

Federal Court



Cour fédérale

**Date: 20150317**

**Docket: T-2058-12**

**Citation: 2015 FC 339**

**BETWEEN:**

**VOLTAGE PICTURES LLC**

**Plaintiff**

**and**

**JOHN DOE and JANE DOE**

**Defendants**

**and**

**TEKSAVVY SOLUTIONS INC.**

**Responding Party**

**and**

**SAMUELSON-GLUSHKO CANADIAN  
INTERNET POLICY AND PUBLIC  
INTEREST CLINIC**

**Intervener**

**REASONS FOR ORDER**

**ARONOVITCH P.**

I. **Background**

[1] The plaintiff, a film production company called Voltage Pictures LLC (Voltage), commenced the underlying action against unidentified “Doe” defendants alleging that they engaged in illegal file sharing over the Internet and thereby infringed on the plaintiff’s rights in certain cinematic works.

[2] After initially identifying the defendants by their Internet Protocol (IP) addresses, Voltage approached their Internet service provider, TekSavvy Solutions Inc. (TekSavvy), to obtain their names and addresses in order to pursue the litigation. TekSavvy asked Voltage to first obtain a court order but otherwise said it would not oppose the motion.

[3] Accordingly, Voltage brought a motion under Rule 238 of the *Federal Courts Rules*, SOR/98-106 (*Rules*) for an order to compel production of the names and addresses of subscribers associated with roughly 2,000 IP addresses that it had identified. Prothonotary Aalto heard and disposed of the motion by way of Reasons for Order and Order (the Order) dated February 20, 2014: *Voltage Pictures LLC v John Doe and Jane Doe*, 2014 FC 161 (*Voltage*)).

[4] As noted by Prothonotary Aalto, this type of order is also referred to as a “Norwich” order, taking its name from the House of Lords decision *Norwich Pharmacal Co v Customs & Excise Commissioners*, [1974] AC 133 (*Norwich Pharmacal*), which established the right of parties to have discovery of non-parties by means of an “equitable bill of discovery” if necessary

to ascertain the identity of unknown defendants. The Federal Court of Appeal in *BMG Canada Inc v Doe*, 2005 FCA 193 at paras 30 and 32, 252 DLR (4th) 342 (affirming *BMG Canada Inc v Doe*, 2004 FC 488 at paras 10-14, 250 FTR 267 (*BMG*)) found that the legal principles which apply to the equitable bill of discovery apply equally to the test under Rule 238 of the *Rules*.

[5] Having considered the applicable principles and weighed Voltage's right to defend its copyright against the subscribers' rights to privacy and concerns about possible misuse of their information, Prothonotary Aalto concluded that Voltage had met the test under Rule 238 and that the motion should be granted, with certain safeguards.

[6] Prothonotary Aalto ordered TekSavvy to disclose to Voltage, to the extent it was able, the contact information of customer accounts associated with the IP addresses identified by Voltage. The Order included a provision that Voltage pay TekSavvy "All reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by this Order." Any disputes arising in relation to these costs were left to be resolved by the case management judge.

[7] The intended scope of the Order and the reasonable costs incurred by TekSavvy in abiding with the Order now come to be assessed by way of the present motion, the parties to the motion have widely divergent views of what the Order covers.

[8] TekSavvy claims recovery of a total of \$346,480.68 on a full indemnity basis to make it whole for the costs it says it incurred as a result of Voltage's motion. Voltage for its part takes a diametrically opposite view, saying that the effect of the Order is prospective and covers only

those costs incurred following the issuance of the Order. In the alternative, Voltage says that TekSavvy has not proven its costs and is not entitled to any costs. In the further alternative, based on its own calculations, Voltage argues that TekSavvy is entitled no more than \$884.00.

[9] TekSavvy's interpretation of the Order's meaning is too expansive, Voltage's too narrow. Neither position, in my view, is justifiable on the evidence or at law.

## II. **Facts and submissions of the parties**

[10] TekSavvy is a relatively small telecommunications and Internet service provider (ISP), with roughly 280 employees, based in Chatham, Ontario. TekSavvy's principal affiant in support of its claim is Marc Gaudrault, its Chief Executive Officer. He attests to the fact that the costs incurred by TekSavvy were especially significant because at times "effectively everyone in the company was occupied with responding to and addressing the motion brought by Voltage."

[11] Gaudrault's affidavit sets out the timeline of the events giving rise to its claim for various costs. We learn that the first contact was made by way of an inquiry by Barry Logan, of Canipre Inc. (Canipre), on behalf of Voltage. Logan contacted TekSavvy on October 10, 2012, through an online information request in order to discuss serving materials for a court order to deliver subscriber information, and to request information about how TekSavvy would determine the information from a technical view point.

[12] E-mail exchanges ensued between Logan and Christian Tacit, TekSavvy's corporate counsel, as well as Logan and Patrick Misur, TekSavvy's Director of Corporate Systems, who provided the requested technical information.

[13] On November 1, 2012, Voltage sent TekSavvy draft motion materials identifying over 4,500 IP addresses for which it sought subscriber information, and proposing a motion date of November 19, 2012.

[14] By November 14, 2012, TekSavvy had retained Nicholas McHaffie at Stikeman Elliot LLP to advise them in respect of the motion. McHaffie advised John Philpott, counsel for Voltage, of TekSavvy's intention to provide prior notice of Voltage's motion to affected subscribers in order to notify them of the issues at stake and allow them to take any steps they deemed necessary, including seeking legal advice or being represented at the hearing of the motion.

[15] Philpott took the view that notice was not required at law and would delay the proceeding, but offered to continue cooperating, provided that doing so did not delay or prejudice his client, and agreed to postpone the motion until December 10, 2012, to allow for notices to be sent.

