the motion to stay. It is then significant that Ms Bern's Affidavit goes into great detail on the merits of the Application and thus opens up the field of cross-examination even if certain matters would not have been relevant otherwise; see *Wojick* . Farley J.'s reasons are of assistance but more important is the fact that his order does not limit the scope of the examination.

20 I observe that the cases of *Lubotta v. Lubotta*, [1959] O.W.N. 322 (Master) , and *Wojick v. Wojick*, [1971] 2 O.R. 687 (H.C.) , dealt with the scope of allowable questions on the cross-examination of a party on an affidavit. Sam is not a party in the Ontario application. He was not being cross-examined on an affidavit — indeed, he has not provided an affidavit in the Ontario application.

21 It is my view that the scope of allowable questions under r. 39.03 of the *Rules of Civil Procedure* where a witness is being examined in aid of a motion, is of more limited scope than that which would be proper on an examination for discovery. It is similar to, but not completely the same as, the scope of allowable questions on the cross-examination of a party [on] an affidavit. I shall try to review the parameters of r. 39.03 in more detail below.

Rule 39.03 and the Scope of Allowable Questions

22 Rule 39.03 deals with the examination of a non-party as a witness on a pending motion or application. The relevant provisions are set out below:

> 39.03 (1) Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.
>
> (2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.

23 I note that r. 39.03 does not attempt to specify the scope of questions allowed on the examination. The rule does not say whether the questions are to be limited to the subject or subjects that are at issue in the motion or those at issue in the substantive action or application.

24 Since r. 39.03 does not help us in trying to identify the scope of questions permitted on an examination or cross-examination under r. 39.03, perhaps some guidance may be found in the case law.

25 A leading case is *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 , a decision of the Ontario Court of Appeal. The court was giving consideration to who might be examined under old R. 230 and 231, and the extent of the examinations. Old R.230 is the predecessor of r. 39.03 and it stated:

> *230.* Any party may by subpoena require the attendance of a witness to be examined, before any officer having jurisdiction in the county in which the witness resides, for the purpose of using his evidence upon any motion.

26 In deciding who could be examined, the court set out what it thought was the scope of allowable questions under R. 230. The court, at p. 192, stated:

> *The evidence sought to be elicited must be relevant to the issue on the motion* . If it is, there is a *prima facie* right to resort to Rule 230. *That right must not be so exercised as to be an abuse of the process of the Court. There will be such an abuse* if the main motion is itself an abuse, as by being frivolous and vexatious, or *if the process under Rule 230, while ostensibly for the purpose of eliciting relevant evidence, is in fact being used ... in such a way as to be in itself an abuse* (as for example, by issuing subpoenas to every member of the House of Commons to prove a defamatory statement shouted out by a spectator in the gallery). The list is not exhaustive. [Emphasis added.]

27 This principle was followed by Cory J. (as he then was) in *Hamilton Harbour Commissioners v. J.P. Porter Co. Ltd.* (1976), 13 O.R. (2d) 199 (H.C.) . I observe that this case was not mentioned by counsel on the argument of the appeal herein.

28 The case before Cory J. was an appeal from the order of a master requiring the reattendance of the defendants to answer questions on their examinations as witnesses pursuant to R. 230. At p. 201, Cory J. stated:

> The basis for any questions asked of those persons subpoenaed pursuant to the provisions of Rule 230, depends on their relevancy to the issues.

29 Cory J. obviously meant issues in the motion as opposed to issues in the substantive action, since he relied on the above-cited passage in *Canada Metal* . In considering what issues were relevant to the motion, Cory J. went on to consider the grounds for the motion, as a guide to what was relevant.

30 I adopt the principle of *Canada Metal Co.* , as being of assistance in determining what questions are relevant where a non-party is being examined in aid of a motion, pursuant to r. 39.03.

One should limit oneself to questions that deal with the issues that are relevant on the motion. That can be done, in part, by considering the nature of the motion and also the grounds for the motion.

