CITATION: Badesha v. Cronos Group, 2025 ONSC 743
COURT FILE NO.: CV-20-00641990-00CP
DATE: 20250203

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HARPREET BADESHA, Plaintiff

– and –

CRONOS GROUP INC., MICHAEL GORENSTEIN and JERRY BARBATO, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Paul Guy and Serge Kalloghlian,* for the Plaintiff

James Doris and Aditi Gupta, for the Defendants

HEARD: February 3, 2025

DISCOVERY MOTION

[1] The Plaintiffs in this certified class action move to compel attendance at discovery of Anna Shlimak, a former consultant to the corporate Defendant, Cronos Group Inc. ("Cronos").

[2] Counsel agreed 8 months ago that the personal Defendant, Michael Gorenstein, who is the President and CEO of Cronos, would be examined on behalf of Cronos as well as personally. Defendants' counsel explain that, relying on that understanding, they went to great efforts to prepare for Gorenstein to be examined as the corporation's representative. The Defendants also committed to have Gorenstein travel from his residence in Miami to Toronto in mid-December for his examination. Likewise, they committed that Jerry Barbato, the other personal Defendant and Cronos's former CFO, would travel from Virginia to Toronto for his examination.

[3] The approved discovery plan allocates up to 5 days for Plaintiff's counsel to examine the Defendants. It was agreed upon that Plaintiff's counsel would examine Barbato first for two days and Gorenstein second for three days. A day before the examinations were set to begin, counsel for the Plaintiff advised counsel for the Defendants that they had changed their minds and now wished to examine Gorenstein as personal Defendant for two of the three days, and for the third

day they instead wanted to examine Anna Shlimak. In an email dated December 14, 2024, Plaintiff's counsel wrote:

> Further to our discussion today about the discovery examination of Mr. Gorenstein, we propose that we examine Mr. Gorenstein for two days (Dec 16 and 17) in his personal capacity and as the corporate representative of Cronos, and that Cronos agree to an examination of up to one day of A. Shlimak under Rule 30.10 limited to her role as VP Investor Relations, which examination will be scheduled at a mutually convenient time in the New Year.
>
> If that is not agreeable, we will examine Mr. Gorenstein for two days (Dec. 16 and 17) in his personal capacity as an individual defendant and will move in the new year for an order allowing us to examine for one day Ms. Shlimak as the corporate representative of Cronos.
>
> Let me know once you have instructions or want to discuss.

[4] Shlimak was an investor relations consultant to Cronos during the bulk of the class period. She is not a Cronos employee. Plaintiff's counsel is of the view that her evidence is important to the issue of materiality as it relates to the misrepresentations alleged against Cronos. The Plaintiff had previously requested, and Cronos agreed, to make documentary production from Shlimak, as she apparently had possession of relevant documents.

[5] Plaintiff's counsel argue that it is for the Plaintiff, not the Defendant, to decide who is the most appropriate person to be discovered on behalf of the corporate Defendant: *Mastroianni v. Pusateri's Ltd.*, 2023 ONSC 7554. Defendants' counsel respond, correctly, that the approved discovery plan gives the Defendants the right to select their representative. The Plaintiff then has the right to request someone else, provided that they act reasonably in doing so.

[6] Plaintiff's counsel further contend that, given her familiarity with the materiality issues, their choice of Shlimak is reasonable. They also submit that they are allowed to change their mind about who to discover when they realize the importance of a given witness: *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia*, 2021 BCSC 1723.

[7] Defendants' counsel did not agree with Plaintiff's counsel's proposal to examine Shlimak. They are of the view that as a consultant she may have some specific knowledge, but that she is not able to speak on behalf of the corporation and does not articulate Cronos' position in the litigation. They say that is the appropriate role for Gorenstein as corporate CEO.

[8] Plaintiff's counsel proceeded to examine Gorenstein for two days, and declined the opportunity to examine him for a third day although he was ready and willing to continue with the examination. The examination of Gorenstein focused on his defense as a personal Defendant, but apparently also covered matters relating to Cronos' defense. In any case, the issues at least partly overlap. It is Plaintiff's counsel's view that the two-day examination of Gorenstein did not cover the issues of materiality that could be better addressed by Shlimak.

