

Joel D. Watson

Direct Line: 416.777.4879
e-mail: watsonj@bennettjones.ca
Our File No.: 27339.351

August 11, 2004

Via Email and Service

Messrs. Harry Radomski, Richard Naiberg
and Peter Ruby
Goodmans LLP
Suite 2400, 250 Yonge Street
Toronto, Ontario
M5B 2M6

Your Clients: The Appellants/Plaintiffs

Messrs. Charles F. Scott and Rocco Di Pucchio
Lax O'Sullivan Scott LLP
Suite 1920, 145 King Street West
Toronto, Ontario
M5H 1J8

Your Client: Shaw Communications Inc.

Ms. Wendy Matheson and Ms. Laura Malloni
Torys LLP
Suite 3000, 79 Wellington Street West
P.O. Box 270, TD Centre
Toronto, Ontario
M5K 1N2

Your Client: Rogers Communications Inc.

Mr. James A. Hodgson and Ms. Kathryn Podrebarac
Hodgson Tough Shields DesBrisay O'Donnell LLP
Suite 550, 36 Toronto Street
Toronto, Ontario
M5C 2C5

Your Client: Bell Canada/Sympatico

Mr. Serge Sasseville
Quebecor Media Inc.
300 Viger Avenue East
Montreal, Quebec
H2X 3W4

Your Client: Vidéotron Ltée.



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Ms. Philippa Lawson
Canadian Internet Policy and Public Interest Centre
University of Ottawa, Faculty of Law
57 Louis Pasteur Street
Ottawa, Ontario
K1N 6N4

Your Client: CIPPIC

Mr. Howard Knopf
Macera & Jarzyna LLP
P.O. Box 2088, Stn. D
427 Laurier Ave. W., Suite 1200
Ottawa, Ontario
K1P 5W3

Your Client: CIPPIC

Dear Counsel:

**Re: TELUS Communications Inc. et al. ats. BMG Canada Inc. et al.
Court File No. T-292-04
Federal Court of Appeal File No. A-203-04**

Please find attached TELUS Communications Inc.'s Memorandum of Fact and Law, served upon you pursuant to the *Federal Court Rules*.

Yours truly,

BENNETT JONES LLP

Joel D. Watson

JDW/jhm
Attachment

BMSTORLegal\027339\00351\282668v1

FEDERAL COURT OF APPEAL

BETWEEN:

BMG CANADA INC., EMI MUSIC CANADA, A DIVISION OF EMI GROUP
CANADA INC., SONY MUSIC ENTERTAINMENT (CANADA) INC.,
UNIVERSAL MUSIC CANADA INC., WARNER MUSIC CANADA LTD.,
BMG MUSIC, ARISTA RECORDS, INC.,
ZOMBA RECORDING CORPORATION, EMI MUSIC SWEDEN AB,
CAPITOL RECORDS, INC., CHRYSALIS RECORDS LIMITED,
VIRGIN RECORDS LIMITED, SONY MUSIC ENTERTAINMENT INC.,
SONY MUSIC ENTERTAINMENT (UK) INC., UMG RECORDINGS, INC.,
MERCURY RECORDS LIMITED AND WEA INTERNATIONAL INC.

Appellants
(Plaintiffs)

-and-

JOHN DOE, JANE DOE AND ALL THOSE PERSONS WHO ARE INFRINGING
THE PLAINTIFFS' COPYRIGHT IN SOUND RECORDINGS

(Defendants)

-and-

SHAW COMMUNICATIONS INC., ROGER CABLE COMMUNICATIONS INC.,
BELL CANADA, TELUS COMMUNICATIONS INC. and VIDEOTRON LTEE.

Respondents
(Third Party Respondents)

-and-

CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Intervener

**MEMORANDUM OF FACT AND LAW
OF THE NON-PARTY RESPONDENT
TELUS COMMUNICATIONS INC.**

PART I – THE FACTS

Overview

1. The Appeal by seventeen of Canada's largest record companies, represented by the Canadian Recording Industry Association (collectively "CRIA"), of the Order of the Honourable Mr. Justice von Finckenstein dated March 31, 2004, should be dismissed.

2. CRIA did not provide sufficient certainty for a court to order the conscription of TELUS Communications Inc.'s ("TELUS") employees into CRIA's self-described "campaign" or "wave of lawsuits" against people who share music on the Internet. The disruption of TELUS's business, and the chance of wrongful identification were too great, and the evidence in support of the motion, too weak, for the Order sought by CRIA below to have been granted. It was therefore properly dismissed.

Reference: Notice of Motion of Appellants (against TELUS), Appeal Book, Vol. I, Tab 7 at pp. 73-75 ("Notice of Motion").

Plaintiffs' Notice of Appeal issued April 14, 2004, Appeal Book, Vol. I, Tab 1 at p. 4 ("Notice of Appeal").

Affidavit of David Shrimpton sworn March 4, 2004, Appeal Book, Vol. IX, Tab 22 ("Shrimpton Affidavit") at p. 2518, para. 6, Exhibit "A" "Canadian Recording Industry Hopes To Inspire Fear Over File Swapping" and "Music Industry Hunting Canadian Pirates" at pp. 2528-31.

Affidavit of Greg Pultz sworn February 13, 2004, Appeal Book, Vol. IX, Tab 21 ("Pultz Affidavit") Exhibit "B" RIAA Press Release "New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers" at pp. 2511-12.

Reasons and Order of Justice von Finckenstein dated March 31, 2004, Appeal Book, Vol. I, Tab 2 ("Order").

3. It is notable that CRIA's Memorandum fails to cite any of the evidence in its overview, all the while arguing that Justice von Finckenstein misunderstood the evidence and misapplied the law. CRIA's statements with regard to the identification of IP Addresses, infringement, refusal to provide information voluntarily and only source of information, are not supported by the evidence or law. Among other things, CRIA has not, but must, prove how it obtained the IP Addresses in the first place, before a court can be confident that these very first pieces of information are at all accurate and before the Court conscripts TELUS employees to take those IP Addresses and attempt to link account holders to them. The fact that two out of three

addresses provided by CRIA could not be linked to accounts that were open at the time of the alleged infringement must be considered before TELUS, as an innocent non-party, is forced to investigate the account holders and hand them over into the hands of CRIA.

Reference: Appellants' Memorandum of Fact and Law at pp. 1-2, paras. 1-5.

Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2524-25, para. 27.

4. To obtain the order, which by its extraordinary nature is supposed to be rare, the onus was on CRIA to show that there was sufficient certainty of infringement *and* that there was no other way to locate the alleged infringers *and* that there was sufficient certainty that compelling the investigation would reveal the alleged infringers *without* unfairly prejudicing the non-parties or harming innocent parties in the process. It did not do so. Instead, in a highly publicized campaign, CRIA proceeded with hearsay affidavits, which left unexplained gaps and sought to compel investigations, without compensation, into dated IP Addresses where the results would be unreliable. Whether based on the decisions in *Norwich* and *Glaxo* or on Rules 233 or 238 of the *Federal Court Rules*, the order sought is a discretionary one, requiring the balancing of CRIA's, the ISP's, the account holder's and the public's interests. That discretion was exercised based on findings of fact, applying a test that CRIA itself urged upon Justice von Finckenstein, and accordingly, should not be interfered with unless it is clearly wrong. That is not the case here.

Reference: *Norwich Pharmacal Co. v. Commissioners of Customs and Excise*, [1973] 2 All E.R. 943 (H.L.) ("*Norwich*") at 949 per Lord Reid.

Glaxo Wellcome PLC v. Minister of National Revenue (1998), 81 C.P.R. (3d) 372 (F.C.A.) ("*Glaxo*") at 392, 378-379.

Rules 233, 238, *Federal Court Rules*, 1998, SOR/98-106 ("*Federal Court Rules*").

Housen v. Nikolaisen, [2002] 2 S.C.R. 235 ("*Housen*") at 245, 248, 250, 252.

Reading & Bates Construction Co. v. Baker Energy Resources Co. (1988), 25 F.T.R. 226 (T.D.) ("*Reading & Bates*") at 229, para. 6, citing *Algonquin Mercantile Corporation v. Dart Industries Canada Ltd.* (1984), 55 N.R. 291 (F.C.A.).

Order, Appeal Book, Vol. I, Tab 2 at pp. 15-20, paras. 10-18, pp. 25-26, para. 31, p. 31, para. 42.

Excerpt from Written Submissions of CRIA on the Motion before Justice von Finckenstein, at pp. 9-10, para. 33, p. 13, para. 44, attached as Appendix "B" ("*CRIA Excerpt*").

5. Justice von Finckenstein dismissed CRIA's motions to conscript TELUS, Shaw Communications Inc., Rogers Cable Communications Inc., Bell Canada, and Vidéotron Ltée (collectively, the "ISPs") because what CRIA sought was not an order for the production of existing documents as in *Norwich* and *Glaxo*, but rather an order compelling TELUS to conduct investigations into constantly shifting IP Addresses that were months old (without knowing how CRIA purports to have obtained the IP Addresses in the first place) to attempt to link the IP Addresses on one system to Media Access Control Addresses ("MAC Addresses") (which are themselves not certain or always static) on another, and cross-reference those findings with account information on yet another system; all of which would not identify the specific user in any event. On top of that exercise, CRIA also sought to compel TELUS employees to become expert forensic witnesses for CRIA by preparing and swearing affidavits, without compensation, and without consideration for the impact on TELUS's own businesses, particularly if individuals were wrongly identified.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 31-32, para. 43.

Notice of Motion, Appeal Book, Vol. I, Tab 7, Schedule "A" at pp. 77-79.

6. Unlike in *Norwich* and *Glaxo*, where the records being sought were readily available and certain, TELUS did not have paper or electronic files which linked IP Addresses to a user. In *Norwich* and *Glaxo*, the motions were, in every sense, a production of existing documents in the possession of the parties. In both *Norwich* and *Glaxo*, there was no doubt that there had been infringement and that the Customs Ministries had records of who the infringers were. The issue in *Glaxo*, as well as *Norwich*, was whether or not the non-party (in both cases, Customs Ministries collecting information pursuant to a statutory power) was required to hand over existing documents in their possession, not whether they could be forced to generate them. In *Glaxo*, at page 379, the plaintiff's application material included:

6. The Minister has already disclosed to Glaxo detailed information regarding importation of ranitidine hydrochloride including, on a transaction-by-transaction, volume and value and origin, but has withheld the importers identities which would allow Glaxo to protect the rights which have been and are clearly being violated.

Reference: *Glaxo* at 379, para. 9.

Order, Appeal Book, Vol. I, Tab 2 at p. 18, para. 15, pp. 26-28, paras. 32-35.

Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2519-25, paras. 10-27.

7. Because of the extraordinary relief requested, in addition to the other elements of the *Norwich* test, CRIA must show a *prima facie* case. Indeed, CRIA both accepted the "*prima facie*" standard and urged the application of the *Norwich* decision to Rule 238 in the court below. It cannot now argue that Justice von Finckenstein erred in law, having urged upon him, on the motion, the very thing it now says is an error.

Reference: *Norwich* at 949 per Lord Reid.

CRIA Excerpt at pp. 9-10, paras. 31-34, p. 12, para. 41, p. 13, para. 44.

8. Moreover, His Honour was not wrong. Although a "*bona fide*" case is referred to in some (but not all) of the decisions in *Norwich*, both *Norwich* and *Glaxo* show on the facts in those cases, that an order for discovery from a non-party should only be given if the moving parties have presented a *prima facie* case, not just that they are proceeding in "good faith". An honestly held, but objectively suspect case is not enough to intrude into the private affairs of a non-party. There must be no substantial chance of injustice being done. In both *Norwich* and *Glaxo*, it was clear that the patent had been infringed, not just that the plaintiff was proceeding in good faith. The test was more than "*bona fide*".

Protection of traders from having their names disclosed is a more difficult matter. *If we could be sure that those whose names are sought are all tortfeasors, they do not deserve any protection. In the present case the possibility that any are not is so remote that I think it can be neglected.* The only possible way in which any of these imports could be legitimate and not an infringement would seem to be that someone might have exported some furazolidone from this country and then whoever owned it abroad might have sent it back here. Then there would be no infringement. But again that seems most unlikely.

But there may be other cases where there is much more doubt. The validity of the patent may be doubtful and that there could well be other doubts. *If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court and at the expense of the person seeking the disclosure. The court will then only order discovery if satisfied that there is no substantial chance of injustice being done.* [Emphasis added]

Reference: *Norwich* at 949 per Lord Reid.

British Steel Corporation v. Granada Television, [1981] 1 All E.R. 417 (H.L.) ("*British Steel*") at 459 per Lord Wilberforce.

9. In this case, regardless of the legal test of what constitutes copyright infringement, CRIA has not shown that the IP Addresses it specified are likely the right ones because it does not show how it obtained them. In addition to not explaining how the IP Addresses were obtained (they are not visible on the "screen-shots" contained in CRIA's material), CRIA's primary witness was not even in the office when the work was allegedly done, let alone there to view the screens of the alleged files sharers, or able to prove that anyone had listened to the music and compared the songs against the list of copyrighted works. Moreover, he "assumed" the ISPs would have logs and that it would be relatively easy for them to search for the account holder (which is wrong) even though he acknowledged that locating the router would not locate the user, that there may be authorized and unauthorized users behind each router and that he did not even know what version of KaZaA was being used. There was simply not enough certainty for Justice von Finckenstein to exercise his discretion to compel an innocent non-party to go to work for, and hand over private information to, CRIA.