31 In the case in appeal, we are dealing with a motion to stay the Ontario application based on the ground that, having regard to the two Quebec actions, the Ontario court is forum non conveniens.

32 I will discuss briefly the principle stated in the cases of *Lubotta* , supra, and *Wojick* , supra. All relevant matters are permissible for questioning, and what is and is not ultimately relevant should be left to be decided by the trier of fact. There is, however, a limit that I think should be put on the semblance of relevancy test, and that is, where questions are asked of a non-party on an examination of that party conducted under r. 39.03, while semblance of relevancy should be the guide, the court should impose a limit if the questions go into issues that are so blatantly irrelevant that to allow the examining party to pursue those issues amounts to an abuse of the process of the court. The court should not permit its order to be used so as to authorize what amounts to a "fishing expedition": see *France (Republic) v. DeHavilland Aircraft of Canada Ltd.* (1991), 3 O.R. (3d) 705 , at p. 717 (C.A.).

The Test on a Motion to Stay

33 Without in any way attempting to be comprehensive with respect to the test on a motion to stay, and merely for the purpose of identifying the nature of such a motion for the purpose of ruling on the relevancy of the questions and undertakings at issue in the appeal, it appears that a good number of factors are taken into account when a motion to stay is based upon forum non conveniens. Among these factors are:

1. The residences of the parties.

2. The residences of needed witnesses.

3. The locations of documents that are relevant.

4. The locations of public records that are relevant.

See *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96 (S.C.C.) .

34 In *Westminer Canada Holdings Ltd. v. Coughlan* (1989), 33 C.P.C. (2d) 27 (Ont. Master) , at pp. 27 and 28, the above elements were reviewed. While that case dealt with questions arising out of the cross-examination of a party on that party's affidavit, the comments of Master Garfield pertaining to the scope of proper questions of a witness on a motion to stay are of help. Master Garfield, at p. 29, stated:

> It is true that the plaintiffs wish to inquire into the defendant's suggestion that all the witnesses named are necessary, *but it will, in my view, be oppressive and an abuse of the process of the Court to allow such inquiries which would, concomitant with such revelations, go into the merits of the action* . The Court requires, as do the plaintiffs, only to know if there is a general relevance of where the evidence is located. The plaintiffs have been given that information and at this stage are not entitled to know more. [Emphasis added.]

35 Of course, the court will consider the grounds for the bringing of the motion to stay. In the case at bar, Roslyn's chief grounds for bringing the motion to stay the Ontario application are the following:

> *1.* The applicant, Elfe Juvenile Products Inc. ("Elfe"), seeks an order pursuant to s. 250 of the Ontario *Business Corporations Act* , R.S.O. 1990, c. B.16 ("O.B.C.A."), rectifying the register or other records of Elfe.
>
> *2.* Issues relating to the ownership and control of Elfe are currently before the Superior Court of the province of Quebec in the two Quebec actions hitherto mentioned.
>
> *3.* The initial Quebec action was commenced and Roslyn filed her aggressive intervention in that action before the Ontario application was launched.
>
> *4.* Quebec is a proper forum and, indeed, is the preferable forum for the hearing of the dispute between all the parties.
>
> *5.* An application pursuant to s. 250 of the O.B.C.A. is a summary procedure whereby orders to rectify the register or other records of a corporation are made only in the clearest cases, and not where substantial issues of fact remain unsolved.

36 Further help in determining the scope of relevance on the examination of a non-party witness is indeed in the reasons given by the judicial officer who ordered that the witness be examined or who might be the judicial officer who would actually hear the motion to stay. In an ideal situation the parameters would be set out in the order of the judicial officer who actually ordered that the witness be examined in aid of the motion to stay. The reasons of Farley J. assist in determining what he thought the scope of the questions that might be put to Sam on Sam's examination under letters of request (which examination was, and is, of course, to be conducted for the purpose of providing evidence relevant to Roslyn's motion to stay the Ontario application).