[16] Gaudrault explains that, in the two years prior to Voltage's request, TekSavvy had undertaken only 17 correlations of IP addresses to locate contact information for subscribers. The work was performed manually, taking between one and two hours per correlation. The

correlation of thousands of IP addresses with timestamps covering a two month period (and thus 180 daily log files), one-by-one, using TekSavvy's manual system would have thus required an inordinate amount of time. TekSavvy therefore had to plan and implement a new process to at least partially automate the process. The new approach consisted of eight-steps described in Gaudrault's affidavit, and required a number of senior TekSavvy officers and staff members.

[17] The preliminary steps of correlating IP addresses with subscriber information commenced on November 14, 2012. On November 28, 2012, Voltage sent TekSavvy a revised list which consisted of 2,114 IP addresses with notice to TekSavvy that it intended to proceed with its motion on December 17, 2012. TekSavvy undertook the necessary correlation of Voltage's revised list. Once made, TekSavvy ran the correlation a second time, with two lists in order to find discrepancies. On December 4, 2012, six days after receipt of the revised list of IP addresses, this verification yielded a final list of subscriber information for approximately 1,130 subscribers.

[18] On December 10, 2012, TekSavvy sent notice to the affected subscribers and issued a press release regarding Voltage's request and the pending motion.

[19] In order to reduce the overall number of telephone and e-mail inquiries and to efficiently convey information to its subscribers, TekSavvy created an online portal tool. On December 13, 2012, TekSavvy sent an e-mail notice to all of its customers, some 200,000 at that time, informing them of the portal and providing answers to the frequently asked questions concerning the Voltage motion.

[20] Over the next several days, TekSavvy received reports from some recipients of the notice indicating that they had not been TekSavvy customers at the relevant time or that there were other errors in the identification of subscribers. Despite the double-checks it had already conducted, TekSavvy learned that some of the subscriber information was inaccurate. It therefore undertook further confirmation and verification of its information. On December 16, 2012, the eve of the then hearing of the motion, TekSavvy discovered that it had incorrectly notified 42 subscribers and had failed to notify an additional 92 subscribers.

[21] The motion did not proceed as scheduled on December 17, 2012. TekSavvy requested an adjournment in order to correct the identified errors and allow the Canadian Internet Policy and Public Interest Clinic (CIPPIC) to seek leave to intervene. The adjournment was granted by Justice O'Keefe.

[22] Justice Mandamin granted a further adjournment on January 14, 2013, pending disposition of CIPPIC's motion to intervene, which Madam Prothonotary Tabib granted on February 13, 2013. Voltage's motion for third party discovery was ultimately heard on June 25, 2013.

[23] TekSavvy's provides evidence to the effect that Voltage's motion generated considerable interest and concern among TekSavvy's then-current subscribers, potential subscribers, and the general public. This resulted in a massive increase in telephone and online inquiries, comments and complaints to TekSavvy. Gaudrault says that in the days before the December 17, 2012 return date of the motion, at one point TekSavvy was receiving 4,000 to 6,000 calls per day, of

which 90 percent were related to Voltage, had as many as 200 telephone calls in queue for response, and had employees working overtime to field inquiries.

[24] Gaudrault attests to the fact that the attention and interest generated by Voltage's motion was also manifested in a much more negative way. TekSavvy, Voltage, and Canipre were each victims of distributed denial-of-service (DDoS) attacks, in which hackers disable a website or online business by manipulating a huge number of computers to flood a targeted host with communication requests. Given the targets (TekSavvy, Voltage, and Canipre) and the timing of the attacks (which started on December 15, 2012), Gaudrault attributes the DDoS attack to the Voltage motion.

[25] TekSavvy's systems were not able to respond to the attack. It was therefore forced to spend time finding and implementing a solution from a third-party provider, Arbor Networks, in order to "harden" its defences against future DDoS attacks.

[26] Culminating from all of these events, TekSavvy presents its bill of costs and claim for \$178,820.98 in legal costs, \$108,616.68 in administrative costs, and \$60,043.02 in disbursements. TekSavvy insists that these costs were incurred "in acting on Voltage's request for contact information and thus abiding by the Order," and says that but for Voltage's motion, it would not have incurred any of these costs and expenses.

[27] TekSavvy takes the view that its costs must be assessed in the context in which they were incurred. Voltage's request for information relating to more than 2,000 IP addresses in the



context of a civil proceeding was unprecedented for TekSavvy, and indeed in Canada. Responding to the request required TekSavvy to undertake significant technical measures to accurately correlate the large number of IP addresses to customer account information; communicate with individuals registered to these accounts to ensure they had appropriate notice of the request; respond to a massive increase in customer inquiries relating to the Voltage motion; take legal advice, including representation on the motion; and respond to a malicious DDoS attack on its business.

[28] On the recommendation of its investigative firm, Canipre, Voltage made a deliberate tactical decision to name TekSavvy as respondent to its motion due to its small size. TekSavvy argues therefore, that the costs flowing from that decision are appropriately borne by Voltage based on the Order and Voltage's undertaking to reimburse the reasonable expenses incurred by TekSavvy.

[29] TekSavvy had expressly advised Voltage from the start that, given the mass of information sought and TekSavvy's size, it would be a substantial undertaking for TekSavvy and would take significant resources away from the operations of its business. TekSavvy estimated the length of time needed for the correlation as taking between ten and fifteen days. Knowing this, Voltage chose to pursue its motion, and give an undertaking as to costs. TekSavvy urges therefore, that Voltage ought not to be allowed to now resile from its undertaking.

[30] For its part, Voltage describes a claim of more than \$350,000.00 associated with identifying contact information for some 1,100 IP addresses as "grossly inflated" and prohibitive

given that, under the new legislative regime, the maximum fine for copyright infringement is \$5,000.00. Voltage maintains that this “scandalous,” inflated claim is nothing more than a collateral attack on the Prothonotary’s Order meant to frustrate its purpose and implementation.

