Court File No. T-292-04

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 THE PLAINTIFFS' COPYRIGHT IN SOUND RECORDINGS

Defendants

WRITTEN REPRESENTATIONS

PART I - THE NATURE OF THIS MOTION

1. The Internet service provider business unit of TELUS Communications Inc. ("TELUS") is a non-party respondent to the plaintiffs motion, to compel TELUS to produce documents, pursuant to Rule 233 of the Federal Court Rules, 1998 SOR/98-106 (the "Rules"). The plaintiffs comprise seventeen (17) record companies, being represented by the Canadian Recording Industry Association (collectively, "CRIA")

2. TELUS does not have documents as described by CRIA in its possession in the normal course.

3. However, what CRIA actually appears to be seeking is a mandatory order, conscripting the non-party TELUS to conduct investigations for CRIA and to generate documents, containing information sought by CRIA, without concern for the impact such a request would have on the business interests of TELUS, and without concern for the reliability of the information generated. Such an order, without reasonable limitation, would be excessive and inequitable.

PART II - THE FACTS

4. CRIA has asked the Court to direct TELUS, and other Internet Service Providers (the "ISPs"), to disclose business records which identify Internet users, whom CRIA alleges are infringing copyright, by "uploading" music to the Internet, so that it can be "downloaded" and copied by others.

5. 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: Affidavit of David Shrimpton, Sworn March 4, 2002, at p. 2, para 4. Motion Record of TELUS, ("Shrimpton Affidavit").

6. Schedule "A" to the draft order provides, in the case of TELUS, three peer-to-peer network pseudonyms, Internet Protocal addresses ("IP address") and the date and time the IP addresses were reportedly "uploading" or "sharing" music 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 database, an account list providing the name, address, telephone and facsimile numbers for the account holder, Sweetydee11@KaZaA.

Reference: Shrimpton Affidavit, at pp. 4-5, paras. 13-14.

7. Sweetydee11@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. Sweetydee11@KaZaA identifies this user to KaZaA and to other subscribers to that service. 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 Sweetydee11@KaZaA if the alleged user were a KaZaA Plus subscriber. If the user subscribed to KaZaA Plus, Sweetydee11@KaZaA would have had to register and would have had to pay for the service.

Reference: Shrimpton Affidavit, at pp. 4-5, paras. 13-14.

8. 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 relatively straightforward task for the ISP to determine the identity and contact information of the Infringers.
>
> **Reference:** Affidavit of Gary Millin, Sworn February 5. 2004, at p. 14, para 48, Motion Record of the Plaintiffs ("Millin Affidavit").

9. Moreover, Mr. Millin has 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. To locate the account holder associated with an IP address, TELUS employees must first locate a Media Access Control address ("MAC address"), which could be located on one of four different networks, to which the IP address was assigned, at a particular time, since the IP addresses are dynamic. 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.

Reference: Shrimpton Affidavit, at p. 2, paras. 3 and 5.

10. Moreover, this only addresses identification of the account holder. TELUS has no ability to identify the users.

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Reference: Shrimpton Affidavit, at pp. 2-3, para. 5.

11. As stated above, TELUS does not have anywhere a document which identifies either Sweetydee11@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 the 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.

Reference: Shrimpton Affidavit, at p. 5, para. 15.

12. To attempt to obtain the type of information requested, TELUS employees will be required to conduct searches of at least three different databases and cross-reference the information found, to locate the likely account holder. This process is not done in the normal course of business and thus there would not be any 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. TELUS does not monitor the content of what account holders access on the Internet.

Reference: Shrimpton Affidavit, at pp. 5-6, para. 16.

13. 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 address 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, at p. 6, para. 17.

14. 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.

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Reference: Shrimpton Affidavit, at p. 6, para. 18.

15. 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") 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, at p. 6, para. 19.

16. 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, at p. 7, para. 20.

17. 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. The account holder and the user are not always the same, or even known to each other.

Reference: Shrimpton Affidavit, at p. 7, paras. 21-22.

18. With respect to the account holder, if the request is made within 30 days of when the Internet was accessed for the impugned peer-to-peer 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, the information becomes less reliable to the point of being non-existent.

Reference: Shrimpton Affidavit, at p. 7, para. 22.

19. 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' 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, at p. 7, para. 23.

20. The limitations in searching for the MAC address are:

(a) 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 Sweetydee11@KaZaA as being 66.183.24.99;

(b) the vast majority of TELUS IP addresses are dynamic, meaning that they are moved from account holder to account holder;

(c) TELUS currently has four Internet systems in operation, each which has different record keeping protocols; and

(d) 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, at pp. 7-8, para. 23.

21. Even if the MAC address is determined, it would not necessarily determine the identity of the account holder for certain in all instances, because of certain hardware limitations that may provide erroneous results.