Reference: Order, Appeal Book, Vol. I, Tab 2, at pp. 18-21, paras. 17-20, pp. 26-28, paras. 32-35.

Transcript of the Cross-Examination of Gary Millin, March 4, 2004, Appeal Book, Vol. IX, Tab 23 at pp. 2578-86, qq. 161-196 ("Millin Cross-Examination").

10. Moreover, judicial discretion to involve an innocent non-party should not be exercised unless the plaintiff truly intends to commence or pursue the existing proceeding. It should not be used for "mere gratification of curiosity" or for some ancillary but lesser purpose than pursuing legitimate action. Instilling fear, compelling settlements and disrupting the TELUS customer base is not legitimate action. CRIA's failure to include its statement of claim in its original material, its request for exemption from the implied undertaking rule, the actions of its American counterpart, and its suggestion that the affidavits would be used in separate applications, all suggest CRIA did not intend to pursue the existing action once the information was disclosed.

Reference: *British Steel* at 459 per Lord Wilberforce.

Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2518, para. 6, p. 2526, para. 31, and Exhibit "A" at pp. 2528-31.

Additional Plaintiffs' Material, Appeal Book, Vol. I, Tab 3; Statement of Claim; Additional Plaintiffs' Material, Appeal Book Vol. X, Tab 29, Letter from R. Dimock to J. Watson dated February 25, 2004.

11. Accordingly, it is respectfully submitted that CRIA cannot show that Justice von Finckenstein erred in requiring solid proof before granting relief. Justice von Finckenstein did not err in rigorously applying the *Norwich* test and holding that "the purpose of Rule 233 is to compel the disclosure, but not the very creation of documents."

Reference: Order, Appeal Book, Vol. I, Tab 2 at p. 18, para. 15.

12. It is also respectfully submitted that CRIA cannot seek the relief set out at paragraph 83 of its Memorandum that was not sought on the motion below and not set out in CRIA's Notice of Appeal. Firstly, the relief sought below was against the Internet Service Provider Business Unit of TELUS only, not TELUS as a whole, as appears now to be the object of this Appeal. TELUS has many other business units each with their own records relating to a myriad of different services. As no relief was sought from these other business units below, there was no opportunity to adduce evidence of the enormity and intrusiveness of such a request. Secondly, the relief below was limited to disclosure of specific pieces of account information, such as last known name and address, that could be associated to the IP Address provided. Paragraph 83 of CRIA's Memorandum is much broader, seeking "any and all records relating to the identity and address for service". Thirdly, neither the notice of motion nor the notice of appeal sought cross-examination of a representative as is now purportedly sought. It is inequitable to the Respondents and Justice von Finckenstein for CRIA to now attempt to change the relief sought. CRIA cannot appeal that which was not sought below and that which was not set out in its Notice of Appeal.

Reference: Notice of Motion, Appeal Book, Vol. I, Tab 7 at pp. 73-75.

Notice of Appeal, Appeal Book, Vol. I, Tab 1 at p. 4.

Appellants' Memorandum of Fact and Law at pp. 28-29, para. 83.

Rules 337 and 339, *Federal Court Rules*.

What CRIA Asked For

13. On the Motion, CRIA moved pursuant to Rule 233, for an Order directing TELUS to:

1(a) disclose to counsel for the Plaintiffs the last known name; home, mailing and business addresses; telephone numbers; facsimile numbers and e-mail

addresses in the business records of the ISP associated with the IP Addresses and dates and times listed in Schedule "A" to this Order, if available; and

(b) produce to counsel for the Plaintiffs a copy of the ISP's records used to identify the information disclosed pursuant to subparagraph (a), which copies may be redacted by the ISP prior to production to remove irrelevant information.

2. ...deliver to counsel for the Plaintiffs, forthwith and in any event no later than ten days after the date on which the Plaintiffs serve a copy of this Order...an affidavit...

(a) setting out the information disclosed pursuant to subparagraph 1(a) above; and

(b) attaching as exhibits the documents produced pursuant to subparagraph 1(b) above.

CRIA also asked for the implied undertaking rule not to apply. The draft Order did not provide for compensation or costs to TELUS, or for examination of a TELUS representative.

Reference: Notice of Motion, Appeal Book, Vol. I, Tab 7, Schedule "A" at pp. 77-79.

14. TELUS provides Internet access on a flat fee for connection basis (except for some older dial-up service plans which are unlikely to be used for music sharing) and therefore keeps only limited records of Internet usage. TELUS does not maintain records of Internet usage for the purpose of identifying Internet account holders and the materials accessed or transmitted by them while on the Internet. Accordingly, TELUS does not have a "business document" containing the information TELUS has been requested to produce.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2517, para. 4.

15. Schedule "A" to the draft order in the court below provided, in the case of TELUS, three peer-to-peer ("P2P") network pseudonyms, Internet Protocol Addresses ("IP Addresses") and the date and time the IP Addresses were reportedly "sharing" sound recordings said to be subject to copyright. The pseudonyms are names created by the individual users and are not related to any TELUS account information. For example, TELUS does not have an account in the name of Sweetydee11@KaZaA. TELUS cannot therefore produce from a file cabinet or electronic database, an account list providing the name, address, telephone and facsimile numbers for the user, Sweetydee11@KaZaA.

Reference: Notice of Motion, Appeal Book, Vol. I, Tab 7, Schedule "A" at p. 79.

Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2519-20, paras. 13-14.

16. Sweetdee11@KaZaA is a user name for a person who has access to online file sharing technology from a web based service provider, www.KaZaA.com. Sweetdee11@KaZaA identifies this user to KaZaA and to other subscribers to that service. Importantly, CRIA has not brought this motion against any of the file-sharing providers, such as KaZaA, who presumably would have more direct information as to the identity of Sweetdee11@KaZaA if the alleged user were a KaZaA Plus subscriber. If the user subscribed to KaZaA Plus, Sweetdee11@KaZaA would have had to register and would have had to pay for the service. Apparently CRIA did not contemplate alternatives such as this as CRIA's prime witness did not know what version of KaZaA the alleged infringers subscribed to.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2519-20, paras. 13-14.

Millin Cross-Examination, Appeal Book, Vol. IX, Tab 23 at p. 2583, qq. 180-181.

17. Because TELUS has no information on Sweetdee11@KaZaA, it would be required to take the IP Address and conduct an investigation to determine what account had been assigned the IP Address at the time of the alleged sharing activity. CRIA, through the affidavit of Gary Millin, implicitly acknowledges that TELUS is unlikely to have the business records sought and that investigation will be required. Mr. Millin states that:

48. Once an ISP is given an IP address within the range of IP addresses it manages, and the date and time it was used, it should be a relatively straightforward task for the ISP to determine the identity and contact information of the Infringers.

Reference: Affidavit of Gary Millin, Sworn February 6, 2004, Appeal Book, Vol. VII, Tab 12 at p. 1972, para. 48 ("Millin Affidavit").

18. Mr. Millin however, had no actual knowledge, and in speculating, greatly oversimplified the ability of TELUS to obtain the information requested. Although TELUS employees are able to conduct investigations to determine whether a TELUS account is associated with an IP Address, it is not a simple or straightforward process. Because IP Addresses are dynamic, *i.e.*, being constantly reassigned as computers access and exit the Internet, to locate the account holder associated with an IP Address, TELUS employees must first locate a MAC Address, which could be located on one of four different networks, to which the IP Address was assigned,

at a particular time. The MAC Address then must be cross-referenced with account records, if they are available for the time in question. This process is onerous, not completely accurate, and consumes TELUS resources. Moreover, this only addresses identification of the account holder. TELUS has no ability to identify the users.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2517-18, paras. 3 and 5.

19. As stated above, TELUS does not have anywhere a document which identifies either Sweetdee11@KaZaA, or the IP Addresses as set out at schedule "A" to the proposed order. Such a document simply would have no commercial use or benefit to TELUS. What CRIA is really asking is for the Court to direct TELUS to search and determine what TELUS account accessed the TELUS Internet system and was given a particular IP Address at the time set out in schedule "A" to the draft order. This process is not done in the normal course of business and thus there are no existing lists, files, records, or documents containing the information requested. In addition, none of the TELUS staff would know the information requested as a result of their normal duties as TELUS does not monitor the content of what account holders access on the Internet.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2520-21, paras. 15-16.

20. The only way for TELUS to locate the account that accessed the Internet using the IP Address in question would be to cross-reference the IP Address at the date, time, network and time zone to a database of MAC Addresses and then cross-reference the MAC Addresses with the account database, assuming that the information still exists and is recoverable. The more historic a search is, the less reliable the information will be, as records are kept in different ways and for different periods for different systems.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2521, para. 17.

21. TELUS provides Internet service primarily in Alberta and British Columbia but has accounts in some of the other provinces and territories as well. TELUS has 750,000 individual Internet account holders and provides Internet service to 85,000 institutions, government departments and corporations.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2521, para. 18.

22. TELUS has a certain number of IP Addresses allocated to it by the American Registry for Internet Numbers ("ARIN"). There are, however, fewer IP Addresses than accounts. The IP system is predicated on the assumption that all potential users will not want to access the Internet at the same time. Accordingly, most IP Addresses are dynamic, which means that they are not associated consistently with any particular personal computer ("PC"), MAC Addresses, or Internet access account. Instead, as a customer accesses the Internet, the hardware connection, to which the person's PC is connected, "calls" for an IP Address and one is "assigned" to it temporarily by the system. Accordingly, an IP Address may not be associated with any account for very long. It is therefore not possible to directly identify an account holder merely from an IP Address.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2521, para. 19.

23. To complicate matters, the PC does not itself have an address, but rather the hardware connection, *i.e.*, the router or network adaptor, through which the PC gains access to the Internet has an embedded address that was assigned to it when it accessed the Internet for the first time. This is called the MAC Address and it is an address associated with the hardware connection not the PC. This distinction is important, particularly when the hardware connection provides access to multiple PCs through the use of a Local Area Network ("LAN").

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2522, para. 20.

24. Accordingly, for TELUS to determine the account holder, it would first have to determine which MAC Address was assigned the IP Address in question at the particular point in time. Even then, TELUS can never identify the "user", *i.e.*, the person actually using the computer at the time of the alleged infringement. TELUS can only identify the person who opened up the TELUS account associated with the MAC Address. To compound matters, the account holder and the user are not always the same, or even known to each other, due to multiple users, hardware limitations and the potential for unauthorized use.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2522, paras. 21-22.

25. With respect to the account holder, if the request is made within thirty (30) days of when the Internet was accessed for the impugned P2P sharing activity, TELUS has a good chance of identifying the account (depending on the particular TELUS Internet system the customer was

using). However, for requests concerning customer activity thirty (30) days or more before the request (as in this case), the information becomes less reliable to the point of being non-existent.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2522, para. 22.

26. As noted above, TELUS sells high-speed access to the Internet on the basis of a flat fee for the connection itself, not on the basis of time connected to the Internet. Accordingly, TELUS has no reason for billing purposes to track or to record what materials its account holders access and transmit on the Internet. Therefore, even if TELUS performs investigations, they are limited by the temporary nature of TELUS's records (often to a thirty-day period), which are directed towards addressing current customer service concerns, when they arise, not for recording historical Internet access or fulfilling requests to identify users.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2522-23, para. 23.

The Information is Not Sufficiently Reliable

27. The limitations in searching for the MAC Address are:

- (i) there is no certainty that CRIA has the correct IP Address to start with. Mr. Millin's affidavit does not explain how CRIA identified the IP Address for Sweetdee11@KaZaA as being 66.183.24.99;
- (ii) the vast majority of TELUS IP Addresses are dynamic, meaning that they are moved from account holder to account holder;
- (iii) TELUS currently has four Internet systems in operation, each which has different record keeping protocols; and
- (iv) there is a range of archival information available to locate the MAC Address, depending upon the system, with some systems having no archiving capacity at all. Accordingly, TELUS may or may not have a log of the IP Address and/or MAC Address, depending upon the time of usage and the time CRIA makes its request.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2522-23, para. 23.

28. Even if the MAC Address is determined, it would not necessarily determine the identity of the account holder with certainty in all instances, because of hardware limitations that may provide erroneous results.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2523, para. 24.

29. Upon determining which MAC Address was assigned the IP Address at the particular point in time, TELUS would then need to cross-reference the MAC Address with the Online Customer Administration ("OCA") database to determine to which TELUS account the MAC Address was registered. OCA logs however only exist for thirty (30) day periods in most cases.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2523, para. 25.

30. Even if the MAC Address is determined and the account holder is identified, it would not necessarily determine the identity of the user because:

- (a) someone other than the account holder may have access to the PC;
- (b) certain institutional and corporate accounts have multiple LANs, each with multiple users. There could be as many as 255 users on each LAN if they are using a router. Many residential households have LAN as well, and accordingly, there may be multiple users behind each MAC address;
- (c) if a user accesses an Internet chat room, the PC he or she is using may be hacked or an Automated Internet Relay or a File Transfer Protocol server may be deposited on the user's PC. As a result, some other user may be sharing files on that PC, through that account and MAC address, without the first user's (or account holder's) knowledge; and
- (d) wireless networks may not be secured against external access.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2524, para. 26.