37 Counsel for Sam submits that comments made by Farley J. appertaining to the relevance of questions are obiter dicta and do not bind me. I do not agree with counsel for Sam in that regard. Farley J. was of the opinion that Sam's testimony would help him to decide whether he would grant an order to stay the Ontario application. Farley J.'s thoughts about the relevance of Sam's testimony should be accorded weight by me in considering this appeal. Since Farley J. thought

that Sam's testimony would help him to determine whether he would order a stay of the Ontario application, what he said about that subject may indicate the latitude that he contemplated would govern relevancy when Sam was examined in Montreal.

38 Fortunately, the reasons for decision of Farley J. are now reported at (1993), 19 C.P.C. (3d) 355 (Ont. Gen. Div.) . I now reproduce from the report of Farley J.'s reasons, at pp. 360-361, the segment that I consider to reflect his thoughts on the scope of relevancy of questions to be put to Sam:

> It does not appear that there is duplication in the Quebec action which does not directly involve Elfe, the moving party in this situation, since it appears that in [sic] April 16, 1993 the brothers of the respondent in this motion filed a partial desistment discontinuing the only part of the Quebec action dealing with Elfe, being claim E3 in the originating Quebec notice. (E3 "declares that Sam Bern does not, directly or indirectly, own the shares of Elfe".)
>
> It appears to me that Sam Bern would be able to shed considerable light on the facts and circumstances of this messy family situation, wherein sister is pitted against her brothers relating to shares of Elfe which it appears that at least in the beginning of the tale Sam Bern, the father, is involved. It would appear to me such information would form the underlying knowledge as to whether it would be appropriate to grant a stay of proceedings. Certainly it appears that the court should not be asked to exercise its discretion in a vacuum or a partial vacuum.
>
> *There is in my view in light of the material referred to in para. 88 of Elfe's factum a reasonable basis to conclude that it would be desirable to have first-hand evidence relating to these questions* . [Emphasis added.]

39 Paragraph 88 of Elfe's factum (before Farley J.) is as follows:

> *88.* These certain particular facts include, but are not limited to, *the circumstances surrounding the placement by Sam Bern [sic] Sheldon Bern's signature on a public document* [Aff. of Roslyn Bern, para. 18, p. 126; Aff. of Sheldon Bern, para. 9, 6, p. 370, 373], *whether Sam Bern is acting in concert with the Respondent* [Aff. of Roslyn Bern, para. 22, 25, 27, 33, p. 128-131; Aff. of Sheldon Bern, para. 16, p. 374] *and other information that Sam Bern has given the Respondent with respect to the issues between the parties* [Aff. of Roslyn Bern, para. 27, p. 129]. [Emphasis added.]

The Test of Relevancy on Sam's Examination under rule 39.03

40 Therefore, the principles which I think should govern the examination of Sam on his examination and cross-examination under r. 39.03 are the following:

> *1.* The questions should relate to the issues in the motion to stay the Ontario application.

2. So long as the questions (and answers in response to them) have a semblance of relevancy to those issues they are permissible, subject to the condition that if any questions are so wide off the mark of semblance of relevancy as to amount to an abuse of the court's process, they need not be answered.

3. Guidance to the boundaries of the semblance of relevancy may be found in the reasons given by Farley J. supporting his decision that Sam be examined in relation to the motion before him to stay the Ontario application.

Application of Above Test to the Specific Questions

The Undertakings

41 Under the reasons of Master Peppiatt there are but two undertakings still in dispute.

42 *Page 88, line 12* : Sam undertook to look in his book to determine whether a cheque dated October 25, 1990, was the one given to Sam by Ivan for the redemption of shares. This undertaking is not answered. I can see no reason why Sam should not answer it. So Sam should answer this undertaking.

43 *Page 115, line 7* : Exhibit F to the affidavit of Nancy J. Tourgis, sworn March 2, 1994, contained at Tab 5(F) of the appeal record, is a letter from Solmon, Rothbart, Goodman, solicitors for Elfe, to McMaster Meighen, solicitors for Sam. This letter is dated March 1, 1994, and deals with undertakings given at p. 115, line 7. In the letter Mr. Solman, counsel for Elfe, expressed the concern that the answer provided by Sam is insufficient. He sets out a number of additional questions, which, in his judgment, arose from this undertaking. It is my opinion that the letter dated March 3, 1994, from Mr. Torralbo, counsel for Sam, to Mr. Solmon, which is annexed as Exhibit "A" to the affidavit of Nancy J. Tourgis, sworn March 2, 1994, does adequately answer this undertaking.