[31] Voltage points out that in order to comply with the “Notice and Notice” provisions of the *Copyright Modernization Act*, SC 2012, c 20 which came into force in January of 2015, ISPs will have to correlate IP addresses completely free of charge. This statutory requirement, for Voltage, signifies recognition of the fact the correlation of IP addresses by ISPs is considered a cost of doing business, and that the associated costs are negligible.

[32] According to the plaintiff, developing jurisprudence in Europe is also beginning to recognize these principles. Voltage cites the UK decision *Twentieth Century Fox Film Corporation and others v British Telecommunications plc (No 2)*, [2011] EWHC 2174 (Ch) at para. 32 (*Fox*), which affirms that ISPs are commercial enterprises that make a profit from offering services that are used to infringe the rights of copyright holders and that “[a]s such, the costs of implementing the order [to provide client information] can be regarded as a cost of carrying on that business.”

[33] Voltage argues that a large swath of the costs claimed by TekSavvy must be denied as they result from TekSavvy’s “shameless” campaign of marketing and self-promotion through the media and through its communications with its subscribers and the public alike, which TekSavvy engaged in extensively and which, according to Voltage, inured to TekSavvy’s advantage by enhancing its reputation and greatly increasing the ISP’s customer base.

[34] According to Voltage, most ISPs have their customers' contact information readily available to them. It takes "minutes" for them to correlate an IP address to its associated customer information and, for large requests, simple programs can be written in minutes to correlate thousands of IP addresses at the press of a button. The cost of correlating IP addresses is so low that most ISPs don't even charge for the service.

[35] Voltage relies on the opinion of Steven Rogers, an expert in databases and electronic evidence, to the effect that it should reasonably have taken a total of fourteen hours to correlate the subject IP addresses, at a cost of \$884.00, including legal fees. Any significant deviation from this number, says Voltage, is unreasonable, contrary to the fundamental legal principle of fairness, and would have a severe chilling effect on all future, similar litigation.

### III. **The scope and application of the Order**

[36] TekSavvy takes the view that the cost terms of Prothonotary Aalto's Order are intended to have the effect described in *Norwich Pharmacal*, namely, to ensure that the applicant bears the "full costs of the respondent" and any expense incurred by the third party in providing the information ordered to be produced (*Norwich Pharmacal*, at para 100; emphasis added).

[37] Prothonotary Aalto thoroughly reviewed the Canadian, English, and American jurisprudence on this issue, citing the principles of reimbursement and indemnification set out in those cases, including specific reference to the principle to be taken from *BMG* that "any order made will not cause undue delay, inconvenience and expense to the third-party or others" (*Voltage*, at para 45).

[38] TekSavvy maintains that Prothonotary Aalto's expansive language and reference to the three heads of costs indicate that that the Order was not a *de minimis* order.

[39] Rather, TekSavvy says, the Order should be read as intending to give effect to the principle of indemnification that is to be gleaned from the jurisprudence which, according to TekSavvy, is that an "innocent third party" to the litigation, in TekSavvy's circumstances, must be made whole; be fully indemnified for any and all costs incurred in connection with a motion for a Norwich-type order, not limited to the tariff or ordinary scale observed for the parties to the litigation; and be subject only to the reasonableness of those costs.

[40] In effect, TekSavvy proposes that damages are the appropriate measure to assess its costs – that is, for TekSavvy to be placed in the position it would have been in but for Voltage's motion.

[41] I find no support for that view in the jurisprudence or Prothonotary Aalto's Order. More to the point, TekSavvy has produced no cases where, in similar circumstances, costs have been ordered to be paid, or assessed to be paid, on that basis.

[42] Lord Cross of Chelsea, in *Norwich Pharmacal*, distinguishes between the legal costs of the party responding to a motion or applying for third party discovery, and the reimbursement of expenses incurred in complying with the Order as follows: "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" (at para 100; emphasis added).

[43] Justice von Finckenstein reiterates this distinction in *BMG*. In that case, the Court was seized of a motion similar to the one at issue in this case, brought by members of Canada's recording industry seeking disclosure of subscriber information from five Canadian ISPs. At paragraph 13, Justice von Finckenstein refers to the following principle to be gleaned from *Norwich Pharmacal and Glaxo Wellcome PLC v Canada (Minister of National Revenue)*, [1998] 4 FC 439 at para 24, 162 DLR (4th) 433 (CA): "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."

[44] Justice von Finckenstein goes on as follows at para 35:

[35] Clearly the process that is 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.

[Emphasis added]

[45] In that case, the Court ultimately denied the motion but awarded the costs of the motion to the third party ISPs who had opposed it.

[46] The decision of the Court of Queen's Bench of Alberta in *Alberta (Treasury Branches) v Leahy*, 2000 ABQB 575, 270 AR 1 (*Leahy*), on which TekSavvy relies, does not bear out the proposition that the principle of reimbursement of costs endorsed in Norwich cases is akin to the measure of damages.

[47] In *Leahy*, the Court considers an application to set aside a number of ex parte orders which permitted the Alberta Treasury Branch to trace funds and obtain production of documents from third party financial institutions. At paragraph 106, Justice Mason summarizes the factors that the court must reference in considering an application for “Norwich relief”:

[...]

(iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some refer to the associated expenses of complying with the orders, while others speak of damages; [...]

[48] The statement is made by way of a general summary without any reference to specific cases or orders of any court. The *ex parte* Norwich orders at issue in *Leahy* provide only that the plaintiff “would pay the reasonable fees incurred in complying with the order” (at para 159).