31. As a result, TELUS cannot identify an account holder, based on an IP Address, with certainty. In the present case, TELUS can only say that it has likely identified one of the three accounts associated with the IP Addresses provided by CRIA:

- (a) TELUS could not find the account information for 66.183.24.99 11/26/2003, 8:06 AM EST (-0500 GMT);
- (b) TELUS has located some information on IP 198.53.33.222 at the time specified 10/25/2003 9:28 AM EDT (-0400 GMT), which showed the MAC address of the network card or router that had leased that IP at the time. However, the account

currently holding that MAC address was not open at the time of the alleged infringement; and

- (c) TELUS may have located the account information for 66.222.250.84 12/1/2003, 11:28 AM EST (-0500GMT).

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2524-25, para. 27.

The Request is Onerous

32. CRIA's current requests are likely the first of many more similar requests. CRIA's American affiliate has described its current actions as a "campaign" in a press release announcing the initiation of 532 lawsuits on a single day. The American campaign has now come to Canada as disclosed by CRIA in statements made to the press just prior to the first return date of this motion.

Reference: Pultz Affidavit, Appeal Book, Vol. IX, Tab 21, Exhibit "B", "New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers", posted in the RIAA Website on January 21, 2004 at pp. 2511-12.

Shrimpton Affidavit, Appeal Book, Vol IX, Tab 22 at p. 2518, para. 6, Exhibit "A", "Canadian Recording Industry Hopes To Inspire Fear Over File Swapping" published in the February 14, 2004 *The Globe and Mail*; and "Music Industry Hunting Canadian 'Pirates'" published in the February 13, 2004, *The Toronto Star* at pp. 2528-31.

33. TELUS has no part in the alleged infringement. In fact just the opposite, TELUS markets an on-line fee based music service that competes with the P2P sharing networks.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2518-19, para. 8.

34. CRIA could possibly obtain some of the information it seeks directly from the file sharing networks involved where they charge fees, such as KaZaA Plus.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2518-19 para. 8.

35. Compliance with the order sought below and/or the more onerous order sought in CRIA's Memoranda, would prejudice TELUS by requiring that numerous investigations be conducted on short notice without consideration for TELUS's own business and customer needs and that TELUS employees and counsel then prepare affidavits based on those investigations and/or that they attend to be cross-examined by CRIA, the account holder defendants that are identified, or both. This will be extremely disruptive and costly to TELUS's business.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2517-18, para. 5.

36. Each request by CRIA will consume TELUS resources without consideration for TELUS's other commitments. Each historical request can take over one hour to investigate. The TELUS Dynamic Host Control Protocol Archive Library is held on compact discs and has to be manually retrieved, loaded, "unzipped" and reviewed. In the case of one of the three IP Addresses sought by CRIA in this motion, it took over six hours. This is an expensive process which includes not only employee time but also the cost of the use of the equipment, disc retrieval, the loss of the employees involved in performing their real jobs and the cost and time spent contacting the customer to notify them that a request for their personal information has been made, as well as the time spent by TELUS in-house and external legal counsel reviewing and vetting requests, preparing affidavits or statements and attendance at cross-examinations. Moreover, granting the Order sought below, the Court must consider the potential adverse impact on TELUS customer relations from erroneous allegations and threatened lawsuits.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2525, para. 29.

The Decision of the Federal Court

37. Justice von Finckenstein found that the motions raised three issues:

- (i) What legal test should the Court apply?
- (ii) Have the Plaintiffs (Appellants) met the test?
- (iii) If an order is issued, what should be the scope and terms of such order?

Reference: Order, Appeal Book, Vol. I, Tab 2 at p. 14, para. 8.

38. Justice von Finckenstein held Rule 233 did not apply and that the test established by the *Norwich* and *Glaxo* cases was the test that should apply to an application brought under Rule 238 in a "John Doe" action. This was also the test that CRIA urged in the Court below.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 15-18, paras. 10-14.

39. Justice von Finckenstein found that CRIA had to show:

- (a) the applicant must establish a *prima facie* case against the unknown alleged wrongdoer;

- (b) the person from whom discovery is sought must be in some way involved in the matter under dispute, whom he must be more than an innocent bystander;
- (c) the person from whom discovery is sought must be the only practical source of information available to the applicants;
- (d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs;
- (e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns.

Reference: Order, Appeal Book, Vol. I, Tab 2, p. 17, para. 13.

40. Justice von Finckenstein held that CRIA had not met the test on the evidence, denied CRIA's motions and granted costs to the ISPs. First, he held that CRIA did not establish a *prima facie* case against the alleged unknown wrongdoers because:

- (i) the affidavit evidence was deficient,
- (ii) there was no evidence of a connection between the user pseudonyms and the IP Addresses, and
- (iii) there was no evidence of infringement of copyright.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 18-25, paras. 16-29, p. 33, para. 47.

41. Second, the Plaintiffs (Appellants) provided no evidence that the ISPs were the only practical source of information available to them.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 25-26, para. 31.

42. Third, the public interest concerns in favour of disclosure did not outweigh the privacy concerns because of:

- (i) the specific circumstances and facts of the case,
- (ii) the age of the data,
- (iii) the unreliability of the data, and

- (iv) the serious possibility of an innocent account holder being identified.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 29-31, paras. 36-42.

43. Furthermore, Justice von Finckenstein held that if an order had been issued, among other things, the information produced would be limited to, *i.e.*, name and the last known address, the implied undertaking rule would remain in place and CRIA would be required to compensate the ISPs for their expenses and legal costs.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 32-33, paras. 44-46.

PART II – THE POINTS IN ISSUE

44. TELUS respectfully submits that the issues on appeal are:

- (i) Was the Motions Judge correct in finding that Rule 233 only applies to existing documents?
- (ii) Was the Motions Judge correct in finding that the same test for an order compelling discovery of a non-party for identification of the defendant should be applied whether under Rule 238 or in reliance upon the decisions of this Honourable Court in *Glaxo* and the British House of Lords in *Norwich* and *British Steel*?
- (iii) Was the Motions Judge correct in finding that the test to be applied required CRIA to demonstrate a *prima facie* case?
- (iv) In any event of whether a *prima facie* case or *bona fide* case is required, did the Motions Judge make a palpable and overriding error in finding as fact that CRIA had not shown:
 - (a) that its evidence was reliable (since it was hearsay on critical issues and did not state the source of the information or that it was believed?)
 - (b) that it had identified the proper IP Addresses?

- (c) that there was copyrighted music being uploaded (because there was no evidence that the music files had been listened to and compared with the copyrighted works?)
- (v) Did the Motions Judge make a palpable and overriding error in finding that CRIA had not shown whether or not the ISPs were the only practical source of information available to the plaintiffs?

PART III – SUBMISSIONS

Standard of Review

45. It is respectfully submitted that on matters of law, the standard of review is correctness, on matters of fact, the standard of review is palpable and overriding error, and that on matters of discretion, the standard of review is clearly wrong.

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event'...rather than a 'tryout on the road.'"...For these reasons, review of factual findings under the clearly-erroneous standard – with its deference to the trier of fact – is the rule, not the exception.

Reference: *Housen* at 249-250, para. 13 citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (S.C.).

46. A discretionary decision of a motions judge should not be interfered with unless it was clearly wrong in law or on the facts.

Reference: *Reading & Bates* at 229, paras. 5-6.

Production of "Documents"

47. CRIA appeals Justice von Finckenstein's finding that Rule 233 required documents to exist. However, Rule 233 is discretionary and His Honour was not clearly wrong in refusing to

exercise that discretion where the non-party would be required to create the documents. Moreover, Rule 233 clearly requires the document to be in the possession of the non-party (*i.e.*, to exist) for it to be produced:

On motion, the Court *may* order the *production of any document that is in the possession of a person* who is not a party to the action, if the document is relevant and its production could be compelled at trial. [Emphasis added]

Reference: Notice of Appeal, Appeal Book, Vol. I, Tab 1 at p. 4 and p. 8, para. 12.

Rule 233, *Federal Court Rules*.

48. Mr. Millin acknowledges that there would not be existing records but speculates that "once an ISP is given an IP Address within the range of IP Addresses it manages, and the date and time it was used, *it should be a relatively straightforward task for the ISP to determine the identity and contact information of the Infringers.*" [Emphasis added]

Reference: Millin Affidavit, Appeal Book, Vol. VII, Tab 12 at p. 1972, para. 48.

49. CRIA's new position, found at paragraph 25 of its Memorandum, that the notices issued as a result of the motion constitute "existing documents" is disingenuous. CRIA knows full well that the information was only obtained and the notices sent so as to be able to respond to the motion itself.

Reference: Appellants' Memorandum of Fact and Law at p. 10, para. 25.
Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2524-525, para. 27.

50. Similarly, CRIA's reliance upon the definition of "document" at Rule 222, ignores the reality that absent investigation, production of copies of backup tapes (if they fit within the definition which is not admitted) of uncorrelated data without analysis would be of no utility to CRIA, and the tapes themselves could not be located by TELUS without analysis in any event. Moreover Rule 222 is specifically applicable to Rules 223 to 232 and 295 but not to Rules 233 and 238 and Rule 41 has no applicability at all. The only evidence before the Motions Judge from both CRIA and TELUS was that no document or record existed prior to the motion.

Reference: Rules 41 and 222, *Federal Court Rules*.

51. Accordingly, Justice von Finckenstein was correct when he held that "the purpose of Rule 233 is to compel the disclosure, but not the very creation of documents."

Reference: Order, Appeal Book, Vol. I, Tab 2 at p. 18, para. 15.
Glaxo at 379, para. 9.

The Applicable Test for Disclosure by a Non-Party in a "John Doe" Action

52. CRIA argued that the applicable test for disclosure by a non-party in a "John Doe" action was that established in *Norwich* and adopted by this Court in *Glaxo*. Justice von Finckenstein agreed and applied the test. The Appellants now reverse their position and argue that the lower courts acceptance of their argument was in error. This should not be permitted. Moreover, absent conflicting wording in Rule 238, the test for discovery of a non-party as to the identity of the defendant should be the same after an action is commenced as it is before, particularly where the words used in rule 238 are similar to those used in the *Glaxo* and *Norwich* decisions.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 15-18, paras. 10-15.
CRIA Excerpt at p. 9-10, paras. 31-34, p. 12, para. 41.

Information on an Issue in the Action

53. Rule 238(3) provides:

The Court *may*, on a motion under subsection (1), grant leave to examine a person and determine the time and manner of conducting the examinations, *if it is satisfied that* [Emphasis added]

- (a) the person may have information on an issue in the action;

Reference: Rule 238(3), *Federal Court Rules*.

54. Rule 238(3) does not expressly set out what level of proof the Court must have before being satisfied enough to exercise its discretion. Justice von Finckenstein found that the level of proof for discovery after an action was commenced should be the same as before. CRIA in the court below submitted that the test was either *bona fide* or *prima facie* from *Norwich* and *Glaxo* without drawing a distinction. Justice von Finckenstein cited *Glaxo* and was aware of the reference to "*bona fide*". However, in *Glaxo*, like *Norwich*, there was no doubt that there had been infringement and that the Respondents knew who the infringers were. The adoption of the words "*bona fide*" from one of the judgments in *Norwich* must be considered in the context of the facts of those cases, and the specific reference to "no substantial chance of injustice" by Lord

Reid cited above, which clearly evidence a higher level of proof before an innocent non-party is discovered.

Reference: Order, Appeal Book, Vol. I, Tab 2 at p. 15, para. 10, p. 18, para. 14.

CRIA Excerpt at pp. 9-10, para. 33, p. 13, para. 44.

Norwich at 949 per Lord Reid.

British Steel at 459 per Lord Wilberforce.

Glaxo at p. 377, paras. 3 and 5, at 379, para. 9, at pp. 387-389, paras. 24-27.

55. Regardless of whether *bona fide* or *prima facie* is the standard of proof, CRIA failed to meet either. CRIA had the onus to convince Justice von Finckenstein that there had been infringement and that by connecting the IP Addresses it produced to the ISP accounts, the ISPs would be able to identify the infringers, *i.e.* the defendants. However, CRIA did not prove the IP Addresses or that there had been infringement. Millin stated that the IP Addresses were those of the KaZaA pseudonyms but at no time did the Millin Affidavit explain or outline how these IP Addresses were obtained by Media Sentry, who obtained them, what procedures were undertaken to obtain the IP Addresses and the reliability of the procedures and the accuracy of the IP Addresses obtained. Mr. Millin did not provide any evidence in support of those beliefs and in fact admitted that he had no personal knowledge of how those IP Addresses were obtained or what KaZaA system was being used. In contrast, Shrimpton gave detailed technical information in response. This is the cornerstone of the entire motion and its omission is a fatal flaw. Moreover, neither of CRIA's witnesses testified from personal knowledge or hearsay that the files had been listened to.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2522-23, para. 23.

Millin Cross-Examination, Appeal Book, Vol. IX, Tab 23 at pp. 2551-60, qq. 70-88, pp. 2578-83, qq. 161-181.

56. Millin cannot just swear the computer told an unnamed employee who told him. Section 31 of the *Canada Evidence Act* requires that CRIA prove the technology used actually works and is trustworthy:

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

31.2 (1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established under section 31.4 applies.

(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

CRIA did not meet the requirements of section 31 of the *Canada Evidence Act*.

Reference: *Canada Evidence Act*, R.S.C. 1985, c. C-5, as amended.

Millin Cross-Examination, Appeal Book, Vol. IX, Tab 23 at pp. 2551-60, qq. 70-88, pp. 2578-83, qq. 161-181.