Reference: Shrimpton Affidavit, at p. 8, para. 24.

22. 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 30-day periods in most cases.

Reference: Shrimpton Affidavit, at p. 8, para. 25.

23. 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, at p. 9, para. 26.

24. As a result, TELUS cannot identify an account holder, based on an IP address, with 100% 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, at p. 9-10, para. 27.

25. 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 recent press release announcing 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: Affidavit of Greg Pultz, sworn February 13, 2004, Motion Record of Shaw Communications Inc., ("Pultz Affidavit") Exhibit "B", "New Wave of Record Industry Lawsuits Brought Against 532 Illegal File Sharers", posted in the RIAA Website on January 21, 2004;

Shrimpton Affidavit, at p. 3, 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*.

26. 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 peer-to-peer sharing networks.

Reference: Shrimpton Affidavit, at pp. 3-4, para. 8.

27. CRIA could 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, at p. 4, para. 8.

28. Compliance with the order as presently sought would prejudice TELUS by requiring that: numerous investigations be conducted on short notice; without consideration for TELUS' own business and customer needs; that TELUS employees and counsel then prepare affidavits based on analysis of data; 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' business.

Reference: Shrimpton Affidavit, at pp. 2-3, para. 5.

29. Each request by CRIA will consume TELUS resources and CRIA has asked that these requests be complied with, without compensation or 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. The internal cost of the employee time alone is $36.00 per hour, not including any consideration for use of the equipment, over-time, 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. It also does not consider the time spent by TELUS in-house and external legal counsel reviewing and vetting requests, or the time spent in preparing affidavits and attendance at cross-examinations, nor does it include the adverse impact on TELUS customer relations from erroneous allegations and threatened lawsuits.

Reference: Shrimpton Affidavit, at p. 10, para. 29.

PART III - SUBMISSIONS

30. CRIA's notice of motion seeks production, pursuant to Rule 233, from non-parties of business records within their possession, which could be compelled at trial. Rule 233 of the Federal Court Rules provides:

> 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: Plaintiffs Notice of Motion at p. 2;

Rule 233 of the Federal Court Rules, 1998 SOR/98-106.

31. However CRIA's draft order asks this Honourable Court to direct 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
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> (b) produce to counsel for the Plaintiffs a copy of the ISP's records used to identify the information disclosed pursuant to subparagraph (a), ...
>
> 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 as issued on the ISP, 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.

Reference: Draft Order, Plaintiffs' Notice of Motion, Schedule A, Plaintiffs' Motion Record.

32. CRIA's affiant implicitly acknowledges that there would not be existing records but speculates that: "[O]nce 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 relatively straightforward task for the ISP to determine the identity and contact information of the Infringers.*" [Emphasis added]

33. TELUS has confirmed that aside from the necessity of conducting searches to be able to respond to this motion procedurally, it would not have any existing records, which would contain the information sought. Accordingly, it is respectfully submitted that the motion does not seek production of an existing document but rather a mandatory order directing an investigation. It is respectfully submitted that the Order sought is not within the ambit of Rule 233.

34. In addition, even in the event that CRIA was to be granted leave to amend their motion to rely upon Rule 238(1) (which TELUS does not concede should be permitted), TELUS would have no existing document upon which a representative could be cross-examined (but for generation of same to respond to this motion), which provides the identity of the users behind the IP addresses provided. Discovery is limited to questions and answers, and does not entail servitude.

35. As above, even in the event CRIA is granted leave to amend their motion to rely upon the decision of the House of Lords in *Norwich Pharmacal Co.* v. *Commissioners of Customs and Excise* as adopted by the Federal Court of Appeal in *Glaxo Welcome PLC v. Minister of National Revenue* (again which is not conceded), it is respectfully submitted that the relief sought by CRIA, *i.e.*, conscription of TELUS for the purposes of conducting an investigation, exceeds the jurisprudence emanating from those decisions. In those cases, and those that follow them, the non-party in question had existing documentary records as a result of its normal functions but was refusing to produce them for reasons of policy, privilege or privacy. The question of whether the non-party was required to divert resources to conduct an investigation to generate documents was not canvassed.

Reference: *Norwich Pharmacal Co.* v. *Commissioners of Customs and Excise*, [1974] A.C. 133 (HL), ("*Norwich*") at; *Glaxo Welcome PLC v. Minister of National Revenue*, (1998), 81 C.P.R. (3d) 372 at 392, 378-379 (F.C.A.) ("*Glaxo*").

36. 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 third parties of CRIA's campaign.

Reference: Shrimpton Affidavit, at p. 3, para. 3.

