Court File No. 99-CV-161526

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *EVIDENCE ACT*, R.S.O. 1990, c. E.23, s. 60

IN THE MATTER OF THE *CANADA EVIDENCE ACT*, R.S.C. 1985, c. C-5, s. 47

IN THE MATTER OF AN ACTION NOW PENDING IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK CIVIL ACTION NO. 96 CIV 5667(RPP)

99 162 985

B E T W E E N:

DAVID PECARSKY, OVERALL SUPPLY INC., JASON SHANNON, JOEL BOWEN, KEVIN S. MALAKOUTI, MICHAEL GAMBOI, CHARLES YOUNG and CHAD NIEGEL on behalf of themselves and all others similarly situated Applicants	*Duncan Embury,* for the applicants
- and -	
LIPTON WISEMAN ALTBAUM & PARTNERS Respondent	*Philip Anisman,* for the respondent
	Heard: May 31, 1999

REASONS FOR DECISION

NORDHEIMER, J.:

[1] This is an application brought pursuant to section 60 of the *Evidence Act*, R.S.O. 1990, c. E.23 and sections 46 and 47 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 to enforce a letter of request issued by the United States District Court, Southern District of New York requiring the respondent to produce certain specified documents set out in Appendix "A" to these reasons and to attend for discovery.

[2] The respondent opposes this order being granted on what I believe can be fairly characterized as two basic grounds: (i) that the requested documents and examination go well beyond those necessary to address the single accounting issue raised in the U.S. action[1] and is therefore improper and would impose an undue burden on the respondent in complying with it and (ii) that the nature of the request is in fact a "fishing expedition" by which the applicants hope to discover information which would, in turn, allow the applicants to add the respondent as a defendant to the U.S. action.

[3] The U.S. action involves a class action by shareholders of Gaming Lottery Corporation ("GLC") in which they claim that the share price of GLC was improperly or artificially inflated by various activities engaged in by GLC including its acquisition of a company called Specialty Manufacturing Inc. ("Specialty"). GLC acquired Specialty in early 1995 and, among other things, consolidated its financial results into the financial results of GLC. It does not appear to be in dispute this had the effect of improving the appearance of the financial performance of GLC. Some months later, GLC was forced to divest itself of Specialty because of its inability to obtain a gaming licence from the Washington State Gambling Commission and, consequently, was forced to restate its financial statements. This had the effect of causing an immediate decline in the share price of GLC. The U.S. action was instituted as a consequence of these events.

[4] One of the central issues in the U.S. action concerns the propriety of the accounting treatment accorded to the Speciality transaction which GLC and two of its chief officers, who are defendants in the U.S. action, contend was undertaken on the advice of the respondent. The respondent was the auditor for GLC during the material times. There are two written documents which were authored by the respondent upon which particular reliance are placed in respect of this defence and they are a memorandum dated January 11, 1995 and a letter dated September 11, 1995. The specific authors of these two documents are John Wiseman and Rukhshana Dinshaw, both of whom are no longer associated with the respondent. Indeed, Wiseman left as a partner in the respondent with effect from November 1, 1995 to join GLC.

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[1] The U.S. action to which I refer is the pending proceeding in the United States District Court, namely, In Re Gaming Lottery Securities Litigation, 96 CIV 5567(RPP)

[5] A letter of request was issued by Judge Patterson of the U.S. District Court on December 2, 1998 as a result of a motion brought by the applicants and not opposed by the defendants in the U.S. action[2]. I understand that Judge Patterson is in charge of the U.S. action and has heard all motions relating to it including a motion to summarily dismiss the action by the defendants (which was itself dismissed) and a motion to certify the proceeding as a class action. Unfortunately, I do not have the benefit of any reasons from Judge Patterson for the issuance of the letter of request, although this is understandable given that the matter proceed on an unopposed basis. Judge Patterson's endorsement simply says "No opposing papers having been received, this motion is granted."