[49] While a Norwich order remains a discovery remedy that is out of the ordinary, orders requiring ISPs to provide contact information for their subscribers are not new or uncommon, whether in the context of the posting of defamatory materials (*York University v Bell Canada Enterprises* (2009), 99 OR (3d) 695 (Sup Ct) (*York University*); *Pierce v Canjex Publishing Ltd.*, 2011 BCSC 1503, 27 BCLR (5th) 397 (*Pierce*)), or of alleged infringement of intellectual property rights (*BMG; Voltage Pictures LLC v Jane Doe*, 2011 FC 1024, 395 FTR 315 (*Voltage 2011*)). Indeed, TekSavvy acknowledges that the only uncommon aspect of Voltage’s motion is in the number of IP addresses that are identified.

[50] Of note, in each of the above cases where the application for disclosure of information is granted, the costs payable by the rights holder to the ISP in question are restricted to the costs of complying with the order to produce the contact information sought by the applicant.

[51] In *York University* Justice Strathy found that “the costs of compliance were nominal and had been met” (at para 39). In *Voltage 2011*, a case much like the present, Justice Shore held that there were sufficient grounds to issue an order for discovery of three ISPs. Justice Short allowed Voltage to proceed with an examination for discovery of the ISPs in order to obtain the customer information associated with the IP addresses it had identified, and required Voltage to reimburse the costs of complying with the order. Justice Shore described these costs as follows: “any reasonable expenses incurred by Bell Canada, Cogeco Cable Inc. and Videotron GP in collecting the personal information identified in [the first paragraph of his order].” No costs were awarded on the motion as the ISPs in that case, as in this one, had required a court order but had not opposed the motion.

[52] *Pierce* is to the same effect. Having concluded that the Norwich order was justified, the Court ordered the reimbursement of the third party’s costs of compliance with the order which the Court described as constituting “all reasonable costs incurred” by Canjex, the publisher of a website, “for the retrieval, production and delivery of identifying information [...]” (at para 32).

[53] In my view, Prothonotary Aalto’s order is consistent with the jurisprudence in intent, scope, and application. He states in his reasons that, the “production of such information [if ordered]” should not cause delay, inconvenience, or costs to TekSavvy, and that TekSavvy

would be “reimbursed for its reasonable costs in providing the information” (*Voltage* at paras 135 and 46; emphasis added).

[54] I ascribe no special significance to the fact that Prothonotary Aalto identifies three heads of costs to be reimbursed. The legal costs, the administrative costs, and the disbursements he identifies are not independent costs, they are recoverable only insofar as they are directed to and incurred for the purposes of “abiding by *this* Order” to produce the requested subscriber information. There is no basis in the jurisprudence or in Prothonotary Aalto’s reasons to give any broader scope or meaning to the plain language of his order.

[55] Had Prothonotary Aalto intended TekSavvy to be compensated, in full, for any costs that it would have incurred “but for the motion” or “in connection with the motion,” I am confident he would have so ordered.

[56] I will proceed on the basis that the costs which Voltage is required to reimburse are limited to those incurred in abiding with the Order, that is, to locate and produce the required contact information of the subscribers identified by their IP addresses. It remains to be determined, on the evidence, what those costs are and whether they are reasonable, by which I mean “reasonably necessary” to give effect to the Order (*Fontaine v Canada (Attorney General)*, 2012 ONSC 3552 at para 7).



IV. **TekSavvy's notices to affected clients**

[57] TekSavvy claims the costs associated with its notice to affected subscribers as its costs of implementing the Order.

[58] As noted above, there was an exchange between counsel regarding the necessity for TekSavvy to give notice to its affected clients. Despite thinking notice was not required, Voltage agreed to an extension of time to allow TekSavvy to give notice to its affected subscribers, on the condition that it be undertaken without prejudice to his client. At Voltage's request, the notice included a request that affected clients not destroy any evidence of their online activities pending the disposition of the motion.

[59] The notices were sent out on December 10, 2012. They inform the named recipient of the motion and of the fact that one of the IP addresses at issue is associated with the recipient's account. The notice includes copies of the motion materials as well as assurances that customer information will not be disclosed without a court order.

[60] The notice refers recipients to a TekSavvy website where they can become familiar with their rights and obligations under copyright law, and suggests that the recipient might wish to seek independent advice. The notice also includes the date at which the motion, at that time, was scheduled to be heard as well as contact information for TekSavvy's marketing department.

[61] TekSavvy maintains that its approach to notice was entirely appropriate as the *Rules*, generally, and Rule 238 in particular, are premised on a system of providing notice to parties and those whose rights are potentially affected. Notice allows those whose interests are before the Court to be aware of what is occurring, seek legal advice as appropriate, and respond or appear to the motion if they so choose.

[62] TekSavvy points to Justice Strathy's statement in *York University* that: "It may be, that in an appropriate case, the Internet service provider should be required to give notice to its customer for the purpose of enabling the customer to make submissions as to whether the order should be granted." The Court went on to note that: "this was suggested in *Dendrite International Inc. v Doe* above, and was done by Google, apparently on its own initiative, in the *Cohen v Google Inc.* case" (at para 38).

[63] That said, Justice Strathy also noted that notice did not appear to have been given as a matter of course in other cases involving Norwich orders, and concluded that it wasn't necessary to do so in that case (*York University* at para 24).

[64] While the Court has the discretion to order a party to give notice, the *Rules* do not require TekSavvy to have provided notice of the motion to its affected clients. TekSavvy acted voluntarily and on its own initiative. Whether it acted out of altruism or self-interest is irrelevant.

[65] I do not accept the argument that the notice served to verify the correlation as it led to a more accurate identification of affected customers, and that the resulting costs should therefore

be subsumed in the costs of abiding with the Order. This appears to be an explanation after the fact. Notice was not given to ensure the accuracy of the correlation. There is nothing in the notices or in the exchanges of counsel to suggest that the purpose of the notice was anything other than to inform subscribers of the motion and to provide them with an opportunity to seek legal advice, or to appear at the motion.