[9] It is clear to me that the Plaintiff cannot meet the test under Rule 30.10 for examination of a non-party. Among other things, the party seeking such an examination must show that it has been unable to obtain the information from the opposite party and from the non-party sought to be examined: *Merritt v. London Health Sciences Centre*, 2021 ONSC 4351, at paras. 30-39. As the Divisional Court has said, "there must be a refusal, actual or constructive, to obtain the information before the applicant will be able to meet the onus under rule 31.10(2)(a)": *Famous Players Development Corp. v. Central Capital Corp.*, [1991] OJ No. 2127.

[10] There is no refusal in the record, and the Plaintiff has not been rebuffed in any request for information.

[11] Likewise, the Plaintiff cannot meet the test under Rule 31.03(2)(b) for leave to examine a second corporate witness. The requirements for leave are set out in Rue 31.03(4):

> (4) Before making an order under clause (2) (b) or (3) (b), the court shall satisfy itself that,
>
> > (a) satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience; and
> >
> > (b) examination of more than one person would likely expedite the conduct of the action.

[12] The fact that the person whom the moving party seeks to examine may be an important witness is not a sufficient ground for ordering an additional witness to be examined on behalf of a party. The first witness must be shown to be unable or unwilling to satisfactorily inform themselves before an additional representative will be authorized by the court: *Baylis Estate v. Canada (Attorney General)* (2000), 49 CPC (4th) 179 (SCJ), at para. 9, leave to appeal ref'd [2000] OJ No. 4931 (Div. Ct.).

[13] It would also be necessary to show that "questions asked have not been answered, or that answers given are incomplete, unresponsive, or ambiguous, or the follow-up questions have similarly not been answered in a clear, complete and responsive way": *Fortini v. Simcoe (County)*, 2012 ONSC 1034, at para. 10. Again, the record contains no refused questions, and there is no suggestion that Gorenstein was less than forthcoming or complete and responsive in his answers when examined.

[14] It is for good reason that orders to examine a second representative of a corporation are rarely granted; under the applicable Rules, the test for an additional examination for discovery is strict: *Fischer v. IG Investment Management Ltd.*, 2016 ONSC 4405, at para. 40. The record must demonstrate not just that the proposed new witness will be a good witness, but that if that person is not examined the moving party will have no meaningful discovery: *Little v. Ellerbrock*, 2014 ONSC 5945, at para. 21.

[15] There is no suggestion here that Gorenstein is unable or unwilling to inform himself of the issues that Plaintiff's counsel seeks to address in discoveries. The very point of contention here is that Gorenstein spent many hours preparing and informing himself on the issues in the litigation, and that a change at the 11th hour is wasteful and burdensome.

[16] There are no grounds on which to base an order that Shlimak be examined for discovery, either as a corporate representative or as a non-party witness. Under the circumstances, I am not prepared to require Gorenstein to re-attend for another day of discoveries. He prepared himself once, travelled to Toronto and attended as agreed; he did nothing to deserve the burden of having to go through that again.

[17] In their email of December 14, 2024, Plaintiff's counsel gave themselves a choice: continue for another day with Gorenstein or seek leave to examine Shlimak. They have now taken that choice, the consequence of which is that they voluntarily gave up their further day with Gorenstein.

[18] At the end of the hearing before me, Defendants' counsel offered to agree to Plaintiff's counsel posing written interrogatories to Gorenstein in lieu of another day of discovery. Defendant's counsel further suggested that these interrogatories may contain questions directed at matters on which Shlimak is knowledgeable, and that Gorenstein may, if possible and appropriate, answer those by undertaking to consult with Shlimak and by conveying her response.

[19] In my view, Defendants' counsel offer is a generous one. It is a way to provide the Plaintiff with the information he seeks without unduly expanding the examinations for discovery beyond the limits that the Rules provide. Plaintiff's counsel is a liberty to forward Defendants' counsel a set of written interrogatories on the terms set out above.

[20] Counsel advise that they have agreed on $10,000 as the amount of costs to be paid in respect of this motion. The Plaintiff shall therefore pay the Defendants $10,000 in costs, all inclusive.

Date: February 3, 2025 **Morgan J.**