The breadth of the request

[6] It is apparent that the sole accounting issue that is identified in the material before me is the issue of consolidating the results of Specialty with those of GLC and the alleged reliance by GLC on the above-mentioned two documents from the respondent with their advice on that topic. Counsel for the applicants, however, submitted that the accounting issues were broader than this. He referred to the affidavit of Robert Finkel, one of the U.S. attorneys for the applicants, in which Mr. Finkel says, at para. 37:

> "Since the filing of the complaint, Plaintiffs have obtained evidence in discovery that suggests that GLC's ***entire*** financial statements for 1995 and 1996 were illusory." (original emphasis)
>
> and also at para. 40:
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> "However, as noted above, evidence adduced during discovery suggests that GLC's financial statements were completely fraudulent."

[2] I should perhaps more accurately say that there was no "timely" opposition to the motion. I understand that the defendants did file an opposition to the breadth of the request but since it was delivered out of time, it was summarily rejected by Judge Patterson.

[7] When I inquired of counsel for the applicants where I would find in the complaint the allegation or assertion that the validity of the financial statements of GLC as a whole were in issue in the U.S. action, I was referred to paragraph 100 of the complaint. That paragraph says:

> "The Company's financial results set forth above in paragraph 99, were materially false or misleading because, among other things, since the Specialty Manufacturing acquisition had either not been completed or been completed illegally, reporting Specialty Manufacturing's revenues and earnings on a consolidated basis with those of the Company, caused the Company's financial statements, including its revenues and earnings to be materially overstated, resulting in a direct violation of GAAP, including FAS No. 94." (emphasis added)

Counsel for the applicants relies on the wording emphasized above to contend that the accounting issue is broader than simply the consolidation issue and involves the legitimacy of the entire financial statements for GLC for the fiscal years, 1995 and 1996.

[8] I do not see where that issue fairly arises from the complaint as currently drafted. While I can appreciate that the rules regarding pleadings in actions in the District Court in the United States may be different from ours and may not require the same degree of pleading of material facts that our rules require, I have difficulty accepting that an issue as fundamental and potentially wide-ranging as a company's entire financial statements being "illusory" or "fraudulent" can be founded entirely on the words "among other things".

[9] Further, I note in this regard that in the affidavit of Sarah Gold, one of the U. S. attorneys for the defendants in the U.S. action, Ms. Gold has stated, in para. 7, in relation to the assertions of Mr. Finkel, that:

> "If by this terminology Mr. Finkel means to suggest that the accuracy of the entire financial statements for the two fiscal years ending January 31, 1995 and January 31, 1996 is at issue in [the U.S. action], this is the first I have heard of any such allegations. Plaintiff's complaint contains no allegations about the financial statements during the year ending January 1995, and as for the year ending January 1996 the only allegation concerns the reporting of the revenues of Specialty Manufacturing. Moreover, discovery has not in fact produced any evidence suggesting anything improper for fiscal year 1995 or anything beyond

> the existing allegations concerning the treatment of Specialty Manufacturing's revenues during fiscal year 1996."

[10] Subject to what I have to say below, I would be loath to enforce a letter of request requiring an Ontario citizen who is not a party to the foreign proceeding to produce large numbers of documents and to be examined under oath with respect to issues over which there is considerable uncertainty as to whether they properly form part of the issues in the foreign proceeding. Indeed, it appears to me that the request in this regard has all of the appearance of being merely a "fishing expedition" with respect to these allegations.

The Issues and the Law

[11] The starting point for the enforcement of a letter of request is section 60 of the *Evidence Act* and the corresponding section of the *Canada Evidence Act*. Section 60 states:

> "Where it is made to appear to the Ontario Court (General Division) or a judge thereof, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the rules of court, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court of tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, . . ."[3]

[12] While at times earlier in the jurisprudence it was held that a letter of request would only be enforced if the evidence sought to be obtained was for the purpose of trial, it was made clear by the Supreme Court of Canada in *Zingre v. R.* (1981), 127 D.L.R. (3d) 223 that letters of request could be enforced even for discovery purposes. Mr. Justice Dickson (as he then was) said for the Court in *Zingre* at p. 231:

> "In general, our Courts will only order an examination for the purpose of gathering evidence to be used at trial, but that is not to say that an order will never be made at the pre-trial stage. Section 43 does not make a distinction between

