Court File No. T-2058-12

FEDERAL COURT

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

RESPONDING WRITTEN REPRESENTATIONS OF TEKSAVVY SOLUTIONS INC.
(*Re: Voltage Appeal of Costs Order*)

October 2, 2015

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PART I - OVERVIEW

1. In her Costs Order of March 17, 2015,[1] Prothonotary Aronovitch assessed the "reasonable legal costs, administrative costs and disbursements" incurred by TekSavvy Solutions Inc. (TekSavvy) in abiding by Prothonotary Aalto's 2014 *Norwich* Order, and ordered that there be no costs of that assessment. Voltage Pictures LLC (Voltage) appeals Prothonotary Aronovitch's disposition on costs, arguing that it ought to have been awarded costs of the assessment. In addition, although it did not file an appeal on this issue, Voltage now argues that the Court should reduce the amount that Prothonotary Aronovitch assessed as TekSavvy's reasonable costs.

2. Voltage's appeal of the costs disposition ought to be dismissed. As set out in TekSavvy's written representations on its own appeal, the Rule 400 factors, which both parties agree should be considered, favour an award of costs to TekSavvy and not to Voltage. Putting aside Voltage's inflammatory language and repeated efforts to disparage TekSavvy (which are without any evidentiary basis, and which Prothonotary Aronovitch found were irrelevant), the fact remains that the costs of the assessment process were primarily driven up by Voltage having "led lengthy evidence of all manner of extraneous matters",[2] and that TekSavvy was successful in having its reasonable costs of the 2014 *Norwich* Order assessed, albeit not at the level requested.[3]

3. Voltage's attempt to reduce Prothonotary Aronovitch's assessment of TekSavvy's reasonable costs should also be rejected, both because it is not properly before the Court, and because Voltage proffers no reasonable factual or legal grounds to reduce the assessment. There is no evidentiary support for Voltage's assertions that TekSavvy could profit by being compensated for its costs, or that Voltage would be precluded from pursuing its thousands of claims. Similarly, neither Voltage's reference to having "rifled through" the costs claimed by TekSavvy, nor its unsubstantiated contention that "it is likely that some of [TekSavvy's] actual costs are inflated" forms any basis for reducing the assessment of Prothonotary Aronovitch.

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[1] Order and Reasons for Order of Prothonotary Aronovitch, March 17, 2015 ("Costs Order" and "Costs Reasons"); TekSavvy Motion Record (*Re: Appeal of Costs Order*) ("TekSavvy Record"), Vol. III, Tab C.

[2] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at paras. 127-129.

[3] As seen in TekSavvy's own appeal of the Costs Order (TekSavvy Record).

PART II - FACTS AND BACKGROUND

4. TekSavvy has set out the relevant facts in its Written Representations (*Re: Appeal of Costs Order*)[4] and will not repeat them here. However, Voltage's Memorandum of Fact and Law[5] contains a number of factual errors and misstatements. TekSavvy will briefly address the most significant factual inaccuracies in Voltage's memorandum.

5. Voltage claims that TekSavvy has "refused to provide Voltage with the name of even one of its offending customers."[6] Leaving aside that there has not been any determination that any of TekSavvy's customers have engaged in infringement, Voltage has to date not paid TekSavvy its reasonable costs, even as assessed by Prothonotary Aronovitch. As this was a requirement of both the 2014 *Norwich* Order[7] and the Costs Order,[8] there is no basis for TekSavvy to disclose confidential customer information to Voltage, and no improper refusal to do so by TekSavvy.

6. Voltage next asserts that TekSavvy's claim for reasonable legal costs, administrative costs and disbursements was an attempt by TekSavvy to shield its customers by making it cost-prohibitive for Voltage to proceed.[9] This statement contains two separate unsupported assertions. First, there is no evidence whatsoever to support an insinuation that TekSavvy's claim is anything other than a request to recover the costs it demonstrably incurred in responding to Voltage's request for customer information. Voltage did not even put the suggestion of such an "ulterior motive" to TekSavvy on cross-examination during the Costs Motion. Second, despite repeating its "cost-prohibitive" assertion in a number of places,[10] Voltage has filed no evidence that it could not afford to pay the costs claimed or that such costs would

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[4] Written Representations of TekSavvy Solutions Inc. (*Re: Appeal of Costs Order*), dated July 17, 2015 ("TekSavvy's Written Representations"); TekSavvy Record, Vol. III, Tab D, at paras. 7 to 24.