57. Even without regard to the issue of what constitutes copyright infringement in the context of P2P file sharing as put forward by the intervener CIPPIC, the lack of any reliable evidence in support of the Appellants' allegations and conclusions is enough to raise substantial doubt that there exists a *prima facie* case. Justice von Finckenstein did not err in holding that the deficiencies in the affidavit evidence allowed adverse inferences to be drawn and that any reliance by the Court in granting an order based on the reliability of the tracing of the IP Addresses, without any supporting evidence, would be "irresponsible".

Reference: Order, Appeal book, Vol. I, Tab 2 at pp. 19-20, para. 18, pp. 20-21, para. 20.

Rule 81, *Federal Court Rules*.

The Moving Party Has Been Unable to Obtain the Information From Another Source

58. CRIA argues at paragraphs 3 and 29 of their Memorandum, that Justice von Finckenstein made a palpable and overriding error when he found that there was insufficient evidence to conclude that the ISP's were the only practical source of the requested information but they cite no evidence when they baldly state that the "...ISPs are the only entities who have information regarding the identity of the Defendants..." and "...that they are unable to obtain this information informally from others." That is because the evidence simply does not support these statements.

Reference: Appellants' Memorandum of Fact and Law at p. 1, para. 3, p. 11, paras. 29-30, at p. 12, para. 32.

59. CRIA's own submissions in the court below provided:

33. ...3) The person from whom discovery is sought *must be the only practical source* of the information available. ...

39. An applicant, under Rule 238 must show that the evidence cannot be obtained from anyone other than the person to be examined. Moreover, *in order to satisfy Rule 238(3)(b), there should be evidence of the efforts made by the requesting party to obtain the information informally or reasonably from other sources* and of the failure or frustration of those efforts. The plaintiffs, prior to bringing these motions, asked the ISPs to voluntarily provide the information and documents. None would do so. [Emphasis added]

Reference: CRIA Excerpt at pp. 9-11, paras. 33 and 39.

Rule 238(3)(b), *Federal Court Rules*.

60. CRIA has the onus of showing that it could not obtain the information elsewhere. It did not do so even though it is a precondition to the granting of the Order. A non-party is being compelled by court order to become involved in a lawsuit of which it has no interest and which may cause it financial harm. Accordingly, the moving party must show that it is necessary to involve the non-party, not just convenient to do so. In *Glaxo*, the moving party had demonstrated the alternate efforts of a private investigator and access to information requests that it had taken, but which had failed, before bringing the motion against the non-party. CRIA does not disclose what efforts, if any, they made to obtain the information from other sources.

Reference: Millin Affidavit, Appeal Book, Vol. VII, Tab 12 at p. 1971, paras. 45-46.

Glaxo at 397-398, para. 45.

Rule 238(3)(b), *Federal Court Rules*.

Bayside Towing Ltd. v. Canadian Pacific Railway (2000), 187 F.T.R. 247 (Proth.) affirmed (2000), 194 F.T.R. 158 (T.D.).

61. Justice von Finckenstein was entitled to differentiate between the failure to provide evidence by CRIA and the suggestion of an alternative source by David Shrimpton. His Honour was not palpably wrong in holding, in the absence of any evidence in either the Millin Affidavit or the Yonekura Affidavit with respect to the operators of KaZaA, their location and whether identifying information of the alleged infringers could be obtained using their KaZaA pseudonyms, that CRIA did not meet this part of the test. The onus is on the moving party to adduce the evidence. The Respondents are not required to correct the deficient record, only point out that it is deficient.

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 25-26, para. 31.

62. David Shrimpton's statements in his Affidavit that the information might have been obtained from KaZaA do not offend the rule in *Browne v. Dunn*. That rule cannot apply on a motion where the responding party must file its responding affidavit before it is entitled to cross-examine and "put" the evidence to Mr. Millin.

Reference: Rule 84(1), *Federal Court Rules*.

Browne v. Dunn (1894), 6 R. 67 (H.L.) ("*Browne*").

63. The filing of Mr. Shrimpton's Affidavit "put" the evidence to CRIA. CRIA could have delivered a reply affidavit in response to Mr. Shrimpton's affidavit. It did not. CRIA chose to cross-examine Mr. Shrimpton and he provided detailed information about the possibility of KaZaA having billing information. Mr. Shrimpton's statement about KaZaA Plus was not speculation. KaZaA Plus exists and requires financial information. Millin was cross-examined on which KaZaA system was being used and he did not know. Accordingly, the speculation, if any, was the speculation that the court and the Respondents were left to do because of the failure of CRIA to adduce any evidence in chief or in reply on this issue.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2522-23, para. 23.

Transcript from the Examination of David Shrimpton, Appeal Book, Vol X, Tab 28 at pp. 2781-783, qq. 104-109 ("Shrimpton Cross-examination").

Millin Cross-Examination, Appeal Book, Vol. IX, Tab 23 at pp. 2581-583, qq. 169-182.

64. In addition, the precondition of showing that there was no other practical source was "manifest" as Rule 238 requires it, and thus criticism that the evidence was missing does not offend the rule in *Browne*. This is not a case like *Parke-Davis* where Mr. Rowan had personal evidence and attached the affidavit of Ms. Ryan and the Respondents chose to rely upon adverse inference rather than cross-examine. Here there was no evidence adduced by CRIA, hearsay or otherwise. Having found that fact, the Motions Judge was not palpably wrong to find that CRIA had failed to meet that precondition.

Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting the questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

Reference: *Browne* at 71 per Lord Herschell, at 79 per Lord Morris.

Parke-Davis Division v. Canada, [2003] 2 F.C. 514 (C.A.) ("*Parke-Davis*") at 552-553, paras. 98-101.

Order, Appeal Book, Vol. I, Tab 2 at pp. 25-26, para. 31.

Undue Delay, Inconvenience or Expense to the Person

65. Rule 238(3)(d) provides the Order may be granted if the court is satisfied that "the questioning will not cause undue delay, inconvenience or expense to the person or to the other parties." Rule 239(1) mandates that a party requiring an examination of a non-party pay the examined parties travel expenses in advance. Rule 239(2) and (3) contemplate both the assistance of counsel and reimbursement for the cost of counsel be paid by the moving party. However this would not effectively compensate the non-party for the expense related to conducting investigations in advance of such an examination or thereafter.

Reference: Rules 238 and 239, *Federal Court Rules*.

66. *Norwich* explicitly includes as part of the test that the applicants reimburse the non-party the costs incurred in disclosure. This part of the test was omitted from the submissions of the

plaintiffs in the original motion. The Court in *Glaxo* clearly adopted this part of the test in stating:

...Nor, they maintained, should customs officials be required to bear the actual costs of the discovery. ...

...in any case in which there was the least doubt whether disclosure should be made the person to whom the request was made would be fully justified in saying that he would only make it under an order of the court. Then the court would have to decide whether in all the circumstances it was right to make an order...The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant.

Reference: *Glaxo* at 406-407, paras. 66-67, citing *Norwich*.

67. CRIA's statements at paragraph 34 of its Memorandum that "the order sought will not cause undue delay, inconvenience or expense to the ISPs" and that the searches are done on a "regular basis" is in complete and utter disregard of the evidence.

Reference: Appellants' Memorandum of Fact and Law at pp. 12-13, para 34.

Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2517, para. 3, p. 2518, paras. 6-7. pp. 2520-26, paras. 15-31.

Shrimpton Cross-Examination, Appeal Book, Vol X, Tab 28 at pp. 2765-66, qq. 50-53.

68. The investigation required to attempt to identify the account holders is onerous as set out above in detail with specific reference to David Shrimpton's affidavit. It will disrupt TELUS's business and divert resources. Justice von Finckenstein did not err in weighing the clear evidence of disruption and cost to TELUS against the uncertain potential of identifying the users. The prejudicial effect outweighed the probative value.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2520-25, paras. 15-27, 29.

69. Information in electronic logs and databases has to be manually retrieved, loaded, "unzipped" and reviewed. In the case of one of the three IP Addresses sought by CRIA in the original motion, it took over six hours. The process is expensive and does not compensate for the loss of the employees involved to their real jobs.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2525, para. 29.

70. TELUS can expect many more waves of requests from CRIA. This factor also distinguishes this motion from *Norwich, Glaxo*, or any of the previous instances in Canadian Courts where ISPs were directed to identify account holders. This is not an isolated inquiry. CRIA is continuing the campaign started by its American affiliate and it is respectfully submitted that in exercising its equitable discretion, this Honourable Court should consider the collateral effect to the innocent non-parties of CRIA's campaign.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2517, para. 6.

71. In the American experience 532 lawsuits were commenced in one day by CRIA's affiliate. Although TELUS does not expect the same magnitude of requests in Canada, any significant number would be extremely onerous. TELUS does not have the resources to drop everything to assist CRIA in bringing its lawsuits, without some reasonable limit and reimbursement.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at p. 2526, para.31.

72. In consideration of the evidence presented by TELUS as to the costs in time and resources, the high probability that this request will be the first in a wave of many and the discretion of the court in awarding costs, Justice von Finckenstein did not err in holding the process would be onerous and that if the Order was granted that:

Given that the ISPs are in no way involved in any alleged infringement, they would need to be reimbursed for their reasonable costs for furnishing the names of account holders...

Reference: Order, Appeal Book, Vol. I, Tab 2 at pp. 26-28, paras. 32-35.

Balancing the Interests

73. In determining whether to grant the order, the Court must consider and balance the interests of the parties and the non-parties.

I come then to the final and critical point. The remedy (being equitable) is discretionary. Although, as I have said, the media, and journalists, have no immunity, it remains true that there may be an element of public interest in protecting the revelation of the source. This appears from the speeches in *Norwich Pharmacal*...and from the judgments of the New Zealand Court of Appeal on the 'newspaper rule'... The Court ought not to compel confidences bona fide given, to be breached unless necessary in the interest of justice...there is

a public interest in the free flow of information, the strength of which will vary from case to case. In some cases it may be very weak; in others it may be very strong. The Court must take this into account.

Reference: *British Steel* at 459–460 per Lord Wilberforce.

Irwin Toy Ltd. v. Doe, [2000] O.J. No. 3318 (S.C.J.) at 2, paras. 7-11.

74. In addition to the cost and disruption caused by the requests, there is the concern about reliability of the information. Although TELUS has sufficient comfort in its search capability for the purposes of providing notice to account holders of complaints received by TELUS about their use of the Internet, that comfort does not extend to identifying account holders to be sued. In sending a notice, failure to find the correct account holder has minimal impact; whereas revealing an innocent account holder and exposing them to the cost and aggravation of a lawsuit is of an entirely different and more serious nature.

Reference: Shrimpton Affidavit, Appeal Book, Vol. IX, Tab 22 at pp. 2525-26, para. 30.

75. Justice von Finckenstein did not err in holding that the specific circumstances of this case, the lack of evidence, the delay in requesting the data, the unreliability of the data and the serious possibility of wrongfully identifying an innocent account holder led to a determination, that on balance, he should not exercise his discretion to compel TELUS to investigate and disclose the information.

Reference: Order, Appeal Book, Vol. I, Tab 2 at p. 31, para. 42.

PART IV – ORDER

76. TELUS respectfully requests that this Honourable Court dismiss the appeal and deny the order sought by the Appellants. In the alternative, if this Honourable Court, in its discretion, is inclined to grant relief to the Appellants, TELUS requests that the order shall contain the following terms:

1. The Internet Service Provider division of the non-party Respondent TELUS Communications Inc. [the “ISP”] shall, within fourteen (14) days of the date of the service upon it of a copy of this Court’s Order, disclose to counsel for the Appellants the last known name and address of the account holder in the

business records of the ISP associated with the IP Addresses, dates and times listed in Schedule "A" to the Appellants' Notice of Motion, if available;

2. The Appellants shall pay all administrative and internal and external legal expenses of the ISP in connection with identifying the information sought on this motion and in responding to this motion.

3. In any event, the ISP should be awarded its legal costs of both the motion below and of this appeal.

77. Pursuant to Rule 401(1) of the *Federal Court Rules* the Court may exercise its discretion and "award costs of a motion in an amount fixed by the Court." Justice von Finckenstein ordered CRIA to pay to TELUS the costs of the motion.

Reference: Rule 401, *Federal Court Rules*.

Order, Appeal Book, Vol. I, Tab 2 at pp. 26-28, paras. 32-35.

78. TELUS was not obliged to disclose the information requested without court order. Given the obvious concern about privacy rights, the substantial deficiencies in the evidence presented by CRIA, and TELUS's doubts with regard to the reliability of the information, TELUS's response was completely reasonable and necessary. Under a *Norwich* Order the costs are to be borne by the applicant.

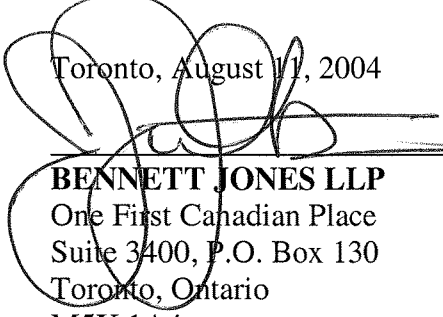
...in any case in which there was the *least doubt* whether disclosure should be made the person to whom the request was made would be *fully justified in saying that he would only make it under an order of the court*. Then the court would have to decide whether in all the circumstances it was right to make an order...The *full costs of the respondent* of the application and any expense incurred in providing the information would have to be *borne by the applicant*.
[Emphasis added]

Reference: *Glaxo* at 406-407, paras. 66-67, citing *Norwich*.