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[3] The reference to the Ontario Court (General Division) is now deemed to be a reference to the Superior Court of Justice by virtue of section 9(1) of the *Courts Improvement Act, 1996*, S.O. 1996, c. 25

> pre-trial and trial proceedings. It merely speaks of the foreign Court or tribunal "desiring" the testimony of an individual "in relation to" a matter pending before it. I do not think it would be wise to lay down an inflexible rule that admits of no exceptions. The granting of an order for examination, being discretionary, will depend on the facts and particular circumstances of the individual case. The Court or Judge must balance the possible infringement of Canadian sovereignty with the natural desire to assist the Courts of justice of a foreign land. It may well be that, depending on the circumstances, a Court would be prepared to order an examination even if the evidence were to be used for pre-trial proceedings."

[13] As was pointed out by Blair, J. in *Fecht v. Deloitte & Touche* (1996), 28 O.R. (3d) 188 at 196; affirmed (1997), 32 O.R. (3d) 417 (C.A.), any doubt about the availability of the letter of request procedure for pre-trial discovery was removed by the amendment to section 60 of the Ontario *Evidence Act* which now refers to "a purpose for which a letter of request could be issued under the rules of court". Under the *Rules of Civil Procedure*, a letter of request can be obtained for pre-trial discovery purposes. However, it seems to me from a fair reading of the cases that when the letter of request is directed to pre-trial discovery, rather than to evidence for trial, a higher hurdle must be overcome to satisfy the court that it is desirable that the letter of request be enforced. I reach that conclusion from some of the wording used in the cases which seem to suggest, as one can note in the wording used by Dickson, J. in *Zingre* quoted above, that the enforcement of a letter of request for discovery purposes is less the norm or, put another way, more the exception than the rule. In any event, it is, after all, always a matter of discretion whether an order will be granted to enforce a letter of request.

[14] I should note at this juncture that counsel for the applicants submitted that the evidence being sought was, in fact, evidence being sought for trial because the notice of motion for the letter of request that was before Judge Patterson refers to the fact that the evidence to be obtained is "to be used at trial." I do not consider that to be determinative of the issue. If one takes a fair reading of the material that is before me it is clear that this exercise is one of discovery to determine whether there is information in the possession of the respondent which might be of benefit to the plaintiffs at the trial of the U.S. action. It is not a situation where the evidence, no matter what, is going to be put in at the trial of the U.S. action and there is no suggestion to that effect anywhere in the material. While I have no doubt that if beneficial evidence is obtained from the respondent, the plaintiffs will use it at trial, that is not the meaning

of the words "to be used at trial" or "for the purposes of trial" as I understand them from the cases dealing with letters of request. Therefore, notwithstanding the wording used in the motion to obtain the letter of request, in my view this is still a discovery exercise to see what is available from the respondent.

[15] While there are no hard and fast rules governing these motions, since such rules would be the very antithesis of a discretion, there are certain elements to which reference can be made to determine the appropriate result. In *Friction Division Products Inc. v. E. I. Du Pont de Nemours & Co. (No. 2)* (1986), 56 O.R. (2d) 722 at 732, Osborne, J. (as he then was) laid out six criteria for the enforcement of letters of request:

> (1) the evidence sought is relevant;
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> (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
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> (3) the evidence is not otherwise obtainable;
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> (4) the order sought is not contrary to public policy;
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> (5) the documents sought are identified with reasonable specificity;
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> (6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.

[16] In light of the observations I made above regarding the scope of the use of letters of request, including their use for discovery purposes, it seems apparent that the second criteria identified by Osborne, J. is not in fact required for the enforcement of a letter of request. I shall therefore only deal with the other five criteria.

