

**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, CAPITAL RECORDS, INC., CHRYSALIS RECORDS LIMITED, VIRGIN RECORDS LIMITED, SONY MUSIC ENTERTAINMENT INC., SONY MUSIC ENTERTAINMENT (UK) LIMITED, 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., ROGERS CABLE COMMUNICATIONS INC.,  
BELL CANADA, TELUS COMMUNICATONS INC. AND VIDEOTRON LTEE.

Respondents (Third Party Respondents)

-and-

CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Intervenor

**MEMORANDUM OF FACT AND LAW OF THE  
RESPONDENT, BELL CANADA**

**OVERVIEW:**

1. Bell Canada (“Bell”) is a non-party respondent to this appeal brought by the Plaintiffs. The Plaintiffs’ motions before Mr. Justice von Finckenstein sought an order compelling Bell’s Internet Service Provider (“ISP”) division, among other named ISPs, to disclose personal information concerning some of its customers.
2. The Plaintiffs brought their motions against the named non-party ISPs as part of an action commenced by the Plaintiffs against persons currently identified by the pseudonyms John and Jane Doe. The Plaintiffs claim these persons are facilitating the infringement of copyrights that are either owned by or licensed to the Plaintiffs. Bell did not file an affidavit responding to the Plaintiff’s motions.
3. By order dated March 31, 2004, the Honourable Mr. Justice von Finckenstein dismissed the Plaintiffs’ motions with costs, including more particularly the motion against Bell. The Plaintiffs appeal that order to this Court.
4. The position of Bell in this Court is that Bell can neither win nor lose this Appeal. Bell takes the same position on this appeal as it did before the motions judge: while it does not endorse nor seek to protect any of its customers who may be engaged in allegedly illegal activity, privacy policy and legislation requires Bell to safeguard the personal information of its customers.
5. In their Memorandum of Fact and Law, the Appellants state that the ISPs have refused to voluntarily disclose the information requested. Such a statement is misleading, as Bell is prohibited by the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) from disclosing the information sought unless Bell has the particular account holder’s consent or Bell is ordered to disclose such information by the Court.
6. Bell’s role in this Court, as it was in the Court below, is to assist the Court with respect to the correct legal standard for the issuance of a court order that requires a non-party respondent such as Bell to disclose personal information of a customer to a

plaintiff, the application of that standard to the evidence at hand and the terms of any such order should the Court decide to grant the appeal.

7. Regardless of the outcome of the appeal, Bell should be awarded its legal and administrative costs both in this Court and in the Court below.

## **PART I – FACTS**

8. The Respondent Bell Canada (“Bell”) is a federally regulated telecommunications enterprise whose customer records are subject to the PIPEDA. The PIPEDA came into force on January 1, 2001 with respect to the federally regulated private sector. Bell Sympatico is the ISP division of Bell Canada.

9. The PIPEDA prohibits the disclosure of “personal information” without the consent of the individual associated with the information except in very limited circumstances. Such information may be disclosed without consent if the disclosure is ordered by a court with jurisdiction to compel the production of information or to comply with rules of court relating to the production of records. The information sought by the Appellants is “personal information” as defined by the PIPEDA.

*The Personal Information Protection and Electronic Documents Act*, s. 2(1) and 7(3)(c).

10. Rule 233 of the *Federal Court Rules* provides that a party may apply to obtain the production of a document from a person who is not a party to the action if the document is relevant and could be compelled at trial.

*Federal Court Rules 1998*, rule 233.

11. Rule 238 of the *Federal Court Rules* provides that a party may seek the examination for discovery of a non-party where the moving party demonstrates that the non-party may have information on an issue in an action; the party has been otherwise unable to obtain this information; it would be unfair to the party not to allow the discovery; and the questioning will not cause undue delay, inconvenience or expense.

*Federal Court Rules 1998*, rule 238.

12. Rule 81(1) of the *Federal Court Rules* states that affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds thereof, may be included.

