

## **Introduction**

1. Bell Canada/Sympatico (“Bell”) is a non-party respondent to a motion brought by the plaintiffs under Rule 233 of the *Federal Court Rules 1998*. The applicants’ motion seeks an order compelling Bell to disclose personal information concerning some of its customers.

### *Rule 233, Federal Court Rules 1998*

2. The motion has been brought so as to facilitate an action commenced by the applicants against persons currently identified by the pseudonyms John and Jane Doe who, it is claimed, are facilitating the infringement of copyrights which are either owned by or licensed to the applicants.

3. In support of the motion, the applicants have filed three affidavits.

## **The Interplay of Rule 233 and the Personal Information and Protection and Electronic Documents Act**

4. The information sought from Bell is specified in the draft Order set out in Schedule “A” to the applicants’ Notice of Motion, being the name, home mailing and business addresses, telephone number(s), facsimile number(s) and e-mail address(es) associated in Bell’s files with each of a number of IP addresses, dates and times, which are themselves set out in Schedule “A” of the applicants’ draft Order.

5. Bell is a federally-regulated employer subject to the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). The PIPEDA defines “personal information” as information about an identifiable individual that is not the name, title, business address or telephone number of an employee of an organisation. The information sought by the applicants on this motion is clearly personal information under the PIPEDA.

### *The Personal Information Protection and Electronic Documents Act, s. 2(1)*

6. The enactment of the PIPEDA has signalled to the citizens of Canada that they should possess a heightened expectation of privacy in their personal information and business records.

7. In accordance with this heightened expectation of privacy, the PIPEDA establishes that personal information held in Bell's records may be disclosed without the knowledge or consent of the individual associated with the information only in very limited circumstances. Such information may be disclosed by Bell if the disclosure is ordered by a court with jurisdiction to compel the production of information or to comply with rules of court relating to the production of records.

*The Personal Information Protection and Electronic Documents Act, s. 7(3)(c)*

8. The Federal Court has jurisdiction in this matter.

9. The Court should make an order compelling disclosure of PIPEDA-protected information only if it is satisfied that the moving parties have presented a *prima facie* case for disclosure which is based on admissible evidence.

10. The applicants' claim is that the defendants have improperly distributed material protected by copyrights which the applicants hold and, as such, the disclosure of personal information is justified.

*Statement of Claim* filed February 10, 2004, paragraph 27

11. Accordingly, the Court should only grant the Order sought if it is satisfied that there is admissible evidence of sufficient weight to establish a *prima facie* case that:

- a) The applicants either own or possess the exclusive licence of relevant copyrights;

- b) Bell customers currently identified by the pseudonyms John and Jane Doe have made available for distribution those copyrights, for the purpose of allowing others to infringe them; and
- c) such conduct is actionable.

12. The admissibility and weight of evidence filed in support of a motion such as this one is determined with reference to the *Federal Court Rules 1998* and the jurisprudence thereon.

13. In support of their motion relating to Bell, the applicants have submitted three affidavits: the affidavit of Gary Millen sworn February 6, 2004, the supplementary affidavit of Gary Millen sworn February 9, 2004, and the affidavit of Kathy Yonekura sworn February 10, 2004. The second Millen affidavit (Tab 3) was sworn to correct the IP address for “hotshot@kazda” (64.231.254.117 not 64.231.255.184). None of the affidavits indicate how MediaSentry determined the IP address associated with the P2P user names at the time of investigation nor how the error was made.

14. Rule 81(1) states that affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent’s belief, with the grounds therefor, may be included.

Rule 81(1), *Federal Court Rules 1998*

15. With respect to the ownership and exclusive license issues, on its face, the affidavit of Kathy Yonekura is not based upon personal knowledge but upon belief, and the grounds for her belief have not been included in the materials submitted to the Court. In her affidavit, Ms. Yonekura states that she believes, based upon the representations of the applicants, that the applicants own the copyrights in a great number of musical compositions, which are listed in exhibits to that affidavit. However, she has not included in her affidavit, or in the exhibits thereto, any objective evidence that the applicants do

own those copyrights. Her belief, thus, appears to be based on nothing more than the bare representations of the applicants.

16. Likewise, with respect to the issue of infringement, the affidavits of Gary Millen are not based upon personal knowledge but upon belief, and the source of his belief has not been identified in the materials submitted to the Court. Many of the statements in his affidavit, specifically those relating to the issue of whether the defendants have made copyrighted material available for distribution, are based upon the bare representations of unidentified individuals. On cross-examination, he confirmed that he had no personal knowledge of the investigation relating to each of the alleged Bell customers.

Transcript of Cross-examination of Gary Millen, p. 68-69, Q. 240-243

17. In these circumstances the Court must be satisfied that the applicants have established the necessity of using hearsay evidence in Ms. Yonekura's and Mr. Millen's affidavits. Where such necessity has not been shown, hearsay evidence should be rejected.

*Ethier v. Canada (R.C.M.P. Commr.)*, [1993] 2 F.C. 659 (C.A.)