[17] There is certainly, in my view, relevance to the documents which the respondent may have regarding the information provided to the respondent by GLC that, in turn, gave rise to the authoring of the two documents in 1995. Having said that, however, I agree with the respondent's submission that the letter of request is overly broad. There are many items sought by the letter of request that are of marginal relevance, e.g., the time sheets of, and the accounts

rendered by, the respondent. Others bear no relevance to the issues that I can determine, e.g., documents concerning any communication with any law firm rendering professional services to GLC; documents relating to communications with investors or rating agencies; documents concerning fees charged; desk and pocket calendars; and a myriad of others. However, the mere fact that the letter of request may be overly broad is not necessarily, and in and of itself, a reason for not enforcing the letter of request. It was noted by the Court of Appeal, in its decision dismissing an appeal from the decision of Blair, J. in *Fecht*, that the courts in Ontario do have the power to narrow the request contained in the letter of request to that which the court views as relevant.[4]

[18] In my view, the only material in this request that is relevant at this stage of the proceedings are those documents relating to Specialty concerning the recommendations made by the respondent regarding the appropriate accounting treatment for the earnings of Specialty referred to in the documents from the respondent dated January 11, 1995 and September 11, 1995.

[19] As to whether the evidence is not otherwise obtainable, it is apparent that the two people who have the best information regarding the reasons why the two documents were written are Wiseman and Dinshaw. I was advised at the beginning of the hearing of this motion that a letter of request has been issued by the New York court to this court to compel the examination of those two individuals, who I noted earlier are no longer associated with the respondent. While they would be in the best position to give evidence regarding the discussions between them and GLC, it seems likely that the respondent is in the best position to determine what, if any, documents exist that touch on the letters. By that, I mean, for example, notes in the file or memoranda to the file detailing any such discussions. I am satisfied therefore that at least with respect to the issue of such documents, they cannot be obtained other than from the respondent.

[20] Leaving aside for the moment the issue of public policy, which I will address in respect of the issue of Rule 30.1, it seems to me that the last two criteria are also satisfied with respect to the request as I have narrowed it, that is, the documents are identified with reasonable

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[4] See the Court of Appeal's decision in *Fecht* at p. 419

specificity and the production of those documents would not be unduly burdensome on the respondent if they were ordered produced. While I note the concerns expressed by the respondent, through the affidavit and supplementary affidavit of Mr. Leiderman, regarding the inconvenience that would be placed upon the respondent if it was required to produce the documents, I am not satisfied that the concerns expressed amount to being "unduly" burdensome in all of the circumstances. They seem, rather, to be the normal inconveniences that any party would suffer if subjected to the requirement to respond to a letter of request.

[21] The consideration of these criteria alone is not the end of the matter, however. As noted by Blair, J. in *Fecht*, in considering whether to enforce a letter of request, it is useful to have regard to the requirements that our court would apply to a request for examination of a non-party under rule 30.10 of the *Rules of Civil Procedure*. While the requirements under rule 30.10 are not to be considered conditions precedent to the enforcement of a letter of request, they are of some relevance in determining whether a decision to enforce the letter of request would be a reasonable one.[5]

[22] The Court of Appeal in *Attorney General of Ontario et al. v. Stavro et al.* (1995), 26 O.R. (3d) 39 at p. 48 laid down the following factors to be considered by a motions judge in deciding whether to order production from a non-party under rule 30.10:

(1) the importance of the documents in the litigation;

(2) whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the party seeking production;

(3) whether the discovery of the other party to the litigation with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the other party;

(4) the position of the non-party with respect to production;

(5) the availability of the documents or their informational equivalent from some other source which is accessible to the party seeking production;

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[5] See the Court of Appeal's decision in *Fecht* at p. 420

(6) the relationship of the non-party to the litigation and the parties to the litigation, i.e., is the non-party a stranger to the litigation or is it allied with the party opposing production.