79. Accordingly, it is respectfully submitted that the costs in this appeal and the motion below should be awarded to TELUS.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Toronto, August 11, 2004



BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Joel D. Watson (LSUC #38520B)
Tel: 416.777.4879
Fax: 416.863.1716

Solicitors for the Respondent, TELUS
Communications Inc.

PART V – THE AUTHORITIES

Regulations and Statutes

Federal Court Rules, 1998, SOR/98-106, Rules 41, 81, 84, 222, 233, 238, 239, 337, 339 and 401.

Canada Evidence Act, R.S.C. 1985, c. C-5, as amended, sections 31.1, 31.2, and 31.3.

Cases

Norwich Pharmacal Co. v. Commissioners of Customs and Excise, [1973] 2 All E.R. 943 (H.L.).

Glaxo Wellcome PLC v. Minister of National Revenue (1998), 81 C.P.R. (3d) 372 (F.C.A.).

Housen v. Nikolaisen, [2002] 2 S.C.R. 235.

Reading & Bates Construction Co. v. Baker Energy Resources Co. (1988), 25 F.T.R. 226 (T.D.).

British Steel Corporation v. Granada Television, [1981] 1 All E.R. 417 (H.L.).

Bayside Towing Ltd. v. Canadian Pacific Railway (2000), 187 F.T.R. 247 (Proth.) affirmed (2000), 194 F.T.R. 158 (T.D.).

Browne v. Dunn (1894), 6 R. 67 (H.L.).

Parke-Davis Division v. Canada, [2003] 2 F.C. 514 (C.A.).

Irwin Toy Ltd. v. Doe, [2000] O.J. No. 3318 (S.C.J.).

tion in, cross-examination or re-examination. partie d'une question posée à un contre-interrogatoire ou à un nouvel interrogatoire.

Case Law

Halford v. Seed Hawk Inc. (2001), 16 C.P.R. (4th) 204, 218 F.T.R. 173, 2001 CarswellNat 2521, 2001 FCT 1195 — Rule 232 requires disclosure of the document. Failure to include the disclosed document in an affidavit of documents is not fatal to its admissibility.

Industries Perlite Inc. v. "Marina di Alimuri" (The) (1994), 6 W.D.C.P. (2d) 20 (Fed. T.D.) — The Court ruled that a document used by the defendant's witness to refresh his memory which had not been listed in the defendant's affidavit of documents was not admissible in evidence.

Lady Tanya Fisheries Ltd. v. Sunderland Marine Mutual Ins. Co., [1993] 1 F.C. 547, 60 F.T.R. 169 (T.D.) — The exception for use in cross-examination does not provide an exemption from the general principle that there must be full pre-trial disclosure of relevant documents. In this case the defendants were required to disclose witness statements in their affidavit of documents, despite their concern that advance knowledge of the statements would encourage the plaintiff's witnesses to tailor their replies in cross-examination at trial.

Spektor v. Canada (1991), 43 F.T.R. 261, 6 T.T.R. 145 (T.D.) — The Court refused to rely on any of the documents produced by the defendant because it had filed its list of documents the day before trial and had not given proper notice under the *Canada Evidence Act* that it intended to rely on copies rather than original documents.

R. v. St. John Shipbldg & Dry Dock Co. (December 13, 1978), Doc. T-3513-76 (Fed. T.D.); appeal dismissed as premature [1979] 1 F.C. 523, 8 C.P.C. 251, 24 N.R. 377, 93 D.L.R. (3d) 91 (C.A.) — Where a defendant attempted to rely on a document at trial that it had not previously produced, the Court allowed it to enter the document but ordered further discovery and cross-examination arising from that document.

233. (1) Production from non-party with leave — On motion, the Court may order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.

(2) Personal service on non-party — Notice of a motion for an order under subsection (1) shall be personally served on the person who is in possession of the document.

(3) Preparation of certified copy — The Court may, in an order under subsection (1), give directions for the preparation of a certified copy of the document to be used instead of the original.

233. (1) Production d'un document en la possession d'un tiers — La Cour peut, sur requête, ordonner qu'un document en la possession d'une personne qui n'est pas une partie à l'action soit produit s'il est pertinent et si sa production pourrait être exigée lors de l'instruction.

(2) Signification à personne — L'avis d'une requête présentée pour obtenir l'ordonnance visée au paragraphe (1) est signifié à personne à la personne qui a le document en sa possession.

(3) Préparation d'une copie certifiée conforme — La Cour peut, dans l'ordonnance visée au paragraphe (1), donner des directives au sujet de la préparation d'une copie certifiée conforme du document pour qu'elle tienne lieu d'original.

ordered by an American court.

Beloit Can. Ltd. v. Valmet Oy (1981), 60 C.P.R. (2d) 145 (Fed. T.D.) — Evidence of the assignor cannot be used at trial against a party. Where the inventor is also examined in his capacity as an officer of a corporation, answers given in the deponent's capacity as inventor are not binding on the corporation.

Teledyne Industries Inc. v. Lido Industrial Products Ltd., [1979] 1 F.C. 310, 41 C.P.R. (2d) 1, 91 D.L.R. (3d) 81, 23 N.R. 100 (C.A.) — An examination for discovery of an assignor is a pre-trial questioning of a potential witness, unlike an examination for discovery of a party. Since the assignor is not necessarily under the control of the party, the failure of the assignor to attend cannot lead to the party's pleading being struck out.

Examination of Party under a Disability

Canada (Min. of Citizenship & Immigration) v. Fast (2002), 217 F.T.R. 154, 2002 CarswellNat 513, 2002 FCT 248 — Once the decision is made that a person is capable of being examined, the right of the party to use the evidence thus obtained is unrestricted. However, the Court may reserve the question of the capacity of the person examined to the trial judge.

Examination Where Nominal Plaintiff

Lower Similkameen Indian Band v. Allison (1995), 99 F.T.R. 305 (Proth.) — Where discovery is sought of a person on whose behalf an action is brought, the affidavit in support should demonstrate how the action is for the immediate benefit of the proposed deponent.

238. (1) Examination of non-parties with leave — A party to an action may bring a motion for leave to examine for discovery any person not a party to the action, other than an expert witness for a party, who might have information on an issue in the action.

(2) Personal service on non-party — On a motion under subsection (1), the notice of motion shall be served on the other parties and personally served on the person to be examined.

(3) Where Court may grant leave — The Court may, on a motion under subsection (1), grant leave to examine a person and determine the time and manner of conducting the examination, if it is satisfied that

(a) the person may have information on an issue in the action;

238. (1) Interrogatoire d'un tiers — Une partie à une action peut, par voie de requête, demander l'autorisation de procéder à l'interrogatoire préalable d'une personne qui n'est pas une partie, autre qu'un témoin expert d'une partie, qui pourrait posséder des renseignements sur une question litigieuse soulevée dans l'action.

(2) Signification de l'avis de requête — L'avis de la requête visée au paragraphe (1) est signifié aux autres parties et, par voie de signification à personne, à la personne que la partie se propose d'interroger.

(3) Autorisation de la Cour — Par suite de la requête visée au paragraphe (1), la Cour peut autoriser la partie à interroger une personne et fixer la date et l'heure de l'interrogatoire et la façon de procéder, si elle est convaincue, à la fois:

a) que la personne peut posséder des renseignements sur une question litigieuse soulevée dans l'action;

(b) the party has been unable to obtain the information informally from the person or from another source by any other reasonable means;

(c) it would be unfair not to allow the party an opportunity to question the person before trial; and

(d) the questioning will not cause undue delay, inconvenience or expense to the person or to the other parties.

b) que la partie n'a pu obtenir ces renseignements de la personne de façon informelle ou d'une autre source par des moyens raisonnables;

c) qu'il serait injuste de ne pas permettre à la partie d'interroger la personne avant l'instruction;

d) que l'interrogatoire n'occasionnera pas de retards, d'inconvénients ou de frais déraisonnables à la personne ou aux autres parties.

Related Provisions

Rule 233 provides for production of documents from non-parties.

Case Law

L'Épinglerie Ltée v. M.N.R., 2002 CarswellNat 1515, 2002 FCT 76 (Proth.) — Rule 238 does not contemplate an examination for discovery of former public servants that would be the equivalent of proceeding anew with the examination of the Crown.

Bayside Towing Ltd. v. C.P.R. (2000), 187 F.T.R. 247, 2000 CarswellNat 1500 (Proth.); affirmed (2000), 194 F.T.R. 158, 2000 CarswellNat 2215 (T.D.) — For an order under rule 238, the applicant must show that the evidence cannot be obtained otherwise than from the person to be examined.

Stevens v. Canada (A.G.), [2001] 1 F.C. 156, 187 F.T.R. 228, 2000 CarswellNat 1717, 2000 CarswellNat 3290 (Proth.); affirmed (2002), 215 F.T.R. 228, 2002 CarswellNat 276, 2002 FCT 2 — Although the requirements of rule 238(3) were met, leave to examine a commissioner for inquiry was refused on the basis of deliberative secrecy.

Snook v. "Cape Mariner" (The) (1999), 165 F.T.R. 151 (T.D.) — In order to satisfy rule 238(3)(b), there should be evidence of the efforts made by the requesting party to obtain the information informally or reasonably from other sources and of the failure or frustration of those efforts.

Pakistan National Shipping Corp. v. Canada (1995), 94 F.T.R. 250 (T.D.) — The fact that the Federal Court has no jurisdiction to hear a third party claim is immaterial to a request for discovery from a non-party. All that is required is that an action is proceeding in the Court and that the persons to be examined have information relevant to the action. Here, where the non-party witnesses and documents would be compellable at trial, and the information in the hands of the non-party was material to issues in the action, production and examination were ordered.

Delphi Petroleum Inc. v. Derin Shipping & Trading Ltd. (1993), 24 Admin. L.R. (2d) 94, 73 F.T.R. 241 (T.D.) — The Court may order a non-party to be examined in order to provide evidence for an arbitration. Here, however, the Court was not satisfied that the non-party could provide the information sought.

Nfld. Processing Ltd. v. "South Angela" (The) (1988), 24 F.T.R. 116 (T.D.) — A party cannot attempt to examine witnesses outside of trial by means of discovery. An examination for discovery is not meant to be a fishing expedition where different witnesses are examined as to the events. It is meant to allow a party to examine someone who is knowledgeable about

Procedural Steps in a Typical Appeal

Step	Rule
Appeal Book	Rule 345 — served and filed within 30 days after filing of the agreement on contents of appeal book.
Appellant's Memorandum of Fact and Law	Rule 346(1) — served and filed within 30 days after filing the appeal book.
Respondent's Memorandum of Fact and Law	Rule 346(2) — served and filed within 30 days after service of the appellant's memorandum.
Requisition for Hearing	Rule 347 — served and filed by appellant within 20 days after service of respondent's memorandum or expiration of time therefor.
Books of Authorities	Rule 348 — filed 30 days before the hearing date.

Related Provisions

Form 337 (Notice of Appeal).

Form 341A (Notice of Appearance — Appeal).

Form 341B (Notice of Cross-Appeal).

Form 344 (Certificate of Completeness of Appeal Book).

Form 347 (Requisition for Hearing — Appeal).

Rule 398 provides for stays pending appeal.

Rules 352-356 deal with motions for leave to appeal.

General

Interpretation

336. Definition of "first instance" — In this Part, "first instance" means a proceeding in the Trial Division, the Tax Court of Canada or the tribunal whose order is being appealed.

Commencement of Appeal

337. Content of notice of appeal — An appeal shall be commenced by a notice of appeal, in Form 337, setting out

- (a) the division of the Court to which the appeal is taken;
- (b) the names of the parties;
- (c) a precise statement of the relief

Dispositions générales

Définition

336. Définition — Dans la présente partie, « première instance » s'entend de l'instance devant la Section de première instance, la Cour canadienne de l'impôt ou l'office fédéral dont l'ordonnance est portée en appel.

Formation de l'appel

337. Contenu de l'avis d'appel — L'appel est introduit par un avis d'appel, établi selon la formule 337, qui contient les renseignements suivants:

- a) la section de la Cour saisie de l'appel;
- b) les noms des parties à l'appel;
- c) un énoncé précis de la réparation

sought;

(d) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on;

(e) the name of the court or tribunal appealed from;

(f) the date and details of the order under appeal; and

(g) the place proposed for the hearing of the appeal.

recherchée;

d) un énoncé complet et concis des motifs qui seront invoqués, avec mention de toute disposition législative ou règle applicable;

e) le nom de la cour ou de l'office fédéral dont l'ordonnance fait l'objet de l'appel;

f) la date et les particularités de l'ordonnance;

g) l'endroit proposé pour l'audition de l'appel.

Case Law

Armonikos Corp. v. Saskatchewan Wheat Pool, 2002 CarswellNat 3209, 2002 FCA 444 — A judgment is effective only when issued and filed. Until then, a notice of appeal is premature. A party cannot take advantage of its own failure to finalize a judgment in an expeditious manner.

Nu-Pharm Inc. v. Canada (A.G.) (1999), 246 N.R. 386 (Fed. C.A.) — Once the Trial Division has rendered judgment on the merits, only the Court of Appeal may allow a person to be added as a party for the purpose of filing a notice of appeal and only in the circumstances described in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls Dist. 50 Branch*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406, 19 Admin. L.R. 211, 23 C.R.R. 119, 69 N.B.R. (2d) 271, 177 A.P.R. 271, 66 N.R. 173.

338. (1) Persons to be included as respondents — Unless the Court orders otherwise, an appellant shall include as a respondent in an appeal

(a) every party in the first instance who is adverse in interest to the appellant in the appeal;

(b) any other person required to be named as a party by an Act of Parliament pursuant to which the appeal is brought; and

(c) where there are no persons that are included under paragraph (a) or (b), the Attorney General of Canada.