*Federal Court Rules 1998*, rule 81(1).

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

*Federal Court Rules 1998*, rule 81(2).

14. In support of their motions, the Appellants submitted three affidavits from representatives of MediaSentry, an Internet investigation company: the affidavit of Gary Millen, sworn February 6, 2004; the supplementary affidavit of Gary Millen, sworn February 9, 2004; and the affidavit of Kathy Yonekura sworn February 10, 2004. The second Millen affidavit (Tab 3) was sworn to correct the IP address for "hotshot@kazAa" (64.231.254.117 not 64.231.255.184).

15. Bell did not file an Affidavit responding to the Plaintiffs' motion and advised the Court below that it had obtained the information sought by the Plaintiffs.

16. To Bell's knowledge, the Federal Court has not yet considered in any other proceeding the impact of the PIPEDA on the production of documents from non-parties, pursuant to Rules 233 and 238 of the *Federal Court Rules*.

## **PART II – POINTS AT ISSUE**

17. There are three points at issue in this appeal:
  - a. What is the legal standard that the Court should apply to the Appellant's motion to compel disclosure of personal information to the Appellants?
  - b. Have the Appellants met the legal standard?
  - c. What are the appropriate terms of an order should this Court compel disclosure of personal information to the Appellants?

## **PART III – STATEMENT OF SUBMISSIONS**

### ***The interplay of Federal Court Rules 233 and 238 and the PIPEDA:***

18. The enactment of the PIPEDA has signalled to business enterprises that their customers are entitled to a heightened expectation of privacy for their personal information.
19. In their Memorandum, the Appellants state at paragraph 3 that “the ISPs are the only entities who have information regarding the identity of the Defendants, which they refuse to provide voluntarily.” The Appellants further state at paragraph 17 that “only the ISPs have the information sought regarding the persons to whom the ISPs assigned the 29 IP addresses. The ISPs have refused to provide this information voluntarily.” Finally, at paragraph 29, the Appellants once again state that “the ISPs have refused to provide information regarding the persons to whom the ISPs assigned the 29 IP addresses”.
20. Such statements are misleading. The Appellants fail to acknowledge that the ISPs, including Bell Sympatico, are not entitled to “voluntarily” disclose such personal information except with the customer's consent or pursuant to a court order. Indeed, in paragraph 9 of his *Reasons for Order and Order*, Justice von Finckenstein noted

that all of the parties to the motions below agreed that ISP account holders have an expectation that their identity will be kept private and confidential and that this privacy expectation is based both on the terms of their account agreements with the ISPs and the PIPEDA. Finckenstein J. further noted that all parties to the motions below agreed that the exceptions in the PIPEDA apply in this case and that an ISP, by virtue of s. 7(3)(c) of the PIPEDA, may disclose personal information without consent pursuant to a court order.

*Reasons for Order and Order*, Appeal Book, Vol. I, Tab 2, para. 9.

21. Accordingly, the ISPs cannot “voluntarily” disclose the information sought. The Appellants must obtain a court order.
22. On the motion, the Appellants claimed that the Defendants have improperly distributed material protected by copyrights that the Appellants hold and, as such, the disclosure of personal information from the non-party ISPs is justified.

*Statement of Claim* filed February 10, 2004, Appeal Book, Vol. I, Tab 3 at page 49, para. 27.

23. At paragraphs 13 and 14 of his *Reasons for Order and Order*, Mr. Justice von Finckenstein outlined the following five criteria that a moving party must meet on a motion brought under Rule 238:
  - (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, 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; and

(e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns.

*Reasons for Order and Order*, Appeal Book, Vol. I, Tab 2 at pp.17-18, paras. 13-14.