[23] In terms of these factors, first, I accept that any material that may be in the possession of the respondent which shows what information was given by GLC to the respondent which lead to the creation of the two documents that were subsequently obtained would be important material in the litigation. Second, I also believe that given the central importance of the two documents to the issues in the U.S. action it would be unfair to require the applicant to proceed to trial without knowing whether such material exists and what it reveals. Third, it is apparent from the deposition of Mr. Weltman, the Chief Financial Officer of GLC and the individual who requested the documents from the respondent in 1995, that he either does not remember what the respondent was told at the time or disputes what the respondent relates it was told in the two documents. The basic information that was given to the respondent at the time cannot, therefore, be satisfactorily obtained from, or tested through, GLC. Fourth, it is clear that the respondent objects to producing the material. Fifth, it is also clear that this background material cannot be obtained from any other source unless either or both of Wiseman and Dinshaw took copies of it with them when they left the respondent and there is no evidence that this is the case. Sixth, I am satisfied that the respondent is a stranger to the litigation notwithstanding that it was formerly the auditors for GLC. There is no suggestion in the record before me that would substantiate any other conclusion.

[24] Therefore, a consideration of the factors regarding the application of rule 30.10 would, on balance, support an order enforcing the letter of request, albeit only in the narrower form that I have referred to above.

[25] I now turn to the issue of public policy and the implied undertaking.

The implied undertaking

[26] The respondent also opposes this application on the grounds that it is, in fact, a "fishing expedition" being undertaken by the applicants with the principal goal of obtaining

information upon which they could add the respondent as a defendant in the U.S. action. While such an allegation could be made with respect to any request to enforce letters of request, it appears to me that this issue has particular application to the facts and circumstances here. There is some suggestion in the record that such an objective is at least part of the reason why the evidence is being sought. By way of example, I refer to the following excerpt from paragraph 54 of the affidavit of Robert C. Finkel, who is one of the lead attorneys for the plaintiffs in the U.S. action, wherein he says:

> "Plaintiffs are not precluded by the PSLRA (or any other statute) from obtaining relevant evidence notwithstanding any risk that Lipton Wiseman perceives that the discovery Plaintiffs are seeking will reveal its participation in GLC's fraudulent scheme." (emphasis added)

[27] While Mr. Embury says that this statement only means that the fears of the respondent are not determinative of whether relevant evidence should be produced, I think that the only fair reading of the statement by Mr. Finkel is that the plaintiffs are looking for, or at least are attune to the possibility that their discovery of the respondent may reveal, evidence by which they can allege that the respondent was part of the "fraudulent scheme" that they in turn allege GLC engaged in. There is certainly no positive assertion by the applicants or anyone on their behalf that this is not at least part of the reason for the discovery request being made through the letter of request, notwithstanding the "back and forth" between the parties as reflected in the affidavits filed.

[28] Counsel for the respondent points out that information collected through a letter of request is not protected by the implied undertaking rule, rule 30.1 of the *Rules of Civil Procedure*, or by the implied undertaking at common law, since any use of the evidence if produced to join the respondent as a defendant in the U.S. action would occur in the United States which does not recognize any such undertaking. Therefore, he submits that the respondent is at risk that information which it produces, if so ordered, may form the very basis for it to be made a defendant to the U.S. action. Counsel for the respondent says that this is another reason or basis for denying the applicants' request to enforce the letter of request.

[29] The rationale for the implied undertaking rule is fully canvassed by Morden, A.C.J.O. (as he then was) in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.). While I do not propose to repeat all of what the Associate Chief Justice had to say on the subject in the *Goodman* case, there is one particular segment which bears repeating here. At p. 369, he quotes from Matthews and Malek's *Discovery* (1992) at p. 253 as follows:

> "The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party's documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery."

[30] There cannot be any doubt that if such discovery was being sought from a non-party who was in Ontario, the provisions of rule 30.1 would protect that party from such a use of the documents. I can not see any rational or logical reason why a party who is subject to an application to enforce letters of request from a foreign court should be granted any less protection that it would be entitled to if subject to the same request in a proceeding in our court. To do otherwise, it seems to me, is to ignore that part of the test for enforcing a letter of request which requires that it not be contrary to our public policy or otherwise be prejudicial to the sovereignty of Ontario or its citizens.[6] Our policy is to require that parties use documents obtained through the discovery process only for the purpose of that proceeding and clearly not for the purpose of commencing fresh litigation against the party who was compelled to produce the documents.