(2) Substitution for Attorney General — On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent in an

338. (1) Intimés — Sauf ordonnance contraire de la Cour, l'appelant désigne les personnes suivantes à titre d'intimés dans l'appel:

a) toute personne qui était une partie dans la première instance et qui a dans l'appel des intérêts opposés aux siens;

b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale qui autorise l'appel;

c) si les alinéas a) et b) ne s'appliquent pas, le procureur général du Canada.

(2) Remplaçant du procureur général — La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre d'intimé ou n'est pas disposé à le

appeal, the Court may substitute another person or body, including a tribunal whose order is being appealed, as a respondent in the place of the Attorney General of Canada.

faire, désigner en remplacement une autre personne ou entité, y compris l'office fédéral dont l'ordonnance fait l'objet de l'appel.

Case Law

Indian Mfg. Ltd. v. Lo (1996), 68 C.P.R. (3d) 174, 199 N.R. 114 (Fed. C.A.) — The Court allowed the appellant to amend a notice of appeal to add new parties. As the notice of appeal had not been served, there could be no prejudice. The correct identification of the respondents is the responsibility of the appellant.

339. (1) Service of notice of appeal — Unless the Court directs otherwise or an Act of Parliament authorizing the appeal provides otherwise, within 10 days after the issuance of a notice of appeal, the appellant shall serve it on

- (a) all respondents;
- (b) in the case of an appeal of an order of a tribunal,

- (i) the Attorney General of Canada, and

- (ii) the tribunal or its chief executive officer;

- (c) any person who is not a party and who participated in the first instance; and

- (d) any other person directly affected by the appeal.

(2) **Proof of service —** Proof of service of a notice of appeal shall be filed within 10 days after the notice of appeal is served.

339. (1) Signification l'avis d'appel — Sauf disposition contraire de la loi fédérale qui autorise l'appel ou sauf directives de contraires de la Cour, l'appellant signifie l'avis d'appel aux personnes suivantes dans les 10 jours suivant sa délivrance:

- a) les intimés;

- b) dans le cas de l'appel d'une ordonnance d'un office fédéral:

- (i) le procureur général du Canada,

- (ii) l'office fédéral ou son premier dirigeant;

- c) toute personne qui n'est pas une partie mais qui a participé à la première instance;

- d) toute autre personne directement touchée par l'appel.

(2) **Preuve de signification —** La preuve de la signification de l'avis d'appel est déposée dans les 10 jours suivant cette signification.

Case Law

Adams v. R.C.M.P. (Commr.) (1994), 174 N.R. 314 (Fed. C.A.) — The Court refused an application to dismiss an appeal where, although the notice of appeal had been filed within the prescribed limits, it had not been served on the respondent's counsel pending receipt of instructions. The Court strongly criticized such conduct, stating that it is not acceptable to withhold service of a notice of appeal. Parties who launch proceedings at any level with the intention of putting them in a holding pattern may be called to account for their waste and abuse of public resources. They also risk having their proceedings dismissed.

Canusa Records Inc. v. Blue Crest Music Inc. (1975), 20 C.P.R. (2d) 53 (Fed. C.A.) — In

ment with all due dispatch on the basis of the law as it then appears. A delay to obtain the benefit of a judgment expected to be delivered in the future is not warranted.

40. (1) **Rota of Judges for Vancouver** — On or before July 1 in each year, the Associate Chief Justice shall, in consultation with the other judges of the Trial Division, establish a rota of judges for Vancouver for the twelve months commencing on September 1 of that year, excluding the Christmas recess.

(2) **Powers of Associate Chief Justice** — The Associate Chief Justice may make changes to the Vancouver rota, including the substitution of one judge for another during all or part of the judge's period of assignment.

(3) **Responsibilities of judges** — A judge assigned to Vancouver shall reside in Vancouver for the period of the assignment and hold sittings and otherwise transact the judicial business of the Trial Division in Vancouver and in such other places as may be required.

(4) **Assignment period** — Except with a judge's consent, the Associate Chief Justice shall not

(a) assign the judge to Vancouver for a period exceeding two months; or

(b) reassign the judge to Vancouver for a second assignment within two months after the end of the first.

Related Provisions

Section 7 provides for rotas of judges.

Summoning of Witnesses or Other Persons

41. (1) **Subpoena for witness** — Subject to subsection (4), on receipt of a written request, the Administrator shall issue, in Form 41, a subpoena for the attendance

40. (1) **Liste de rotation de Vancouver** — Au plus tard le 1^{er} juillet de chaque année, le juge en chef adjoint, après consultation des autres juges de la Section de première instance, dresse la liste de roulement des juges à Vancouver pour la période de 12 mois commençant le 1^{er} septembre de l'année, en excluant les vacances judiciaires de Noël.

(2) **Pouvoirs du juge en chef adjoint** — Le juge en chef adjoint peut modifier la liste de roulement, notamment remplacer un juge par un autre pour tout ou partie de sa période d'affectation.

(3) **Responsabilités des juges** — Le juge affecté à Vancouver y réside durant sa période d'affectation; il tient des audiences et voit aux travaux de la Section de première instance à Vancouver et à tout autre endroit requis.

(4) **Consentement du juge affecté** — Le juge en chef adjoint ne peut, à moins d'obtenir le consentement du juge en cause:

a) l'affecter à Vancouver pour plus de deux mois;

b) le réaffecter à Vancouver avant l'expiration des deux mois suivant la fin de la dernière période d'affectation à Vancouver.

Assignment de témoins et d'autres personnes

41. (1) **Subpoena** — Sous réserve du paragraphe (4), sur réception d'une demande écrite, l'administrateur délivre un subpoena, selon la formule 41, pour con-

of a witness or the production of a document or other material in a proceeding.

(2) **Issuance in blank** — A subpoena may be issued in blank and completed by a solicitor or party.

(3) **Multiple names** — Any number of names may be included in one subpoena.

(4) **Where leave required** — No subpoena shall be issued without leave of the Court

(a) for the production of an original record or of an original document, if the record or document may be proven by a copy in accordance with an Act of Parliament or of the legislature of a province;

(b) to compel the appearance of a witness who resides more than 800 km from the place where the witness will be required to attend under the subpoena; or

(c) to compel the attendance of a witness at a hearing other than a trial or a reference under rule 153.

(5) **Ex parte motion** — Leave may be granted under subsection (4) on an *ex parte* motion.

traindre un témoin à comparaître ou à produire un document ou des éléments matériels dans une instance.

(2) **Subpoena en blanc** — Le subpoena peut être délivré en blanc et rempli par l'avocat ou la partie.

(3) **Nombre de noms** — Le nombre de noms pouvant être inscrits sur le même subpoena n'est pas limité.

(4) **Autorisation de la Cour** — Un subpoena ne peut être délivré sans l'autorisation de la Cour dans les cas suivants:

a) pour la production de l'original d'un dossier ou d'un document qui peut être prouvé par une copie en vertu d'une loi fédérale ou provinciale;

b) pour la comparution d'un témoin qui réside à plus de 800 km du lieu de comparution requis;

c) pour la comparution d'un témoin à une audience, sauf lors d'une instruction ou lors d'un renvoi ordonné en vertu de la règle 153.

(5) **Requête ex parte** — L'autorisation visée au paragraphe (4) peut être accordée sur requête *ex parte*.

Notes

Rules 41 to 45 govern the summoning of witnesses and other persons at a hearing. Rule 45 allows the Court to compel the attendance of any person in custody, not just witnesses. This fills the gap in former rule 334 which did not contemplate orders as to the attendance of a party in custody.

Related Provisions

Form 41 (Subpoena).

Form 45 (Order for Attendance of Person in Custody).

Form 46 (Warrant for Arrest of Defaulting Witness).

Tariff A provides for the payment of fees to witnesses.

Gariepy v. Canada (Administrator of Federal Court), [1989] 1 F.C. 544, 22 F.T.R. 86 (T.D.).]

Caterpillar Tractor Co. v. Babcock Allatt Ltd., [1983] 1 F.C. 487, 67 C.P.R. (2d) 135 (T.D.); affirmed (1983), 72 C.P.R. (2d) 286 (C.A.) — Motions to strike may be made at any stage of the action. It is not an answer to a motion to strike out for the plaintiff to say that the claim might be sustainable if it had unrestricted discovery of the defendant.

Leave to Amend

See also rules 75 to 79, 200 and 201.

Spatling v. Canada (Solicitor General), 2003 CarswellNat 1013, 2003 FCT 445 — Leave to amend should not be granted where there is no scintilla of a cause of action, for example, where there is no jurisdiction. [Authors: see also *Canada (Min. of Citizenship & Immigration) v. Seifert*, [2003] 2 F.C. 83, 24 Imm. L.R. (3d) 67, 221 F.T.R. 228, 2002 CarswellNat 2063, 2002 FCT 859 (Proth.).]

Larden v. Canada (1998), 145 F.T.R. 140 (Proth.) — An amendment should be allowed where a claim might possibly succeed if the pleading were amended. To deny an amendment there must be no scintilla of a cause of action. [Authors: see also *Kiely v. The Queen* (1987), 10 F.T.R. 10 (T.D.).]

Appellate Review

Radio Corp. of America v. Hazeltine Corp. (1972), 1 C.P.R. (2d) 22 (S.C.C.) — It is an error for a trial judge to make a determination of a disputed fact on a motion to strike. An appellate court ought to reverse such a determination.

David v. Kluger (1991), 51 F.T.R. 234 (T.D.) — It is an error of law to strike a claim without offering the plaintiff an opportunity to be heard regarding the strike out.

Procter & Gamble Co. v. Nabisco Brands Ltd. (1985), 5 C.P.R. (3d) 417, 62 N.R. 364 (Fed. C.A.) — The Court of Appeal will not overturn a trial judge's refusal to strike a pleading unless the trial judge erred in his appreciation of the pleadings or applied a wrong principle. This is so even if the Court of Appeal would have decided otherwise if it had heard the matter at first instance.

Murray v. Public Service Commn. (1978), 21 N.R. 230 (Fed. C.A.) — The rule that the Court of Appeal will rarely interfere with an exercise of the trial judge's discretion does not apply where the Trial Division struck the plaintiff's claim entirely, thereby affecting substantive, and not merely procedural, rights.

Discovery and Inspection

Discovery of Documents

222. (1) Definition of "document" — In rules 223 to 232 and 295, "document" includes an audio recording, video recording, film, photograph, chart, graph, map, plan, survey, book of account, computer diskette and any other device on which in-

Examen et interrogatoire préalable

Communication de documents

222. (1) Définition de « document » — Pour l'application des règles 223 à 232 et 295, est assimilée à un document toute information enregistrée ou mise en mémoire sur un support, y compris un enregistrement sonore, un enregistrement

formation is recorded or stored.

vidéo, un film, une photographie, un diagramme, un graphique, une carte, un plan, un relevé, un registre comptable et une disquette.

(2) **Interpretation** — For the purposes of rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case.

(2) **Pertinence** — Pour l'application des règles 223 à 232 et 295, un document d'une partie est pertinent si la partie entend l'invoquer ou si le document est susceptible d'être préjudiciable à sa cause ou d'appuyer la cause d'une autre partie.

Notes

Rules 222 to 248 set forth a comprehensive scheme governing discovery. Rules 222 to 233 deal with discovery of documents. Rules 234 to 247 govern examinations for discovery.

Rule 222(2), added in 1998, provides a definition of relevance. The rationale for the definition is unclear. It is unlikely to resolve disputes over the scope or application of the case law, and the new definition is arguably narrower than the test which prevailed under the former Rules. Under the jurisprudence, a document was relevant where it either directly or indirectly advanced the case of one party or damaged that of its adversary, or the document could fairly be said to lead to a train of inquiry which might have either of these two consequences.

Rule 223 is the basic rule in respect of discovery of documents. It requires a party to serve an affidavit of documents in Form 223 listing all relevant documents. The affidavit contains four separate lists: documents that are in the power, possession and control of a party and for which no privilege is claimed; documents for which privilege is claimed; documents no longer in the possession of the party; and documents that are in the control of a person not party to the action.

Rule 223(3) provides that a document is within a party's power, possession or control if the party is entitled to obtain the original or a copy of it and no adverse party is so entitled. This rule must be read in conjunction with rule 225 which provides for orders for disclosure of relevant documents in the possession of corporations directly or indirectly controlled by the party.

Solicitors must certify in the affidavit or on a document attached to the affidavit that they have explained to the client the necessity of making full disclosure and the possible consequences of failing to do so: rule 224(3). Prior to making the affidavit, the deponent is obliged to make reasonable inquiries of current and former servants, officers and employees of the party, including those outside of Canada, who might reasonably be expected to have knowledge relating to any matter in question in the proceedings: rule 224(2).

There is a continuing obligation to provide discovery. Where a party becomes aware that its affidavit of documents is inaccurate or deficient, it must without delay serve a supplementary affidavit correcting the inaccuracy or deficiency: rule 226. Rule 227 sets forth the sanctions for noncompliance with the rules governing production of documents. Where the Court is satisfied that an affidavit is inaccurate or deficient, it may inspect any relevant document and make certain consequential orders including an award of costs against the party who made the inaccurate or deficient affidavit: rule 227(d).

Rule 230 allows the Court to relieve a party from its obligation to produce a document for

Canada Evidence Act

CHAPTER C-5

Authentication
of electronic
documents

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

2000, c. 5, s. 56.