[5] Voltage's Memorandum of Fact and Law ("Voltage Memorandum"); Voltage's Responding Motion Record (*Re: Appeal of Cost Order*) ("Voltage Record"), Vol. II, Tab 5.

[6] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 2.

[7] 2014 *Norwich* Order; TekSavvy Record, Vol. II, Tab B(16), at paras. 2 to 4.

[8] Costs Order; TekSavvy Record, Vol. III, Tab C, at para. 2.

[9] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 3.

[10] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at paras. 41, 48, 70.

prevent it from proceeding. To the contrary, Voltage represented to the Court that it "fully intends to pursue claims against" the over 2,000 TekSavvy customers whose personal information it sought.[11] TekSavvy's claimed costs amount to only $164 per IP address, a modest amount compared to cost of the litigation that Voltage has maintained it intends to pursue.

7. Voltage states that it "identified 2,114 IP addresses engaged in illegal copying and distribution of its copyrighted works. All of the IP addresses were assigned to TekSavvy."[12] To the extent that this is intended to imply that Voltage conducted a broad search and that all of the IP addresses it identified happened coincidentally to belong to TekSavvy, this is not the case. In fact, Voltage itself made the decision to choose only addresses assigned to TekSavvy to be the subject of its *Norwich* motion.[13]

8. Voltage selectively references the "positive response" that TekSavvy received for the steps it took in response to Voltage's request,[14] as Voltage's witness Mr. Logan did in the affidavit evidence he filed,[15] insinuating a reputational boon to TekSavvy arising from Voltage's motion. However, Mr. Logan admitted on cross-examination that "some of the voices were positive, some of the voices were negative" and that the negative voices included those who instigated the DDoS attack against TekSavvy.[16]

9. Voltage goes on to state that TekSavvy was "overwhelmed by its customers' response" to a notice TekSavvy provided regarding the *Norwich* Motion, claiming that the notice caused the response.[17] Voltage has again misstated the evidence. TekSavvy initially provided notice only to those customers directly affected by the *Norwich* Motion (because their IP addresses were identified). However, because of the "high volume of inquiries" resulting from the notice as well as broad public awareness of

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[11] 2014 *Norwich* Reasons; TekSavvy Record, Vol. II, Tab B(16) at para. 19.

[12] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 8.

[13] Transcript from the Cross-Examination of Barry Logan, held October 9, 2014 ("Logan Transcript"); TekSavvy Record, Vol. II, Tab B(11), at pp. 43, 46-48, QQ. 146, 160-165.

[14] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 11(b), .

[15] Affidavit of Barry Logan, sworn July 30, 2014 ("Logan Affidavit"); TekSavvy Record, Vol. I, Tab 8, at paras. 44-46.

[16] Logan Transcript; TekSavvy Record, Vol. II, Tab B(11), at pp. 151-153, QQ. 583-591.

[17] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at paras. 11(b) and 56.

Voltage's motion, TekSavvy contacted the rest of its subscribers, in order to ensure the situation did not "spiral out of control."[18] Thus, TekSavvy's notice was a response to voluminous customer communications, not the cause of them. Mr. Gaudrault advised Voltage of this in no uncertain terms when the suggestion was put to him on cross-examination, saying "It's the opposite".[19] Yet Voltage continues to maintain its claim, contrary to the evidence.

10. Voltage also asserts that TekSavvy seeks to be reimbursed for costs associated with TekSavvy's CEO, Marc Gaudrault, attending court appearances.[20] This is simply untrue. As is clear from TekSavvy's Bill of Reasonable Legal Costs, Administrative Costs and Disbursements, and from Mr. Gaudrault's affidavit, while TekSavvy certainly incurred costs associated with Mr. Gaudrault's extensive time spent responding to Voltage's motion and request, no claim whatsoever was made for any of Mr. Gaudrault's time.[21]

11. Voltage again misstates the evidence when it claims that "TekSavvy admitted that as a result of the media exposure, it was able to **increase** its customer base from 200,000 to 300,000 customers, a very lucrative increase of 30% [*sic*]."[22] There is simply no evidence to support Voltage's claim that TekSavvy's customer growth was attributable to Voltage's motion. TekSavvy certainly made no such admission, as is apparent from the very evidence Voltage references, namely Mr. Gaudrault's affidavit. In fact, Mr. Gaudrault stated that the increase in customer base continued a general trend of a number of years' growth.[23] Nowhere did he suggest or admit that Voltage's