The Refusals

44 It is best to deal with the refusals by category as they are set out in Schedule "B" to the order of Master Peppiatt (that schedule has hitherto been copied in these reasons). I make reference to specific questions as is necessary.

Category 1 — Sam Bern's Involvement with Roslyn Bern

45 Mr. Justice Farley stated in his reasons, in the excerpts thereof that I have above set out, that it would be helpful to have the evidence of Sam firsthand in the light of the material referred to in para. 88 of Elfe's factum (before him). One of those "matters" is whether Sam was acting in concert with his daughter Roslyn, who was the respondent in the proceedings in Ontario. Normally, one

would not consider questions about whether Sam directly or indirectly pays Roslyn's legal fees or whether he is the source of certain documents put into evidence as being necessarily relevant. In the light, however, of those excerpts from the reasons of Farley J. which I have above cited, it is my view that Sam should answer those questions. The reason is es sentially that it would appear that answers to those questions would be of help to Farley J. in deciding whether or not to grant a stay of the Ontario proceedings.

Category 2 — Identification of Signatures by Sam Bern

46 The issue of circumstances surrounding the alleged placement by Sam of Sheldon's signature on a public document is raised in para. 88 of Elfe's factum (before Farley J.). Taking my cue again from the excerpts from Farley J.'s decision above cited, it is my opinion that these questions should be answered by Sam.

Category 3 — The Location in which the Corporate Documents Were Prepared

47 It is my opinion that where the documents were prepared is not relevant to the motion to stay. The current location of those documents is relevant to a motion to stay. See *Westminer Canada Holdings Ltd. v. Coughlan* , supra. Therefore, Sam need not answer this category of question.

Category 4 — Regarding Cowall and Its Directors

48 The identity and location of directors of Cowall are appropriate questions. Cowall was, after all, the precursor corporate manifestation of Elfe. Questions in this category should be answered.

Category 5 — Regarding Consumer Can

49 Questions pertaining to Consumer Can go beyond the pale of relevance and venture into the realm of the abusive. Questions pertaining to Consumer Can are therefore not proper questions.

Disposition of the Appeal

50 The appeal is granted in part. The disposition of the appeal has been much guided by the excerpts from the reasons for decision of Farley J. which I have quoted. The disposition of the appeal has also attempted to incorporate the wisdom of the decisions of the courts in *Lubotta* and *Wojick* , *France (Republic) v. De Havilland Aircraft of Canada Ltd.* , and *Westminer Canada Holdings Ltd. v. Coughlan* , and *Amchem* . Admittedly, drawing the line in any particular instance when one is considering the scope of relevance of the examination of a non-party under r. 39.03 is not easy. It is, in a sense, a sensitive exercise of discretion.

51 Order to go accordingly, varying the order of Master Peppiatt in accordance with these reasons.

52 The appellant has enjoyed some success in the appeal. There was some justification for the bringing of the appeal. The respondent has also enjoyed some success in sustaining a large part of Master Peppiatt's order. Costs in the appeal should try to reflect the apportionment of success. I therefore award no costs of the appeal. The costs of the motion before Master Peppiatt were fixed at $1,000 and were ordered to be paid to Elfe by Sam and Roslyn. I do not interfere with the disposition of costs of the motion before him made by Master Peppiatt.

Appeal granted in part.

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 TACORA RESOURCES INC.

Court File No. CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

Book of Authorities of Cargill, Incorporated and Cargill International Trading Pte Ltd.

(Comeback Motion of Tacora Resources Inc. for an Amended and Restated Initial Order, and Cross-Motion of the Ad Hoc Group of Noteholders, returnable October 24, 2023)

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