*Merck Frosst Canada Inc. v. Canada (Min. of National Health & Welfare)* (1995), 91 F.T.R. 260 Fed. (T.D.)

*Alex Wilson Goldstream Ltd. v. Lapacco Paper Products Ltd.*, [1994] F.C.J. No. 264 Fed. (T.D.)

18 A document is not admissible simply because it is attached to an affidavit. The affidavit evidence must prove the document. The Court must determine if Ms. Yonekura's and Mr. Millen's affidavits prove the exhibits attached thereto, and if those exhibits are therefore admissible.

*Inhesion Industrial Co. v. Anglo Cdn. Mercantile Co.* (2000), 6 C.P.R. (4<sup>th</sup>) 362 (Fed. T.D.)

19. Rule 81(2) states that where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

*Rule 81(2), Federal Court Rules 1998*

### **The Ability of Bell to Comply with the Order Sought**

21. Bell has already advised the Court that, in these particular circumstances, it has been able to identify the Bell customer to which the specific IP address, identified in the Millen affidavits, was assigned on the particular dates and times set out in his affidavits. This is not to say, however, that those customers actually engaged in the conduct described in the affidavits, only that they were the account holder to whom the IP address was assigned at that particular moment. If ordered to comply, Bell can provide the name, address and telephone number of those customers.

22. In the draft Order attached as Schedule “A” to their Notice of Motion, the applicants ask the Court to order that Bell provide the information sought in an affidavit which also attaches the documents produced pursuant to the Order.

23. The *Federal Court Rules 1998* are silent on whether a non-party can satisfy an order to produce documents by serving an affidavit with attached exhibits upon the appropriate party. Bell is unaware of any federal jurisprudence on this issue.

24. *Loblaw Companies Ltd. v. Aliant Telecom Inc.* concerned an e-mail containing confidential information belonging to Loblaw. Loblaw was able to determine that the e-mail had been sent using an account with Yahoo! and an IP address with Aliant Telecom. The New Brunswick Court of Queen’s Bench permitted Loblaw to examine Yahoo! and

Aliant for discovery in order to determine the identity of the sender, whom Loblaw intended to sue. McLellan J. specified that the examination occur through affidavits.

*Loblaw Companies Ltd. v. Aliant Telecom Inc.*, [2003] N.B.J. No. 208 (Q.B.), para. 6

25. The question for the Court is whether the expressed wishes of the applicants, in addition to the persuasive value of *Loblaw Companies Ltd.*, warrant the issuance of an order requiring production through an affidavit. Bell does not object to this procedure provided that it is compensated for its reasonable expenses, including legal fees.

### **The Costs of Compliance with the Order Sought**

26. If the applicants are successful, Bell will be put to considerable expense in complying with the order both in having conducted the searches necessary to determine the information and then providing it to the applicants if Bell is required to provide it either in affidavit form or by way of oral examination.

27. The *Federal Court Rules 1998* are silent on whether the court may order the reimbursement of non-parties for the expense of complying with a production order. Bell is unaware of any federal jurisprudence on this issue.

28. Ontario cases have held that the costs of compliance with such an order can be awarded to the non-party.

*Shelanu Inc. v. Print Three Franchising Corp.*, [2001] O.J. No. 1750 (S.C.)

*Hockenhull v. Laskin*, [1987] O.J. No. 1319 (S.C.)

29. Rule 400(1) of the *Federal Court Rules 1998* states that the Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

30. In *A.L. Sott Financial (Newton) Ltd. v Bauman*, a non-party was granted the reasonable costs of searching for and copying documents subject to a production order, as well as solicitor's fees connected with compliance with the order. Master Bolton held that the non-party's referral of the production request to a solicitor was reasonable considering that the documents requested included confidential information.

*A.L. Sott Financial (Newton) Ltd. v. Bauman*, [1998] B.C.J. No. 950 (Master)

31. Under the PIPEDA, personal information is confidential information.

32. Rule 239(1) and (3) state that a person who has been granted leave to examine a non-party shall pay to the non-party travel expenses and, in certain circumstances, the costs of having a solicitor assist him or her during the examination.

Rules 239(1) and (3), *Federal Court Rules 1998*

33. There is no evidence or suggestion that Bell has misconducted itself in any way. Given the nature of the information sought, Bell has acted reasonably and responsibly in taking steps to ensure that its customers personal information is protected in accordance with its statutory obligations.

34. Bell submits that regardless of the outcome of this motion, the Court should order that Bell be reimbursed for its reasonable out-of-pocket expenses and that the applicants should also be ordered to pay Bell's reasonable legal costs.

*Young v. Canada*, [1988] F.C.J. No. 1067 Fed. (T.D.)

*Socher v. Canada*, [1988] F.C.J. No. 1074 Fed. (T.D.)

*Wise v. Canada*, [1988] F.C.J. No. 1075 Fed. (T.D.)

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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James A. Hodgson

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Kathryn Podrebarac