[31] I note, as the Associate Chief Justice did in *Goodman*, that the United States has essentially the opposite approach regarding the production of documents and the use to which they can be put. In the United States, absent a protective order, parties are free to use documents

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[6] To paraphrase Dickson, J. in *Zingre* at p. 230

produced for any purpose including commencing fresh litigation. We have expressly rejected that approach, as stated in the *Goodman* case at p. 373:

> "Accordingly, neither principled nor practical considerations suggest to me that we should adopt the United States approach."

[32] Some might suggest that if such an obstacle is placed in the path of the enforcement of letters of request that all that will occur is that the plaintiffs will join persons, such as the respondent, as a defendant in the first instance and obtain their discovery through that process. However, that is not as simple a solution as it may initially appear.

[33] The respondent has filed on this motion an affidavit from Professor John Coffee of Columbia University Law School who provided considerable information on the *Private Securities Litigation Reform Act* of 1995 (the "PSLRA"). The PSLRA was passed by the United States Congress in an attempt to curb what were seen by some as abuses for which class actions, particularly in the area of securities litigation, were being used. The PSLRA made various changes to the procedure surrounding such actions. In particular, it prevented any discovery from being undertaken until a motion to dismiss the claim could be determined; it required more stringent and particularized pleadings to be made and it protected secondary defendants (such as accountants and underwriters) by limiting joint and several liability under the *Securities Exchange Act* of 1934. Therefore, it is not simply a matter of joining some one such as an accounting firm and obtaining discovery as a consequence. There appears to be a fair likelihood that such a step would be met by an immediate motion to dismiss which would, I gather, probably be successful unless specific and credible allegations of wrongdoing have been made against the firm. As Professor Coffee points out in his affidavit at paragraph 16:

> "Given the intent of the PSLRA, there is also a perverse irony surrounding this request for discovery. If plaintiffs had directly sued Lipton, Wiseman for securities fraud, their claims would be subject to prompt dismissal because their complaint alleges no facts that would give rise to the requisite "strong inference of fraud" that the complaint must allege under the PSLRA's heightened pleading rules. It is today quite difficult after the PSLRA to plead such an action against auditors that will withstand such a motion to dismiss."

[34] It is my view, therefore, in circumstances, as there are here, of possible claims being made against the respondent, that it would be contrary to the public policy of Ontario and would interfere with its sovereignty and that of its citizens to enforce the letter of request absent an undertaking from the applicants that no such use will be made of the documents produced or the evidence gathered under the letter of request without leave of this court or, alternatively, evidence of a satisfactory protective order being in existence in the U.S. action providing a similar protection to the respondent. Indeed, at the conclusion of his main submissions, Mr. Embury allowed that his clients "would not quarrel" with some form of such an undertaking being a condition of any order being granted to enforce the letter of request.

[35] In terms of whether I have jurisdiction to make conditions to the granting of an order to enforce a letter of request, I have been referred to the decision in *Re Local Court of Stuttgart of the Federal Republic of Germany and Canadian Imperial Bank of Commerce et al.* (1997), 31 O.R. (3d) 684 in which Lax, J. at p. 688 expressed significant reservations as to her authority to impose conditions in such matters, although in the end result an order was granted to enforce the letter of request in all respects so the issue became moot. I note however that the concern in that case was principally whether the section of the Canada *Evidence Act* would allow the imposition of conditions and I am dealing here with an application that is principally under the Ontario *Evidence Act*, the wording of which Lax, J. noted is broader.

[36] From a review of the authorities, it appears that conditions have been imposed by other judges as a term of granting orders to enforce letters of request. For example, Catzman, J. (as he then was) imposed a condition in *Re Mulroney and Coates* (1986), 27 D.L.R. (4th) 118 regarding the manner in which objections should be made; Blair, J. did so in *Re Bank of Credit and Commerce International S.A. (In Liquidation) and Haque et al.* (1996), 30 O.R. (3d) 477 in terms of disclosure of the evidence to be taken and the sealing of the court record; and Laskin, C.J.C. appears to have approved of restrictions placed on the enforcement of the letter of request by the judge of first instance in *District Court of the United States v. Royal American Shows Inc. et al.* (1982), 134 D.L.R. (3d) 32.