Application of
best evidence
rule -- electronic
documents

31.2 (1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established under section 31.4 applies.

Printouts

(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

2000, c. 5, s. 56.

Presumption of
integrity

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

2000, c. 5, s. 56.

Preuve au Canada, Loi sur la

CHAPITRE C-5

Authentification de documents électroniques

31.1 Il incombe à la personne qui cherche à faire admettre en preuve un document électronique d'établir son authenticité au moyen d'éléments de preuve permettant de conclure que le document est bien ce qu'il paraît être.

2000, ch. 5, art. 56.

Règle de la meilleure preuve -- documents électroniques

31.2 (1) Tout document électronique satisfait à la règle de la meilleure preuve dans les cas suivants :

- a) la fiabilité du système d'archivage électronique au moyen duquel ou dans lequel le document est enregistré ou mis en mémoire est démontrée;
- b) une présomption établie en vertu de l'article 31.4 s'applique.

Sorties imprimées

(2) Malgré le paragraphe (1), sauf preuve contraire, le document électronique sous forme de sortie imprimée satisfait à la règle de la meilleure preuve si la sortie imprimée a de toute évidence ou régulièrement été utilisée comme document relatant l'information enregistrée ou mise en mémoire.

2000, ch. 5, art. 56.

Présomption de fiabilité

31.3 Pour l'application du paragraphe 31.2(1), le système d'archivage électronique au moyen duquel ou dans lequel un document électronique est enregistré ou mis en mémoire est réputé fiable, sauf preuve contraire, si, selon le cas :

- a) la preuve permet de conclure qu'à l'époque en cause, le système informatique ou autre dispositif semblable fonctionnait bien, ou, dans le cas contraire, son mauvais fonctionnement n'a pas compromis l'intégrité des documents électroniques, et qu'il n'existe aucun autre motif raisonnable de mettre en doute la fiabilité du système d'archivage électronique;
- b) il est établi que le document électronique présenté en preuve par une partie a été enregistré ou mis en mémoire par une partie adverse;
- c) il est établi que le document électronique a été enregistré ou mis en mémoire dans le cours ordinaire des affaires par une personne qui n'est pas partie à l'instance et qui ne l'a pas enregistré ni ne l'a mis en mémoire sous l'autorité de la partie qui cherche à le présenter en preuve.

2000, ch. 5, art. 56.

identified: it is not sufficient to say merely that he is an officer of the government department.

Kemanord AB v. PPG Industries Inc. (1980), 49 C.P.R. (2d) 29 (Fed. T.D.) — The Court discussed the requirements for affidavits sworn outside Canada.

81. (1) Content of affidavits — 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.

(2) Affidavits on belief — 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.

81. (1) Contenu — Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

(2) Poids de l'affidavit — Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

Notes

The general requirement is that affidavits be confined to the personal knowledge of the deponent. Affidavits on information and belief are allowed only on motions.

The requirement that affidavits be confined to personal knowledge does not necessarily exclude hearsay evidence. The Supreme Court of Canada has developed a principled approach to the admissibility of hearsay. The Federal Court of Appeal has adopted this approach in determining the admissibility of hearsay given by way of affidavit: see *Ethier v. Canada* (RCMP Commr.), [1993] 2 F.C. 659 (C.A.).

Where the affidavit is on belief, the grounds of that belief must be stated. The affidavit should identify the source of the information as a person with first-hand knowledge and should explain the basis for relying upon the information received from that person.

Rule 81(2) allows an adverse inference to be drawn from the failure of the party to provide evidence from persons having personal knowledge. This suggests that an affidavit on information and belief should provide an explanation why the best evidence is not available, unless this is otherwise apparent. The rule is consistent with the approach that the failure to provide the best evidence goes to the weight to be accorded the affidavit: *Lumonics Research Ltd. v. Gould*, [1983] 2 F.C. 360 (C.A.). The adverse inference is expressly displaced in certain proceedings respecting the seizure and forfeiture of terrorist property: ss. 83.13(1.1) and 83.14(2) of the *Criminal Code*, as amended by S.C. 2001, c. 41.

Case Law

Personal Knowledge

Canada v. Olympia Interiors Ltd. (2001), 209 F.T.R. 182, 2001 CarswellNat 1671, 2001 G.T.C. 3581, 2001 FCT 859 (T.D.) — Affidavits in support of an application for an order against a vexatious litigant should be based on personal knowledge.

iner, allow the witness to answer under reserve and then have the permissibility of the question determined by the judge at the hearing.

Pharmacia Inc. v. Canada (Min. of National Health & Welfare) (1996), 66 C.P.R. (3d) 129, 111 F.T.R. 140 (T.D.) — A party was permitted to file corrections to answers given on cross-examination.

Vapor Can. Ltd. v. MacDonald (No. 2), [1971] F.C. 465, 3 C.P.R. (2d) 233, 22 D.L.R. (3d) 607 (T.D.) — Where a deponent's interest differs from that of the party, counsel for the deponent may attend the cross-examination but may not intervene except to protect the fundamental rights of the deponent.

84. (1) When cross-examination may be made — A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

(2) Filing of affidavit after cross-examination — A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

84. (1) Contre-interrogatoire de l'auteur d'un affidavit — Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

(2) Dépôt d'un affidavit après le contre-interrogatoire — La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

Notes

Rule 84 establishes the sequence for cross-examination on affidavits. A party may not cross-examine on its opponent's affidavits until the party has served its own affidavits: rule 84(1). If the party does cross-examine, it cannot subsequently file an affidavit: rule 84(2). This sequence may be altered with leave of the Court or consent of the other parties. Note that all the other parties must consent, not just the party who has served the affidavit in respect of which cross-examination has taken or is to take place.

Related Provisions

Rule 312 provides for the filing of additional affidavits in applications.

Case Law

Budget Steel Ltd. v. Seaspan Int. Ltd., 2003 CarswellNat 900, 2003 FCT 390 (Proth.); affirmed 2003 CarswellNat 1394, 2003 FCT 610 — Supplementary affidavits will be accepted if: their filing serves the interests of justice; they will assist the Court; they will not cause substantial prejudice to the other party; the additional material was not available at an earlier date; and their filing will not unduly delay the proceedings.

the allegations in the pleadings and who has the authority to bind the party for whom he is answering.

Monarch Marking Systems Inc. v. Esselte Meto Ltd., [1984] 1 F.C. 641, 75 C.P.R. (2d) 130 (T.D.) — The corporate veil ought not to be permitted to inhibit the administration of justice. Canadian corporations are readily and economically able to obtain from their foreign affiliates or parents answers to proper questions on discovery.

239. (1) Expenses of person examined — Unless the Court orders otherwise, a party who is granted leave to examine a person under rule 238 shall pay to the person

- (a) at least 10 days before the day of the examination, an amount sufficient to cover reasonable travel expenses; and
- (b) within 10 days after the examination, an amount sufficient to cover any reasonable travel expenses in excess of the initial payment.

(2) **Assistance of solicitor** — A person being examined under rule 238 is entitled to be assisted by a solicitor.

(3) **Costs of solicitor** — On motion, the Court may, in special circumstances, order that the costs of a solicitor assisting a person to be examined under rule 238 be included in the amounts paid under subsection (1).

(4) **Questioning by other parties** — A person being examined under rule 238 may also be questioned by any other party.

(5) **Cross-examination or hearsay** — A person being examined under rule 238 shall not be cross-examined and shall not be required to give hearsay evidence.

(6) **Use as evidence at trial** — The testimony of a person who was examined under rule 238 shall not be used as evidence at trial but, if the person is a witness at trial, it may be used in cross-ex-

239. (1) Indemnité — Sauf ordonnance contraire de la Cour, la partie qui est autorisée à interroger une personne aux termes de la règle 238 paie à cette dernière:

- a) au moins 10 jours avant le jour de l'interrogatoire, une somme d'argent suffisante pour couvrir ses frais de déplacement raisonnables;
- b) dans un délai de 10 jours après l'interrogatoire, une somme d'argent suffisante pour couvrir les frais de déplacement raisonnables qui n'étaient pas couverts par le premier paiement.

(2) **Assistance d'un avocat** — La personne interrogée aux termes de la règle 238 peut se faire assister par un avocat.

(3) **Indemnité additionnelle** — La Cour peut, sur requête, si des circonstances spéciales le justifient, ordonner qu'un montant équivalent aux frais de l'avocat qui assiste la personne à interroger soit inclus dans les sommes versées conformément au paragraphe (1).

(4) **Interrogatoire par les autres parties** — Toute autre partie à l'action peut également interroger la personne interrogée aux termes de la règle 238.

(5) **Contre-interrogatoire interdit** — La personne qui est interrogée aux termes de la règle 238 ne peut être contre-interrogée ni tenue de présenter un témoignage constituant du oui-dire.

(6) **Utilisation en preuve** — Le témoignage de la personne interrogée aux termes de la règle 238 ne peut être utilisé en preuve à l'instruction mais peut, si celle-ci sert de témoin à l'instruction, être

amination in the same manner as any written statement of a witness.

utilisé dans le contre-interrogatoire de la même manière qu'une déclaration écrite d'un témoin.

Notes

The testimony of a non-party examined under rule 238 is no more than the statement of a potential witness. Unlike the examination for discovery of a party, the non-party's testimony cannot be read into the record as evidence at trial.

240. Scope of examination — A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

240. Étendue de l'interrogatoire — La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui:

a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;

b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.

Case Law

Generally

Crestbrook Forest Industries Ltd. v. Canada (M.N.R.), [1993] 3 F.C. 251, [1993] 2 C.T.C. 9, 153 N.R. 122, 93 D.T.C. 5186 (C.A.); leave to appeal to S.C.C. refused (1993), 163 N.R. 320n (S.C.C.) — The Court reviewed the general principles governing examination for discovery, and their historical antecedents. The Court noted that despite statements of principle concerning the broad right of examination, there are limitations on the right of discovery. The Court will not allow discovery to be used as a fishing expedition, nor will the Court require a party to answer any question not within its means of knowledge.

Sydney Steel Corp. v. "Omisalj" (The), [1992] 2 F.C. 193, 52 F.T.R. 144, 1992 CarswellNat 90 (T.D.) — The standard for propriety of a question asked in discovery is whether the information solicited by a question may be relevant to the matters that, at the discovery stage, are in issue on the basis of pleadings filed by the parties.

Reading & Bates Construction Co. v. Baker Energy Resources Co. (1988), 25 F.T.R. 226, 22 C.I.P.R. 240, 24 C.P.R. (3d) 66 (T.D.) — The Court stated six general principles governing the scope of discovery:

a) Relevance is a question of law, and not a matter of discretion. Documents are relevant if they contain information which may directly or indirectly advance a party's case or damage that of his adversary.

b) Questions that are too broad or call for an opinion need not be answered.

and permit distraction of costs in accordance with Quebec practice. Distraction of costs is a matter of substantive law to which the gap rule cannot be applied to bring in provincial practice.

Warwick Shipping Ltd. v. The Queen, [1981] 2 F.C. 57 (T.D.) — The rules make no provision for distraction of costs in favour of the solicitors of the party to whom they are awarded. The Quebec practice in this regard cannot be adopted.

Hamlet of Baker Lake v. Min. of Indian Affairs & Northern Dev., [1981] 1 F.C. 266 (T.D.) — The Court ordered that costs payable to a group of over 100 plaintiffs be paid to their solicitors.

Osborn Refrigeration Sales & Service Inc. v. "Atlantean I" (The), [1979] 2 F.C. 661, 100 D.L.R. (3d) 11 (T.D.) — Costs payable out of the proceeds of sale of a ship that had been arrested and sold are payable to the client on whose behalf they had been incurred, and not to the solicitors directly.

Weight Watchers Int. Inc. v. Burns, [1976] 1 F.C. 237, 62 D.L.R. (3d) 374, 23 C.P.R. (2d) 205 (T.D.) — The Court invoked the gap rule and Ontario practice and granted a charging order over party and party costs in order to preserve a solicitor's lien.

National Capital Commn. v. Bourque, [1971] F.C. 133 (T.D.) — Costs belong to the party and not the solicitor. There is no distraction of costs in favour of the solicitor.

401. (1) Costs of motion — The Court may award costs of a motion in an amount fixed by the Court.

(2) Costs payable forthwith — Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

401. (1) Dépens de la requête — La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

(2) Paiement sans délai — Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

Case Law

Costs of Motion

Nelson v. Canada (Customs & Revenue Agency), [2002] 1 C.T.C. 66, 2001 D.T.C. 5644, 2001 CarswellNat 2270, 2001 FCT 1132 — In awarding costs of a motion the Court took into account the applicant's abusive behaviour in attempting to subpoena persons who had no connection to the cause of action.

Singer v. Enterprise Rent-A-Car Co., [1999] 4 F.C. D-65 (C.A.) — New rule 401 displaces the principle in *Toronto Dominion Bank v. Can. Trustco Mortgage Co.*, below. However, the motions judge retains the discretion to determine that the costs of a motion for an interlocutory injunction should be in the cause. [Authors: see also *A. Lassonde Inc. v. Island Oasis Can. Inc.*, [2001] 2 F.C. 568, 11 C.P.R. (4th) 255, 273 N.R. 179, 2000 CarswellNat 3161, 2000 CarswellNat 3442 (C.A.).]