24. With respect to the Plaintiffs' submissions on the five criteria, Mr. Justice von Finckenstein held as follows:

(a) The Plaintiffs failed to demonstrate a *prima facie* case against the unknown alleged wrongdoers. More particularly, the motion judge found three deficiencies in the Plaintiff's *prima facie* case: the affidavits of Gary Millen are deficient as to content; there is no evidence of connection between the pseudonyms and the IP addresses; and there is no evidence of infringement of copyright.

*Reasons for Order and Order*, Appeal Book, Vol. I, Tab 2 at pp.18-25, paras. 16-29.

(b) The Plaintiffs met the criteria of demonstrating that the ISPs are in some way involved in the matter under dispute and are more than an innocent bystander.

*Reasons for Order and Order*, Appeal Book, Vol. I, Tab 2 at p. 25, para. 30.

(c) The Plaintiffs failed to demonstrate that the ISPs are the only practical source of information available to the Plaintiffs.

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

(d) The process sought to be imposed on the ISPs would be costly and would divert their resources from other tasks. 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, as well as the legal costs of responding to this motion.

*Reasons for Order and Order*, Appeal Book, Vol. I, Tab 2  
at p. 28, para. 35.

- (e) Under the circumstances, given the age of the data [requested by the Plaintiffs], its unreliability, and the serious possibility of an innocent account holder being identified, the privacy concerns outweigh the public interest concerns in favour of disclosure.

*Reasons for Order and Order*, Appeal Book, Vol. I, Tab 2  
at p. 31, para. 42.

***Considerations on the admissibility of the Plaintiffs' affidavit evidence:***

25. While Bell did not file an affidavit responding to the motion brought against it, Bell did draw to the Court's attention in its written submissions that the evidence upon which the Plaintiffs rely must meet the requirements of Rules 81(1) of the *Federal Court Rules*.

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

27. With respect to Federal Court Rule 81(1), the leading case of *The Queen v. A. & A. Jewellers* sets out the Court's expectations of affidavit evidence on a motion:

The Court is entitled to the sworn statement of the person who has personal knowledge of the facts when he is available. The second part of the Rule is merely permissive and is for use when the best evidence, that is to say the oath of the person who knows, is for some acceptable or obvious reason not readily available.

*The Queen v. A.A. Jewellers Ltd.* [1978] 1 F.C. 479 (Fed T.D.) at 480, per Thurlow A.C.J.



28. With respect to an affidavit showing evidence of belief rather than personal knowledge, the deponent must meet two conditions for the affidavit to be admissible: first, the affidavit must be filed on an interlocutory motion; and second, the deponent must indicate in his affidavit the grounds of his belief. Once these conditions are met, the affidavit evidence is admissible, even though it may have little or no weight or probative value.

*Lumonics Research Limited v. Gordon Gould et al.* [1983] 2 F.C. 360 (Fed. C.A.), per Pratte J.A.

29. In the *Lumonics Research* case, a solicitor had filed an affidavit to respond to a motion for production of documents. The moving party argued that there existed no special circumstance warranting the filing of an affidavit on information and belief and that an affidavit of a deponent with personal knowledge was required. The Federal Court of Appeal considered the then equivalent of the present Rule 81(1) and determined that on an interlocutory motion only, such evidence is admissible if the deponent states the grounds or source(s) for his information and belief.

30. Where affidavits do not contain personal knowledge, the Court must be satisfied that the applicants have established the necessity of using hearsay evidence. Where such necessity has not been shown, hearsay evidence has been rejected.

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

31. In *Merck Frosst*, the Applicants sought to introduce affidavits containing hearsay evidence on a motion seeking an Order prohibiting the Minister of National Health and Welfare from issuing a notice of compliance to the respondent in relation to a named drug. There was no evidence that the Applicants had made any attempt to obtain an affidavit from a representative of the respondent to contradict statements made by the respondents in its notice of allegations to the Minister of National Health and Welfare. As the motion was not interlocutory in nature, the affidavit required evidence of the deponent's personal knowledge. The Applicants failed to demonstrate

the necessity of using hearsay evidence rather than obtaining affidavit evidence of a deponent with personal knowledge. The Court thus deemed that the affidavit containing hearsay evidence, which did not demonstrate the necessity of relying on the hearsay evidence, was not admissible.