[37] In any event, I see no reason in principle why this Court, in the exercise of its discretion as to whether or not to enforce a letter of request, ought not to be able to place terms or conditions on the enforcement if it is of the opinion that such terms or conditions are necessary to do justice. It seems to flow naturally and logically from the same principle by which this court can narrow the request sought in the letter of request. It would also seem to be capable of being authorized by that portion of section 60 of the *Ontario Evidence Act* which says:

> ". . . and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper . . ." (emphasis added)

[38] In the end result, therefore, I conclude that I do have jurisdiction to impose such a condition as part of the order enforcing the letter of request.

[39] There are two final matters that need mention. First, Mr. Anisman urged upon me that given the overbroad language of the letter of request, I should not exercise my discretion to narrow the request but should, instead, simply dismiss the application. I took it from his submissions that he was in essence saying that there should be a penalty for being so overbroad in the request and that the penalty ought to be the rejection of the request rather than carving it back to something reasonable. In that way, I suppose, it would serve as a warning to future applicants that they should be careful in the drafting and scope of their request. While there is no doubt considerable merit to that position, I believe it to be overly harsh in the result and inconsistent with the mutual deference and respect that this court has, and should have, to the requests for assistance by other courts in the same manner that we would wish our requests to be handled by them. I do not, therefore, accede to Mr. Anisman's request.

[40] Secondly, there is the issue of whether there should be ordered, in addition to any production of documents, an examination of a witness from the respondent. I note that the applicants' material does not ask for a specific individual to be examined nor does the letter of request itself. Further, the applicants' material does not name any commissioner to preside over the taking of any such examination. It is apparent that no one within the respondent is likely to have any knowledge of the relevant events since both Wiseman and Dinshaw have left and there

is no suggestion that anyone else within the respondent dealt with this matter. Mr. Embury fairly suggested that the issue of an examination of a witness from the respondent might best be left until after any examination of Wiseman and Dinshaw to see if such an examination was even necessary. I agree with that suggestion and would therefore defer that portion of the request for determination at a later date, if necessary.

Conclusion

[41] I therefore grant an order enforcing the letter of request of the United States District Court for the Southern District of New York dated December 17, 1998 restricted to those documents in the possession, power or control of the respondent relating to Specialty concerning the recommendations made by the respondent regarding the appropriate accounting treatment for the earnings of Specialty referred to in the documents from the respondent dated January 11, 1995 and September 11, 1995. It shall be a condition of this order that the applicants shall deliver to the solicitor for the respondent, and file with this court, a written undertaking that they will not use any documents produced pursuant to this order and the letter of request for any purpose other than the prosecution of their claims against the existing defendants in the U.S. action unless they first obtain leave to otherwise use such documents from a judge of this court, all as contemplated by rule 30.1 of the *Rules of Civil Procedure*. If there is a problem with the specific wording of the undertaking, then I may be spoken to.

[42] I make the above order without prejudice to the applicants' right to seek to enforce this letter of request in other respects if it should turn out from the production of the documents under this order that other aspects of the original letter of request can then be shown to be relevant and necessary.

[43] If counsel cannot agree on the appropriate disposition of the costs of this motion, they may make written submissions to me on that issue within 15 days of date of the release of these reasons.

NORDHEIMER J.

RELEASED: June 7/99

DOCUMENTS REQUESTED

1. All workpapers or other documents generated or obtained in connection with any professional services you performed for GLC during the relevant period.

2. All documents concerning Specialty Manufacturing Inc. ("Specialty") including, but not limited to, documents concerning your recommendation of an accounting treatment for the earnings of Specialty referred to in the letter dated September 11, 1995 and memorandum dated January 11, 1995 attached hereto as Tab 3.

3. All documents constituting, reflecting, referring or relating to communications between you and (a) GLC; (b) Jack Banks; (c) Larry Weltman; (d) any officer or director of GLC; (e) attorneys for any of the foregoing; or (f) U.S. or Canadian governmental authorities concerning an accounting treatment for the earnings of Specialty.