37. In *Norwich,* as well as *Glaxo*, the records being sought were readily available. They were, in every sense, a production of existing documents in the possession of the parties, which would have been compellable at trial. The issue in *Glaxo,* as well as *Norwich,* was clearly 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 neither case did the Minister of National Revenue or the Commissioner of Customs argue that they were actually being forced to undertake investigations for the prospective plaintiff. In *Glaxo*, at page 379, the plaintiff's (appellant) application material included at paragraph 6:

> 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.

38. In those instances, it is clear that the documents requested were available, but were being withheld. This is distinct from the present situation where the documents are not available but rather searches would be required to generate documents for the benefit of the plaintiff. Moreover, a Norwich Order should only be given if the moving parties have presented a *prima facie* case and the plaintiff truly intends to commence a 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. In this case unlike *Norwich*, *Glaxo* or the cases cited by CRIA, CRIA has not put cogent, convincing and admissible evidence before this Honourable Court to establish that a *prima facie* case of copyright infringement exists. Instead, CRIA relies upon broad hearsay affidavits.

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

39. It is also a precondition to the granting of the Order that the moving party show that it could not obtain the information elsewhere. Aside from bald and self-serving statements, at paragraphs 45 and 46 of Millin's affidavit, CRIA does not disclose what other efforts they have made to obtain the information.

Reference: Millin Affidavit, at p. 13, pp. 45-46;

Glaxo, *supra*, at p. 397, para 45.

40. The granting of a Norwich Order is within the Court's equitable jurisdiction. However, in determining whether to grant the order, the Court must consider and balance the interests of the plaintiff to the information and to society to the free flow of information:

> 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 interests 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 very 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, supra*, at 459 – 460.

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

41. As well, the exercise of discretion (and any order made) should balance the interests of CRIA and the conscripted ISPs. The ISPs are innocent bystanders. Providing access to the Internet (the means of the alleged copyright infringement) does not equal participation or facilitation as required by the Norwich test. Moreover, if assistance is directed, the assistance should be on terms that both consider the impact on TELUS's business and compensate it for the disruption. This consideration includes indemnification of TELUS by CRIA for the cost of the investigations, litigation that ensues and losses sustained as a result of misidentification.

> "Authorize" means to "sanction, approve and countenance":...Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely "give approval to, sanction, permit, favour, encourage":...Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference. ....However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak*, *supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement:...
>
> ...The Federal Court of Appeal, relying in part on the Australian High Court decision in *Moorhouse v. University of New South Wales*, ..., concluded that the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the machine's users.
>
> 41 With respect, I do not agree that this amounted to authorizing breach of copyright. *Moorhouse*, *supra*, is inconsistent with previous Canadian and British approaches to this issue. See D. Vaver, *Copyright Law* (2000), at p. 27, and *McKeown, supra*, at p. 21-108. In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.
>
> 42 Applying the criteria from *Muzak*, *supra*, and *De Tervagne*, *supra*, I conclude that the Law Society's mere provision of photocopiers for the use of its patrons did not constitute authorization to use the photocopiers to breach copyright law.

Reference: *The Law Society of Upper Canada v. CCH Canadian Limited*, 2004 SCC 13 File No 29320 at para 38, *et seq.*

42. Accordingly, it is respectfully submitted that if relief is afforded the plaintiffs, they should be required to indemnify TELUS for its efforts, which are for the sole benefit of CRIA:

> ...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*, *supra*, at 406-407, paras. 66-67, citing *Norwich*.

43. 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)(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 the fall out thereafter.

Reference: Rule 239(1)(3).

44. In addition to the cost and disruption caused by the requests, there is the concern about reliability given the significant impact of being sued on the account holders if the information is not correct. 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, and will consume further TELUS resources in conducting the investigation in the first place and responding to the competing inquiries and examinations of CRIA and the account holders afterwards, as they litigate that issue. If relief is afforded to CRIA by way of disclosure, it should end there. Delivery of an affidavit is excessive and should not be ordered. Moreover, sufficient time must be granted to permit TELUS to conduct its investigation without disrupting its own business.

45. 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.

46. Accordingly, TELUS requests that if this Honourable Court, in its discretion, is inclined to grant relief to the plaintiff, that the order shall contain the following terms:

(a) that TELUS only be required to produce to counsel for CRIA the name and last known name and mailing address for the account holder from its business records, if available. All other information requested is surplus to CRIA's need to pursue litigation;

(b) that TELUS be granted 14 business days from the date of receiving the issued order to produce the name and address;

(c) that CRIA be ordered to fully indemnify TELUS for all costs (including full legal costs), expenses, losses and damages resulting from the production of any information; and

(e) that CRIA's use of the information be limited to the litigation.

47. Lastly, it is respectfully submitted that there is no authority or equitable foundation to support CRIA's request for the production of an affidavit so as to conscript opinion evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2004.

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