[66] That said, the costs incurred from rechecking and correcting information following the notice would be recoverable, if identified and proven.

V. **The legal costs of implementing the Order**

[67] TekSavvy's legal costs include those of its outside counsel, Stikeman Elliot (\$123,580.98), and its corporate counsel, Tacit (\$54,240.00), for a total of \$178,820.98.

[68] The bill of costs for Stikeman Elliot's services is appropriately particularized and fully supported by itemized invoices and ledgers for advice provided to TekSavvy by two senior lawyers.

[69] The lion's share of Stikeman Elliot's costs relate to advice, preparation, and attendance at the motion before Prothonotary Aalto, as well as preparation and attendance at the various interlocutory motions, or in respect of preliminaries to those motions.

[70] Voltage points out that, ordinarily, a party to a motion who takes no position is not entitled to any costs, let alone to the costs claimed by TekSavvy on a full indemnity basis for two

senior counsel on a routine discovery motion. Indeed, the cost orders in *BMG* as well as in *Voltage 2011* attest to that proposition. In the first case, costs were awarded to the ISPs who had opposed and argued the motion; in the second, no costs were awarded to the ISPs in question as they had not opposed the motion.

[71] In my view, the more important barrier to the recovery of those costs rests on the fact that TekSavvy has conflated the legal costs of the motion with the legal costs of abiding by the Order, and now seeks to recover the former as the legal costs of complying with the Order.

[72] While TekSavvy did not oppose the motion for a Rule 238 order and did not file a written record, TekSavvy's counsel did attend the motion to make oral representations. As such, TekSavvy, a party to the motion, was entitled to ask for its costs, leaving it to Prothonotary Aalto to assess the appropriate level or amount. It appears, however, that the costs of the motion were not addressed as the Order is silent as to costs.

[73] Whatever the reason, the parties' failure to address the costs of the motion is an oversight that cannot now be remedied by subsuming them within the legal costs of abiding by the Order. This applies equally to the legal costs claimed on account of TekSavvy's attendances at the motion to intervene and the various motions to adjourn. In that connection, counsel for TekSavvy conceded at the hearing of this motion that the costs of appearing before Justice Mandamin for a further adjournment could not be claimed as Justice Mandamin explicitly determined that no costs should be awarded in respect of the adjournment.

[74] In any case, were the costs of the motion recoverable, it would not be on a solicitor client basis, as claimed by TekSavvy. There is no support for TekSavvy's contentions that cost orders in Norwich cases are not subject to the ordinary tariff or that costs of a motion for discovery of a third party are awarded on the basis of full indemnity. To the contrary, the costs awarded to ISPs who had opposed the motion for discovery in *BMG* were based on the tariff.

[75] The unique feature of this motion was in the number of IP addresses at issue and the apparent interest it generated. Complex motions are routinely brought under the *Rules* and costs awarded subject to the discretion of the judge, pursuant to Rule 400 and following, based on the tariff subject only to the submissions of parties that may justify costs on an elevated scale, or at full indemnity.

[76] I note that TekSavvy has not submitted a bill of costs based on the tariff. Thus, if these costs were recoverable and the Court wished to order costs on the ordinary scale, it would not be able to assess them on this evidence.

[77] Finally, I need not comment on the entries to Stikeman Elliot's bill that are on account of "Reviewing draft and revised press releases," "Reviewing and revising draft blog posts," and "Review talking points; interviews; conference call re media lines," to name a few. These and other similar items are irrelevant to the implementation of the Order and not recoverable.

[78] I also need not comment on the evidence of Philpott taking issue with the manner in which TekSavvy or its counsel allegedly drove up these costs as I have had no reference to the evidence.

[79] Having reviewed the bill of legal costs, I am satisfied that the following legal costs alone fall within the scope of the Order: the costs of McHaffie's communication with counsel for Voltage concerning time zones or timestamp information necessary to carry out the correlation and those of reviewing and providing advice on Prothonotary Aalto's Order. I fix these at \$4,500.00.

[80] As for Tacit's costs, they are not recoverable as they do not fall within the ambit of the Order, or because his services that may relate to the implementation of the Order cannot be identified or quantified on the evidence.

[81] Gaudrault says that Tacit's retainer by TekSavvy "in the relevant period" was monthly rather than hourly. Tacit did not himself provide a bill of costs or time sheets in relation to his services. Rather, Gaudrault attaches "estimates" of Tacit's monthly costs for advice with respect to Voltage's motion, including representing TekSavvy in the litigation as co-counsel, and giving advice related to customer communication, IT issues, call centre issues, and privacy matters. Neither specific tasks, nor the time at which they were performed or the length of time it would have taken to complete them, are identified.

[82] Most of the items identified are unrelated to the implementation of the Order. Tacit's advice or involvement related to the performance of the look-up or correlation exercise required to locate accurate contact information for TekSavvy subscribers cannot be identified or determined on the evidence. I do not comment on whether any cost items might be excluded due to overlap with items also claimed by Stikeman Elliott.

VI. **The administrative costs of implementing the Order**

[83] The administrative costs are divided into two categories: the "technical" and the "operational" administrative costs.

[84] The "operational" administrative costs are the costs of dealing with the increased volume of phone and e-mail inquiries, as well as communications with subscribers and the public. These costs are addressed separately below.

[85] The "technical" administrative costs include the measures taken by TekSavvy to effect the correlation of IP addresses with client accounts, and the work involved in the eight-step process described by Gaudrault. Net of the costs associated with the notice that was sent to affected clients that TekSavvy has claimed under this heading, and subject to my findings below regarding the inclusion of the system's upgrade, these costs fall squarely within the ambit of the Order and, if proven, are fully recoverable.