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[18] Affidavit of Marc Gaudrault, sworn June 27, 2014 ("Gaudrault Affidavit"); TekSavvy Record, Vol. I, Tab B(2), at para. 30; Transcript from the Cross-Examination of Marc Gaudrault, held October 8, 2014 ("Gaudrault Transcript"); TekSavvy Record, Vol. I, Tab B(5), at p. 59, Q. 214.

[19] Gaudrault Transcript; TekSavvy Record, Vol. I, Tab B(5), at p. 61, QQ. 222-223. See also on this point: Gaudrault Affidavit; TekSavvy Record, Vol. I, Tab B(2), at paras. 30, 31, 35, 36, 49, 56 and 59; Transcript of the Cross-examination of Pierre Aubé, held October 8, 2014; TekSavvy Record, Vol. II, Tab B(7), at p. 7, QQ. 22 and 23.

[20] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 11(c).

[21] Bill of Reasonable Legal Costs, Administrative Costs and Disbursements; TekSavvy Record, Vol. 1, Tab B(1), at pp. 1, 6; Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2) at paras. 36, 51, 54, 59.

[22] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 11(c). [emphasis in original]

[23] Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2) at para. 5 and fn. 1 (Voltage incorrectly cited to para. 4 of the Gaudrault Affidavit).

motion was responsible for *any* of the increase in TekSavvy's customer base, let alone all of it. Indeed, Voltage did not even put the proposition to Mr. Gaudrault on cross-examination.

12. To the contrary, the evidence was that "at times…effectively everyone in [TekSavvy] was occupied with responding to and addressing the motion brought by Voltage,"[24] and that had TekSavvy not responded to customer concerns, "TekSavvy would have stood to lose a significant number of customers."[25] While it is impossible to know what TekSavvy's growth might have been had it not been forced to divert valuable sales personnel and management time to respond to customer complaints and concerns, there is no foundation for the suggestion that Voltage somehow did TekSavvy a business favour by naming TekSavvy as a respondent to its motion.

13. Voltage states that TekSavvy "did not…offer any meaningful contribution" to the *Norwich* Motion.[26] This opinion conflicts with that of Prothonotary Aalto, who found TekSavvy's submissions at the hearing of the *Norwich* Motion to be "helpful".[27]

14. Voltage's assertion that TekSavvy did not request its costs of the Rule 238 Motion before Prothonotary Aalto[28] ignores the fact that Prothonotary Aalto expressly advised the parties that he would not be hearing submissions on costs, and that matters of costs would be left to another day.[29] In this regard, Voltage's suggestion that TekSavvy's request to include the transcripts of the *Norwich* hearing is improper is surprising, given Voltage's express position to TekSavvy that it did not oppose the request.[30]

15. Voltage claims that allowing TekSavvy's claimed costs would "allow

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[24] Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2), at para. 51.

[25] Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2), at para. 36.

[26] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 29.

[27] 2014 *Norwich* Reasons; TekSavvy Record, Vol. II, Tab B(16) at para. 136.

[28] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 34.

[29] *Norwich* Hearing Transcript, TekSavvy Record, Tab B(19), at 731:7-732:28; 751:27-752:13

[30] Email from A. Weissman to N. McHaffie dated July 7, 2015, Exhibit A to the Affidavit of Alexander Sarabura, sworn July 17, 2015; Motion Record of TekSavvy Solutions Inc. (*Re: Motion for Leave to File New Evidence*) ("New Evidence Record"), Tab 2(A).

it…to…potentially profit" from Voltage's Rule 238 motion.[31] There is no evidence to support a contention that TekSavvy is in any position whatsoever to profit from Voltage's motion. Rather, the evidence was clear that TekSavvy would be out of pocket even if 100% of the costs claimed by TekSavvy were allowed. Mr. Gaudrault's evidence was that the costs included in TekSavvy's Bill "do not by any means capture all of the personnel and administrative costs incurred by TekSavvy". Mr. Gaudrault was not cross-examined on this statement.[32]

16. Voltage also asserts that, given the new notice-and-notice regime, TekSavvy's claim for costs include the costs of "a system that Teksavvy needs for its business and will be using repeatedly and indefinitely".[33] This is again directly contrary to the evidence, which was that TekSavvy designed and undertook a process exclusively and uniquely for Voltage's request,[34] which is not surprising as the *Copyright Act* notice-and-notice regime was not in place at the time the request was made. There is no evidence anywhere in the record to support the suggestion that TekSavvy uses the rapidly-devised system for correlations that it used to respond to the Voltage request in the current notice-and-notice regime at all, let alone "repeatedly and indefinitely".