32. A document is neither relevant nor admissible on a motion simply because it is attached to an affidavit. Rather, the affidavit evidence must prove the document before the document may be admitted as evidence.

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

33. In the *Inhesion Industrial* case, the Plaintiff moved for summary judgment on the basis of an alleged assignment to it of a copyrighted work. The Plaintiff filed an affidavit by a deponent with no actual knowledge of the assignment agreement and who did not identify the source of any belief as to the agreement. The Court thus found that the Plaintiff had failed to establish the facts to enable the Court to conclude for the purpose of the summary judgment motion that the copyright had been assigned to the Plaintiff. The Court in the *Inhesion Industrial* case held, at paragraph 22, that:

It is commonly accepted that a document is not rendered relevant or admissible simply because it is attached to an affidavit. Documents generally must be proven before their admission. It would have been simple to have the individual who witnessed the execution of the assignment provide an affidavit to that effect.

34. In Mr. Millen's Affidavit and Supplementary Affidavit, the facts deposed to are not based upon his personal knowledge, but rather upon information provided to him by unidentified individuals. It is not clear from his affidavits if he is relying on second or third-hand hearsay, as he does not state the grounds or sources for his information and belief. Further, the Millen Affidavits do not set out any grounds of necessity for relying on hearsay evidence.

35. In addition, none of the moving parties' affidavits indicate how MediaSentry, the company of which Mr. Millen is the President, determined the IP address associated with the user names of the alleged wrongdoers at the time of investigation, nor how the error was made that necessitated the Millen Supplementary Affidavit.
36. In their Memorandum, the Appellants submit at paragraph 55 that "it was improper for the motions judge to have accepted this criticism [of Mr. Millen's evidence being unreliable] without ever having allowed Mr. Millen to hear the criticism and provide a response. The Appellants assert that the ISPs have violated the rule in *Browne v. Dunn*, which imposes on an opposing party the duty of giving a witness an opportunity of explaining evidence which the cross-examiner intends to use later to impeach the witnesses' testimony or credibility.

*Browne v. Dunn* (1894) 6 R. 67 at 70-71 (H.L.), as expressly adopted by the Supreme Court of Canada in *Peters v. Perras et al.* (1909), 42 S.C.R. 244, 12 Alta. L.R. 80.

37. In fact, upon cross-examination on his affidavit by Bell's counsel, Mr. Millen confirmed that he had no personal knowledge of the investigation relating to each of the alleged Bell customers. As such, the issue of Mr. Millen's lack of personal knowledge was clearly put to him in cross-examination on his affidavit and the Appellants did not, either in re-examination or in a Supplementary Affidavit, attempt to explain the failure to set out the source or sources of Mr. Millen's information.

*Transcript of Cross-examination of Gary Millen*, Appeal Book, Vol. IX, Tab 23, Pages 2600-2601, Q. 240-243.

***The ability of Bell to comply with the Order sought:***

38. At paragraph 25 of their submissions, the Appellants make the statement that "in this case, single documents linking an IP address to a customer do exist." The Appellants do not refer to any reference in the record that such documents do in fact exist. Indeed, the statement itself is misleading, as any documents linking an IP address to a Bell Sympatico account holder would have been generated solely for the

purpose of the motion itself. These documents are not created in the ordinary course of business. They are not pre-existing “documents” in the context of Rule 233 of the *Federal Court Rules*.