[86] Gaudrault's evidence is that the initial analysis of Voltage's request, the planning and design of the new system to partially automate and simultaneously process multiple IP addresses,

required the participation of senior staff, including TekSavvy's Chief Information Officer, Pascal Tellier. The various technical steps were carried out by a team reporting to Tellier, led by Misur. The team included Rick Glassford, Systems Administrator; Chris Sologak, Systems Support Technician; and Pascal Gagnon, Desktop Support.

[87] As described by Gaudrault and elaborated on by Gaudrault and Tellier on cross-examination, the correlation process involved locating, transferring, and decompressing the relevant RADIUS logs based on the timestamps provided by Voltage. TekSavvy stores IP assignment information in these compressed files, which are created daily and stored on a number of different servers. According to TekSavvy, this work required only a few hours and was undertaken on the basis of the longer list of 4,500 IP addresses.

[88] Next, because each RADIUS log contains millions of lines of data, TekSavvy needed to design and run a Structured Query Language (SQL) server to comb through the information and locate the usernames associated with the exact IP address/timestamp combinations requested by Voltage. Setting up the server, loading the RADIUS logs, and searching through the data required numerous hours and the participation of many individuals, partially due to problems with Voltage's timestamps and the need, at different points, to manually verify results and eliminate redundancies.

[89] Finally, having found the usernames associated with the IP addresses provided by Voltage, TekSavvy needed to clone, load, and search through their subscriber database in order to match the usernames to the relevant customer account information. This process – dubbed the



correlation or look-up – also took many hours and required the participation of Tellier, with several stages performed manually. The actual search process was carried out with the shorter list of 2,114 IP addresses, which Voltage had since provided.

[90] TekSavvy ran these correlation searches – that is, of the RADIUS log search and the subscriber database – a second time in order to verify any discrepancies. The resulting list yielded subscriber information for approximately 1,130 individuals. According to TekSavvy, this last step, like the first look-up, took many hours and involved multiple employees.

[91] Accordingly, TekSavvy bills a total of \$22,570.00 for 424 hours of work, billed at an “approximate” hourly rate of \$125.00 for Tellier and \$47.50 for the other team members. The tasks which correspond roughly to the eight steps described by Gaudrault and corresponding hours worked by Tellier and the four-member team are summarized in a single appendix attached to the affidavits of both Gaudrault and Tellier.

[92] Gaudrault says he asked team members to keep track of and record their time dedicated to the process. The tracking was reported to Tellier, who recorded and compiled the information. Based on his knowledge of the time TekSavvy employees spent on the project, Gaudrault believes that the hours claimed are reasonable and indeed conservative compared to the actual time spent.

[93] Tellier attests to the fact that he was directly involved in and supervised the process of identifying TekSavvy subscriber accounts associated with the IP addresses. He reviewed the

affidavit of Gaudrault and believes that the summary of the work performed summarized in the appendix fairly describes the process that TekSavvy undertook.

[94] Based on Tellier's involvement and knowledge of the project, as well as the information reported to him, Tellier believes that the hours set out in the appendix are "a fair representation" of the time worked by himself and the four team members.

[95] Voltage objects to the admissibility of Gaudrault and Tellier's evidence as constituting hearsay, and urges the Court to dismiss the evidence on that basis. Voltage asks the Court to instead rely on the evidence of its two main affiants, Rogers and Logan, and Rogers' in particular, in assessing what should be the reasonable costs of identifying and retrieving the required account information.

[96] Voltage also takes issue with the inclusion of certain steps as coming within the Order, in particular, TekSavvy's costs of setting up its new system (planning, software creation, and the building of servers), which Voltage argues are not part of the search and correlation which alone may be considered as the costs of implementing the Order. Voltage points to *Fox* as authority for the proposition that time spent by ISPs in setting up systems to undertake IP address correlations should be absorbed by ISPs as part of their cost of doing business. If an ISP is going to be in the business, Voltage says, it should have the systems in place necessary to identify subscriber information and to process IP addresses in whatever numbers.

[97] On the first ground regarding hearsay, Voltage makes several points. First, Gaudrault and Tellier did not themselves do the work of correlating the IP addresses. As revealed on cross-examination, it was Misur, not the affiants, who created the appendix setting out the hours of work. Gaudrault's and Tellier's evidence is therefore inadmissible hearsay. Additionally, the times noted in the appendix as well as the hourly rates are merely estimates as TekSavvy employees did not keep time sheets or time logs of the work that was done. Finally, the individuals who carried out the work did not produce their own evidence even though they had direct personal knowledge of the facts.

[98] Given the above, Voltage urges the Court to draw an adverse inference and either strike out or give little weight to Gaudrault's and Tellier's evidence on point.

[99] Voltage invites the Court to instead accept Rogers and Logan's evidence regarding reasonable costs of the required correlation. Rogers is the founder and principal of Digital Evidence International, Inc., a firm that provides Internet investigation services and computer forensic analysis. He is a former member of the RCMP with extensive experience in conducting and managing Internet investigations.

[100] While he speaks to other matters as well, the bulk of Rogers' evidence consists of his review of the eight step process described in Gaudrault's affidavit that TekSavvy undertook to fulfill Voltage's request. Rogers provides commentary on the work he believes each step requires, an estimate of the employee time involved at each stage, and the level and number of employee(s) needed for the job. In certain instances, Rogers suggests alternative processes

available to TekSavvy, disagrees with the necessity for a step (such as analysis at the initial stage), or highlights possible mischaracterizations and redundancies. He notes the more common use of automated systems at various stages, such as during the transfer, decompression, and loading of the RADIUS logs, which requires only machine time rather than human involvement. By his final tally, Rogers estimates that the total human time required to complete Voltage's request would be fourteen hours, as opposed to the fifteen business days claimed by TekSavvy. He says that almost all of the steps could have been completed by a junior system administrator or programmer.