Montana Band v. Canada, [2000] 1 F.C. 267, [1999] 4 C.N.L.R. 65, 172 F.T.R. 46 (T.D.) — Costs of a motion were awarded payable forthwith where the moving party had not attempted to facilitate discovery and should not have brought such a lengthy and complex motion.

Kirkbi AG v. Ritvik Holdings Inc. (1998), 150 F.T.R. 205, 81 C.P.R. (3d) 289 (T.D.) —

FEDERAL COURT

B E T W E E N:

BMG CANADA INC., EMI MUSIC CANADA, A DIVISION OF EMI GROUP
CANADA INC., SONY MUSIC ENTERTAINMENT (CANADA) INC.,
UNIVERSAL MUSIC CANADA INC., WARNER MUSIC CANADA LTD.,
BMG MUSIC, ARISTA RECORDS, INC.,
ZOMBA RECORDING CORPORATION, EMI MUSIC SWEDEN AB,
CAPITOL RECORDS, INC., CHRYSALIS RECORDS LIMITED,
VIRGIN RECORDS LIMITED, SONY MUSIC ENTERTAINMENT INC.,
SONY MUSIC ENTERTAINMENT (UK) INC., UMG RECORDINGS, INC.,
MERCURY RECORDS LIMITED AND WEA INTERNATIONAL INC.

Plaintiffs

- and -

JOHN DOE, JANE DOE AND ALL THOSE PERSONS WHO ARE INFRINGING
COPYRIGHT IN THE PLAINTIFFS' SOUND RECORDINGS

Defendants

**WRITTEN REPRESENTATIONS
on behalf of the Plaintiffs (Applicants)
for motion returnable March 12, 2004**

DIMOCK STRATTON CLARIZIO LLP
Suite 3202, Box 102
20 Queen Street West
Toronto, Ontario
M5H 3R3

Ronald E. Dimock
Bruce W. Stratton
Denis Sloan
Tel: (416) 971-7202
Fax: (416) 971-6638
Of Counsel

III. Plaintiffs' Positions on the Issues

Test

15. The ISPs have a duty to disclose the identity of their customers pursuant to court orders in infringement cases of this kind. Where, as here, there is no overriding principle or interest militating against disclosure, this duty prevails.
16. The plaintiffs need to show a prima facie or *bona fide* case of wrongdoing and the need for the disclosure to proceed with its lawsuit against the alleged infringers.

Privacy

17. Although there may be expectations of privacy in certain Internet communications, these are not privacy rights that are equivalent to the rights that are raised by government action where the power of the state is circumscribed by the Charter. Cases involving privacy that arise from the context of government action are not relevant to the contractual and technical expectations of privacy that are in play in this case.
18. There is no reasonable expectation of privacy in the circumstances of this case. Further, disclosing the information requested will involve no violation of PIPEDA. PIPEDA specifically authorizes disclosure of personal information in cases such as this. As well the subscribers have consented to the disclosures by agreeing to the terms of service with their ISPs.

Reliability

19. ISPs are in the business of providing IP addresses to their account holders. The data maintained by the ISPs is reliable; there is no suggestion that the data itself is erroneous.
20. The ISPs have identified certain circumstances where data may have become unavailable. In such circumstances the request for discovery will result in no useable information being provided. This is not a reason to deny all discovery.
21. The ISPs Shaw and Rogers have admitted that this type of information has been provided regularly in response to other requests.

IV. Plaintiffs' Argument

A. Test for Obtaining Relief

31. There is a duty on the ISPs to disclose the identities of their customers in this set of circumstances. A person who becomes involved in the wrongful acts of another, even if innocently, is under a duty to assist another who is injured by those acts by giving full information to disclose the identity of the wrongdoer.

Glaxo Welcome PLC v. Canada (Minister of National Revenue) (1998), 81 C.P.R. (3d) 372 (F.C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 422.

Norwich Pharmacal Co. v. Customs and Excise Comrs. [1974] A.C. 133 (H.L.) per Lord Reid at 175

Straka v. Humber River Regional Hospital et al. (2000), 51 O.R. (3d) 1 (C.A.) at 13-14.

K. LaRoche & G.J. Pratte, "The Norwich Pharmacal Principle and Its Utility in Intellectual Property Litigation" (2001) 24 *Advocates Quarterly* 301 at 301.

32. This principle can go beyond merely identifying the wrongdoer to requiring the person to include all information necessary to enable the plaintiff to decide whether it is worth suing the wrongdoer or not. In this case, the plaintiffs merely want to learn the identity of certain wrongdoers; they already have evidence of wrongdoing.

Glaxo Welcome PLC v. Canada (Minister of National Revenue) (1998), 81 C.P.R. (3d) 372 (F.C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 422.

Norwich Pharmacal Co. v. Customs and Excise Comrs. [1974] A.C. 133 (H.L.) per Lord Reid at 175

Straka v. Humber River Regional Hospital et al. (2000), 51 O.R. (3d) 1 (C.A.) at 13-14.

33. The criteria for issuing a bill of discovery involves three threshold requirements:

- 1) The applicant must establish a *bona fide* (i.e. *prima facie*) claim against the alleged wrongdoer;
- 2) The applicant must share some sort of relationship with the respondent through the wrongdoing; and,

3) The person from whom discovery is sought must be the only practical source of information available.

The general object is to do justice. The requirements are satisfied on the facts of this case. In exercising its discretion, a court should also take into account the public interests both in favour of and against disclosure. Without disclosure, the plaintiffs would be "non-suited". On the facts of this case, there is nothing that weighs against giving the plaintiffs the opportunity to go forward with their lawsuit.

Straka v. Humber River Regional Hospital et al. (2000), 51 O.R. (3d) 1 (C.A.) at 14

Glaxo Wellcome PLC v. Canada (Minister of National Revenue) (1998), 81 C.P.R. (3d) 372 (F.C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 422.

34. This motion is brought pursuant to Rules 233 and 238 of the Federal Court Rules, 1998¹.

35. The Federal Court has the power, under Rule 233(1), to order the production of any document in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.

Rule 233(1), Federal Court Rules, 1998, SOR/98-106, as am.

36. The defendants are identified by the specified Internet Protocol addresses. The specified Internet Protocol addresses are registered to ISPs who have assigned those Internet Protocol addresses to subscribers whose identity is solely known by the ISPs. The information sought is relevant and could be compelled at trial; only the ISPs have possession of the relevant information.

Affidavit of Gary Millin, *Plaintiffs' Motion Record*, paras. 16, 24, 33, 36 and 37

Notice of Motion, *Plaintiffs' Motion Record*, Schedule 'A'

¹ In a letter dated February 25, 2004, the Plaintiffs indicated to counsel for the ISPs that the motion would be based on Rule 238 as well as 233.

37. Rule 238(1) of the *Federal Court Rules* permits a party to an action, with leave, to examine for discovery any person not a party to the action, other than an expert witness for a party, who might have information on an issue in an action.

Rule 238(1), *Federal Court Rules, 1998*, SOR/98-106, as am.

38. In exercising its discretion under Rule 238(1), the Court must consider the following factors under Rule 238(3):

- (a) the person may have information on an issue in the action;
- (b) the party has been unable to obtain the information informally from the person or from another source by any other reasonable means;
- (c) it would be unfair not to allow the party an opportunity to question the person before trial; and
- (d) the questioning will not cause undue delay, inconvenience or expense to the person or to the other parties.”

Rule 238(3), *Federal Court Rules, 1998*, SOR/98-106, as am.

Stevens v. Canada (Attorney-General) (2001), 1 F.C. 156 (F.C.) at 163.

39. An applicant, under Rule 238 must show that the evidence cannot be obtained from anyone other than from the person to be examined. Moreover, in order to satisfy Rule 238(3)(b), there should be evidence of the efforts made by the requesting party to obtain the information informally or reasonably from other sources and of the failure or frustration of those efforts. The plaintiffs, prior to bringing these motions, asked the ISPs to voluntarily provide the information and documents. None would do so.

Bayside Towing Ltd. v. C.P.R. [2000] F.C.J. No. 1122, (2000), 187 F.T.R. 247 affirmed [2000] F.C.J. No. 1534, (2000), 194 F.T.R. 158 (F.C.)

Snook v. “Cape Marnier” (The) [1999] F.C.J. No. 412, (1999), 165 F.T.R. 151 (F.C.).

40. In considering the factors under Rule 238, the following should be noted:

(a) the ISPs have information on an issue in the action, namely the identity of the alleged infringers.

(b) the plaintiffs have been unable to obtain the information from the ISPs through informal means. The ISPs are the only practical source of the information.

(c) it would certainly be unfair not to allow the plaintiffs an opportunity to question the ISPs; otherwise, the plaintiffs would be non-suited without this information.

(d) providing the information would not cause unreasonable delay, inconvenience or expense.

Affidavit of Gary Millin, Plaintiffs' Motion Record, paras. 90, 91

41. The criteria for the granting of an order under Rules 233 and 238 generally mirror those for the equitable bill of discovery. The principle of the duty to identify the wrongdoer can be invoked whether the order is sought in a John Doe action against the wrongdoer or in another action brought against the third party by way of a bill of discovery.

42. This motion is not a novel proceeding. Third parties have been compelled to disclose documents identifying the name and address of a defendant previously identified solely by an Internet Protocol address. In no case have privacy or other concerns against disclosure outweighed the interest in obtaining the documents and information to identify the defendants.

Irwin Toy v. Doe (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.).

Ontario First Nations Limited Partnership v. John Doe (3 June 2002) (Ont. S.C.J.)

Canadian Blood Services/Société Canadienne du Sang v. John Doe (June 17, 2002) (Ont. S.C.J.)

Wa'el Chehab v. John Doe (October 3, 2003) (Ont. S.C.J.)

Kibale v. Canada, [1991] F.C.J. No. 634 (QL) (FC)

Loblaw Companies Ltd. v. Aliant Telecom Inc. and Yahoo [2003] N.B.J. No. 208 (N.B.Q.B.), online: QL (NBJ).

43. In *Irwin Toy v. Doe*, the Ontario Superior Court of Justice granted the applicant leave to examine an Internet service provider for discovery of the name, address or other identification information of a customer of the ISP who had sent out allegedly defamatory e-

mail messages, which had attached to them two private and confidential electronic files of the plaintiff. The plaintiff required the information to take legal proceedings against those customers of the ISP who had defamed it and misappropriated its confidential information. Satisfactorily to the court, the applicant had made out a *prima facie* case of actionable wrongdoing perpetrated by the defendants from that Internet Protocol address.

Irwin Toy v. Doe (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.).

44. The *prima facie* test set out in *Irwin Toy* is appropriate. Indeed, this test has been followed in cases in which the remedies made available by the Federal Court have been far more invasive than the order sought here. For example, on injunction applications, which often have far reaching consequences for the party affected, the *prima facie* test is applied. Only in the case of an *Anton Piller* order, which permits attendance, preservation and removal remedies far more invasive than the scope of the order sought in this case, must the parties seeking the order satisfy a higher “strong *prima facie*” test.
45. Information disclosing the identity of customers behind IP addresses by ISPs is routinely sought and provided under court orders of the type the plaintiffs seek. On a monthly basis over the last two-year period, through search warrant or court order, government agencies have obtained the identity of persons assigned IP addresses by Rogers Cable Communications.

Cross examination of Ho, Plaintiffs’ Motion Record, p. 4.

46. On this motion, the plaintiffs have demonstrated the following:
- a. a *prima facie* or *bona fide* case, at least, of infringement (see paragraphs below);
 - b. a relationship exists between the ISPs and the alleged infringers (the IP addresses are registered to the ISPs who have assigned use of them to customers or subscribers);
 - c. the fact that the ISPs have documents and information about the identities of customers who are alleged to infringe copyright;
 - d. no other practical source of this information;
 - e. the necessity of this information for the plaintiffs to proceed;

FEDERAL COURT OF APPEAL

B E T W E E N:

BMG CANADA INC., EMI MUSIC CANADA, A
DIVISION OF EMI GROUP CANADA INC., SONY
MUSIC ENTERTAINMENT (CANADA) INC.,
UNIVERSAL MUSIC CANADA INC., WARNER
MUSIC CANADA LTD., BMG MUSIC, ARISTA
RECORDS, INC., ZOMBA RECORDING
CORPORATION, EMI MUSIC SWEDEN AB,
CAPITOL RECORDS, INC., CHRYSALIS RECORDS
LIMITED, VIRGIN RECORDS LIMITED, SONY
MUSIC ENTERTAINMENT INC., SONY MUSIC
ENTERTAINMENT (UK) INC., UMG RECORDINGS,
INC., MERCURY RECORDS LIMITED AND WEA
INTERNATIONAL INC.

Appellants
(Plaintiffs)

-and-

JOHN DOE, JANE DOE AND ALL THOSE PERSONS
WHO ARE INFRINGING THE PLAINTIFFS'
COPYRIGHT IN SOUND RECORDINGS

(Defendants)

-and-

SHAW COMMUNICATIONS INC., ROGER CABLE
COMMUNICATIONS INC., BELL CANADA, TELUS
COMMUNICATIONS INC. and VIDEOTRON LTEE.

Respondents
(Third Party Respondents)

-and-

CANADIAN INTERNET POLICY AND PUBLIC
INTEREST CLINIC

Intervener

**MEMORANDUM OF FACT AND LAW
OF THE NON-PARTY RESPONDENT
TELUS COMMUNICATIONS INC.**

BENNETT JONES LLP

One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Joel D. Watson (LSUC #38520B)
Tel: 416.777.4879
Fax: 416.863.1716

Solicitors for Respondent, TELUS Communications Inc.