4. All documents constituting any "General Binder" or "General File" generated or obtained in connection with any professional services you performed for GLC during the relevant period.

5. All documents constituting an index of your workpapers relating to all professional services you performed for GLC.

6. All documents concerning GLC's calculating, testing, reporting or recognition of revenues, earnings or earnings per share.

7. All documents concerning GLC's computing, testing, reporting or recognition of expenses.

8. All documents concerning any possible, potential, contemplated or actual write-offs or account adjustments with respect to GLC's financial statements.

9. All documents concerning the integrity or accuracy of GLC's methods for recognizing revenue, including, without limitation, all documents concerning any quarterly or year-end evaluation designed to determine whether revenues were recognized in the appropriate fiscal quarter, year or other time period.

10. All documents concerning the adequacy of GLC's internal accounting and auditing controls including, without limitation, all internal controls designed to insure the fair and accurate reporting of GLC's financial statements and results.

11. All documents concerning any possible, potential, contemplated or actual delay in completing any annual audit of GLC's financial statements.

12. All documents concerning any possible, potential, contemplated or actual restatement of GLC's previously issued annual or interim financial statements.

13. All documents concerning the possible, potential, contemplated or actual withdrawal of any audit report or audit opinion on GLC's financial statements.

14. All documents prepared or reviewed by you in connection with financial statements, annual reports, quarterly reports, filings with the United States Securities and Exchange

Commission, (the "SEC") or other public reports or any professional services performed by you regarding GLC, including but not limited to: filings, workpapers, permanent files, bulk files, general files, schedules, spread sheets, review files, second partner review files, correspondence files and audit papers.

15. All documents prepared or reviewed by you concerning the accuracy or adequacy of disclosure in all or any part of GLC's public reports or filings.

16. All documents concerning any communications you had with the SEC or other U.S. or Canadian federal or state regulatory agency or any national, regional or local stock exchange or securities association, including, but not limited to NASDAQ and the Toronto Stock Exchange, relating to GLC.

17. All documents concerning any possible, potential, contemplated or actual audit opinion or report relating to GLC.

18. All charts and other graphic presentations which list and/or describe the internal organization and structure of GLC, its subsidiaries, divisions, subdivisions, affiliates, joint ventures or other corporate subdivisions and the relationship among them and any changes therein, including but not limited to all such documents which identify all management level personnel of GLC.

19. All documents concerning any communication you had with the Audit Committee of GLC or any members of GLC's board of

directors or any officer of GLC concerning GLC's accounting practices, internal controls or financial statements.

20. All documents concerning your retention by GLC, including, without limitation, any letters of engagement, representation letters or management letters exchanged between you and GLC.

21. All documents concerning any communication with any law firm rendering professional services to GLC.

22. All documents concerning any communication with any other accounting firm rendering professional services to GLC.

23. All documents provided to or received from, or concerning communications or meetings with, GLC.

24. All documents concerning any inquiry from, or any communication regarding GLC between you and (a) any investor or potential investor in GLC, or (b) any securities or financial analyst or rating agency.

25. All documents constituting the time records or time sheets for any work you performed for GLC.

26. All documents concerning any fees or compensation you received from GLC.

27. All desk and pocket calendars, diaries, and personal correspondence, reading and chronological files and notebooks, maintained by any of your personnel concerning any activities they performed in connection with any audit, compilation, review, consulting, tax or other professional services you performed for GLC.

28. All documents sent to or received by you from GLC's in-house or outside legal counsel.

29. All documents concerning any communication with any Defendant, including any communication with any Defendants' representatives, agents, attorneys or other person acting or purporting to act on any Defendants' behalf.

30. All documents concerning your policies for the retention or destruction of documents.

31. The documents identifying, with full names and current or last known home and work addresses, all of your personnel who were involved, in a professional capacity, in providing services for GLC.

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Court File No. 99-CV-161526

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID PECARSKY et al

Applicants

- and -

LIPTON WISEMAN ALTBAUM
& PARTNERS

Respondent

REASONS FOR DECISION

NORDHEIMER, J.

RELEASED: June 7, 1999

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