[101] Logan is the owner and principal of Canipre, the company retained by Voltage to track illegal Internet downloads of its cinematic works. His evidence covers a range of topics, many of which are irrelevant to the assessment of the quantum of the costs of abiding with the Order (about which I say more below). As to TekSavvy's claim for the costs under discussion, Logan first provides evidence about the frequency of government requests for subscriber information, as well as the speed and low cost with which these requests are typically fulfilled.

[102] Logan's principal evidence, intended to show that TekSavvy's costs of correlation are unreasonable, is based on his conversations with employees of the six named ISPs, including TekSavvy, whom he contacted regarding their practices and costs of identifying subscriber information. Through these conversations, Logan learns that ISPs generally keep an archive of IP address assignments and, once a request is made, will input the provided IP address(es) and timestamp(s), which will reveal the associated customer(s). Typically, this operation is quick and inexpensive, taking only minutes, with no processing costs other than employee time. Where the

number of IP addresses needing to be correlated increases, so too will employee time and costs. However, Logan states that, overall, each request will nevertheless typically only take a minute and cost between \$1 and \$3.

[103] Based on his survey information, including the annual salaries of technicians typically tasked with responding to court ordered IP correlations, he estimates that the whole job should have cost between \$538.44 and \$692.32.

[104] On Voltage's first ground of objection, that is that Gaudrault's and Tellier's evidence constitutes hearsay and is inadmissible, I would characterize TekSavvy's evidence as a mix of hearsay and direct evidence based on knowledge.

[105] Gaudrault's description of the steps of the new system was adopted by Tellier who was involved in the design and supervision of the process. Tellier can speak directly to his own involvement, as well as the hours and costs attributed to him as senior staff. While the steps in the correlation process were carried out by Misur and his team, Tellier was their direct supervisor and as such, in my view, can reliably attest to the accuracy of the hours set out in the appendix to his affidavit.

[106] The hourly rates that are charged for the various team members are admittedly "approximations" of the hourly costs of each based on their annual salaries. There is no explanation as to exactly how the hourly rate is calculated. However, TekSavvy's evidence on this point was not shaken on cross-examination, and the annual salaries of the team members

given on cross examination were substantially more than the salaries on which Rogers and Logan base their calculations.

[107] TekSavvy argues that requiring affidavits for each member of the team would be disproportionate. Indeed, under Rule 81(1) of the *Rules*, affidavits that are normally required to be confined to facts within the knowledge of the deponent, in the case of motions, may be sworn instead on information and belief, subject, as Voltage rightly points out, to the Court drawing an adverse inference from a party's failure to adduce evidence based on personal knowledge.

[108] However onerous, TekSavvy would have been better advised to provide its best evidence on this critical point. That said, I am satisfied in this instance that there is sufficient direct evidence, as well as reliable evidence based on information and belief, as to the work performed and the hours required to carry out the work to preclude either dismissing or giving little weight to the evidence of Gaudrault and Tellier.

[109] In addition, I find no reason to prefer the evidence of Rogers and Logan as to the reasonableness of the steps undertaken by TekSavvy, the time taken to execute them, or the resources employed for that purpose.

[110] Rogers' evidence is based on his experience and what he refers to as "normal business practice." He did not conduct a similar correlation himself, nor did he start from assumptions that reflected TekSavvy's reality or any knowledge of its infrastructure, policies, or systems. Rogers conceded on cross-examination that his opinion was based on incorrect assumptions, for

example, an assumption that TekSavvy's process for responding to Voltage's request was the same as that used for earlier requests from law enforcement. He also admitted that one of the examples he provided to the Court as to what TekSavvy could have done instead (using IAS Log Viewer) was not only something he was unfamiliar with but something he himself would not have done. He would have used an SQL server, as TekSavvy did.

[111] Accordingly, I did not find Rogers' evidence as to how a hypothetical look-up process might be set up and the time required to execute its functions informative of whether TekSavvy acted reasonably in its response to Voltage's request or helpful in assessing the reasonableness of the time taken by TekSavvy to perform certain functions using its home system.

[112] For the same reason, I have given no weight to Logan's second-hand evidence regarding the costs that other ISPs incur when conducting correlations. Logan's evidence does not establish what systems most ISPs have in place to effect correlations, let alone their degree of efficiency in carrying out that function. Even if the evidence on point were clear or reliable, it would not be relevant in the circumstances. Similarly, the fact that correlations are carried out at no cost under statutory regimes, or that system upgrades to allow for the correlation of large numbers of IP addresses are considered a cost of doing business in other jurisdictions, is neither persuasive nor relevant in the circumstances.

[113] It is TekSavvy's costs that are ordered to be paid. TekSavvy's evidence is uncontradicted. As a smaller ISP with a history of correlating IP addresses to account information

manually, one at a time, it was not set up for large-scale requests and its systems required significant adaptation to deal with a list of over 2,000 IP addresses.

[114] The Order does not distinguish between the correlation and the systems necessary to carry it out. The adaptations to TekSavvy's look-up process were necessary to effect the required correlation and, in my view, its costs are thereby encompassed by the Order. Put another way, in this respect Voltage has to take TekSavvy as it finds it.

[115] While TekSavvy may have derived a benefit from the situation, TekSavvy will not be able to claim the costs of its upgraded correlation process again in the context of future requests. What's more, if such costs are to be excluded, it is up to the parties to see that the cost order reflects their intentions.

[116] I have two final points. First, Voltage initially produced more than 4,000 IP addresses for correlation and, despite having later reduced this number, in my view, bears responsibility for any portion of the work undertaken by TekSavvy on that basis. Voltage cannot now seek to exclude those costs.