39. At paragraph 34 of their submissions, the Appellants state that “the ISPs comply with inquiries of this type on a regular basis.” In fact, requests such as that made by the Appellants are not made to Bell on a regular basis. The information being sought by the Appellants has required Bell Sympatico to conduct searches that entail significant internal and external administrative, technical and legal expenses.
40. At paragraph 51 of their submissions, the Appellants state that “each ISP confirmed that it has relevant information and that MediaSentry accurately associated the IP addresses in question to the correct ISP”. Bell cannot locate in the record before the motions judge any such specific confirmation by Bell of “relevant information” or that “MediaSentry accurately associated the IP addresses in question to the correct ISP”.
41. In the Order Requested section of their Memorandum of Fact and Law, the Appellants advise that they are presently seeking an Order compelling the ISPs to produce “any and all records relating to the identity and address for service of the 29 IP addresses listed in Schedule “B” hereto”. This request appears to be much broader in scope than the Order sought in either the original Notice of Motion or the Notice of Appeal.
42. Bell confirms that, in the particular circumstances of the original motion, Bell Sympatico – the ISP division of Bell Canada - undertook to identify the seven (7) Bell Sympatico account holders to which each specific IP address identified in the Millen affidavits was assigned on the particular dates and times set out therein. This is not to say, however, that those customers actually engaged in the conduct described in the affidavits, only that they were the account holder to whom the IP address was assigned at that particular moment. If ordered to comply by this Honourable Court,

Bell can provide to the Appellants the last known name and address of those Bell Sympatico account holders.

43. Bell further confirms that Bell Sympatico has already notified the seven (7) Bell Sympatico account holders identified in the Millen Affidavits of the action brought by the Appellants.

44. Bell does not believe that this case involves a simple request for information by way of third party examination for discovery, as permitted by Rule 238(1) of the *Federal Court Rules*. Unless directed otherwise by this Court, Bell submits that one of its Bell Sympatico representatives attending an examination for discovery would still be prohibited from disclosing the information sought unless specifically ordered to provide this information by the Court.

45. If this Court orders that Bell disclose to the Appellants the last known name and address of the seven (7) Bell Sympatico account holders identified in the Millen Affidavits, the Appellants will then have sufficient information in order to serve the Statement of Claim on an identified individual. It is then unnecessary to compel a representative of Bell Sympatico to attend at an examination for discovery.

***The costs of compliance with the Order sought:***

46. The Appellants have undertaken at paragraph 34 of their Memorandum to be responsible for the “reasonable costs of the ISPs in complying with the order sought.”

47. Regardless of the outcome of this Appeal, this Court should order that Bell be reimbursed for its out-of-pocket expenses in responding to the motion and in complying with any resulting Order, and that the Appellants should also be ordered to pay Bell’s legal costs both of this appeal and on the motion below. Given its privacy obligations, Bell was required to appear on the motion in order to ensure that this Honourable Court and the Court below applied the appropriate standard in

determining whether to grant a court order for the disclosure of personal information of Bell Sympatico account holders.

#### **PART IV – ORDER REQUESTED**

48. Should this Honourable Court allow the appeal and make an order for disclosure, Bell submits that the following order should be made:

- i) The Internet Service Provider division of the non-party Respondent [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 Appellant’s Notice of Motion, if available;
- ii) 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.

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

**PART V – LIST OF AUTHORITIES*****Regulations and Statutes***

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 2(1) and 7(3)(c).

*Federal Court Rules*, 1998, SOR/98-106, Rules 81(1), 81(2), 233, 238.

***Cases and Secondary Authorities***

*The Queen v. A.A. Jewellers Ltd.* [1978] 1 F.C. 479 (Fed T.D.) at 480, per Thurlow A.C.J.

*Lumonics Research Limited v. Gordon Gould et al.* [1983] 2 F.C. 360 (Fed. C.A.), per Pratte J.A.

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

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

*Browne v. Dunn* (1894) 6 R. 67 at 70-71 (H.L.), as expressly adopted by the Supreme Court of Canada in *Peters v. Perras et al.* (1909), 42 S.C.R. 244, 12 Alta. L.R. 80.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

August 10, 2004

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James A. Hodgson

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Jeffrey S. Percival