[117] In the same vein, and my second point, Voltage cannot argue that the correlation work that TekSavvy carried out prior to the issuance of the Order was done to enable TekSavvy to give notice, that it was therefore carried out at TekSavvy's own risk, and that it should not be compensated. The Order is not limited in time and, in any case, must be taken to include



recovery of the costs of the correlation that had already been done, given that Prothonotary Aalto was aware that such work had been carried out when he issued the Order.

[118] In sum, having reviewed TekSavvy's claim for technical administrative costs, I find that it has proven costs in the amount of \$17,057.50. In arriving at this sum I have excluded costs of "Preparation of information for court" and one half of the costs of "Second check/QA verification" as these were not identified and supported by evidence. Moreover, at the hearing of the motion, TekSavvy failed to explain what was meant by "QA verification."

A. *The "operational" administrative costs of implementing the Order*

[119] Under this heading, TekSavvy seeks to recover the sum of \$81,524.12 for expenses incurred in communicating with affected and non-affected subscribers and the public; creating an online portal tool for the use of subscribers; and responding to a higher volume of inquiries and complaints. The claim, including overtime, is on account of the work performed by supervisors and staff in the e-services department, at the call centre, and in the marketing department.

[120] These tasks, which Gaudrault refers to as "work relating to TekSavvy's reputational impact," are, in effect, TekSavvy's costs of marketing, promotion, and customer relations, which I consider to be TekSavvy's costs of doing business. Consequently, I disallow these costs. I do not consider them recoverable as they are unrelated to the identification and production of the required customer information, and fall outside the ambit of the Order.

VII. **Disbursements**

[121] The bill of costs prepared by TekSavvy sets out the disbursements of Stikeman Elliot in the amount of \$4,585.42. This amount relates to attendance at the motion and various interlocutory proceedings. Given that the costs of the various motions are not recoverable, the disbursements are not as well. The amount is therefore disallowed.

[122] Similarly, I would disallow the sum of \$55,457.60, a “disbursement” paid by TekSavvy to Arbor Networks to implement “system upgrades and hardening.” TekSavvy undertook these upgrades to respond to a greatly increased volume of inquiries and to sustain DDoS attacks. These costs of maintaining and strengthening its systems are TekSavvy’s costs of doing business and are not contemplated in the costs of abiding by the Order.

VIII. **Conclusion**

[123] In sum, I am satisfied that TekSavvy has proven a total of \$21,557.50 as its legal costs, administrative costs, and disbursements of abiding with the Order.

[124] Both parties point to the importance of this finding as a precedent. In my view, the precedential value of this particular assessment of the costs of complying with an order to provide contact information is quite limited as my findings are confined to the facts of this case. Orders directing recovery of an ISP’s costs of complying are commonplace. Cases assessing and

fixing the costs of compliance are not, most likely because those costs are usually not controversial as between rights holders and ISPs.

[125] This case suggests the steps that can be taken to avoid such controversy. The best practice, in my view, would be for the rights holder to ascertain, in advance, with clarity and precision, the method of correlation used by the ISP, as well as the time and costs attendant on the execution of the work based, to begin, on a hypothetical number of IP addresses. The parties should agree and preferably formalize their agreement prior to the rights holder preparing and serving its motion to secure an order of the Court. It goes without saying that a court order is required in every case as a condition precedent to the release of subscriber information.

[126] In the case of a smaller ISP, the rights holder cannot approach the issue with any preconceived notion based on its experience with larger or other ISPs. I open a parenthesis here to say that there is a chain of e-mails, as described by Logan on cross-examination, showing preparatory discussions and exchanges of technical information of the sort I am suggesting. Regrettably, however, no agreement was concluded as to process or costs.

IX. **Other matters and costs of the assessment**

[127] As is apparent from their submissions, both parties are intent on disparaging each other's business practices. Voltage, through Logan, led lengthy evidence on all manner of extraneous matters such as the prevalence of Internet piracy in Canada affecting the ability of rights holders, in particular the film industry, to profit from their products; the technology of file sharing and data transfers through the BitTorrent Protocol used by TekSavvy to create an environment that

facilitates illegal downloading; and TekSavvy's attempts to seize the opportunity of the motion to promote itself and its services through the media, blogs, and chat rooms.

[128] By the same token, Voltage is made out to have purposely targeted TekSavvy because of its size, and had to unfairly bear the burden of Voltage's onerous request and its intrusions on the privacy of TekSavvy's subscribers.

[129] I have given no weight or consideration to the extraneous evidence or submissions of the parties as they are irrelevant to the question at hand, being the assessment of costs. I have, however, considered these matters as going to the costs of the assessment. It may be said that success is divided and that costs should therefore not be awarded. Rather, no costs of the assessment will be awarded because neither party should be rewarded for its conduct: TekSavvy, without justification, has greatly exaggerated its claim, while Voltage has unreasonably sought to trivialize it based on unreliable and largely irrelevant evidence.

[130] An order will go accordingly.

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"Roza Aronovitch"  
Prothonotary

Ottawa, Ontario  
March 17, 2015

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-2058-12

**STYLE OF CAUSE:** VOLTAGE PICTURES LLC v JOHN DOE AND JANE  
DOE and TEKSAVVY SOLUTIONS INC. and  
SAMUELSON-GLUSHKO CANADIAN INTERNET  
POLICY AND PUBLIC INTEREST CLINIC

**PLACE OF HEARING:** OTTAWA, ONTARIO AND BY VIDEOCONFERENCE  
IN TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 8, 2014

**REASONS FOR ORDER:** ARONOVITCH P.

**DATED:** MARCH 17, 2015

**APPEARANCES:**

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