17. Finally, Voltage asserts that TekSavvy provided no explanation of the need for a "second check/QA verification".[35] In fact, Mr. Gaudrault explained both the process and the need for it plainly in his affidavit, in a statement on which he was not cross-examined:

> Given the importance of the issue and the volume of IP addresses requested, the search and correlation work was divided between three people. <u>The correlation was then run a second time and the two generated lists were correlated to look for differences. Those differences were then verified for production of a final list</u>. This search process yielded subscriber information with respect to a total of approximately 1,130 subscribers.[36] [emphasis added]

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[31] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 41.

[32] Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2), at para. 51.

[33] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 55.

[34] Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2), at paras. 10, 19-21, 49-.

[35] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 62.

[36] Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2), at para. 21.

PART III - LAW AND SUBMISSIONS

18. TekSavvy submits that in respect of Voltage's motion, there are three issues to consider:

(a) Is Voltage entitled to its costs of the Costs Motion?

(b) Is Voltage's request to reduce Prothonotary Aronovitch's assessment of TekSavvy's reasonable legal costs, administrative costs and disbursements properly before this Court?

(c) If the answer to (b) is yes, should Voltage's request to reduce the assessment of TekSavvy's reasonable legal costs, administrative costs and disbursements be granted?

19. TekSavvy respectfully submits that for the reasons set out below, each of the above questions must be answered in the negative.

A. Voltage is Not Entitled to its Costs for the Costs Motion

20. Despite its costs of the Costs Motion being the only ground on which Voltage filed a notice of motion for appeal, Voltage spends very little argument explaining why it is entitled to such costs. TekSavvy has already explained why TekSavvy is entitled to the costs of the Costs Motion in its written representations on its own appeal of the Costs Order. A review of Voltage's submissions demonstrates that Voltage's claim for costs of the motion is without merit.

21. Contrary to Voltage's argument, Prothonotary Aronovitch did not deny Voltage its costs solely because she found "some of" its submissions to be irrelevant. Rather, the Learned Prothonotary held that Voltage had unreasonably trivialized TekSavvy's claim based on evidence that was not only irrelevant, but also fundamentally unreliable—in other words, evidence which was a waste of the time and resources of the Court and of the parties.[37]

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[37] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at paras. 112, 124 and 129.

22. It is important to note a significant portion of the record before Prothonotary Aronovitch consisted of this irrelevant evidence filed by Voltage, and the resulting cross-examination that TekSavvy had to conduct with respect to it. Mr. Logan's affidavit amounted to some 275 pages (with exhibits) of evidence "on all manner of extraneous matters", and Prothonotary Aronovitch gave no weight to his "second-hand evidence regarding the costs that other ISPs incur", which was neither persuasive nor relevant.[38] Similarly, Voltage's expert, Mr. Rogers, filed a 70-page report, which Prothonotary Aronovitch found neither informative nor helpful.[39] Cross-examination on these affidavits required almost 250 transcript pages over the course of two days.

23. With respect to Rule 400, the factors favouring TekSavvy have been set out in TekSavvy's written argument on its appeal. The Rule 400 factors cited by Voltage, in contrast, do not support its claim to costs:

(a) Voltage was not the successful party; it sought to pay TekSavvy the nominal sum of $880, and instead TekSavvy's costs were assessed at nearly twenty-five times that amount;

(b) Voltage offered to pay TekSavvy significantly less than the assessed amount (an amount which it has still not paid to TekSavvy), and did not do so until its responding Memorandum of Fact and Law on the Costs Motion;

(c) The "exorbitant work" incurred by Voltage—which is entirely speculative, as Voltage has never produced its own Bill of Costs—was entirely of Voltage's own making, as will be discussed further;

(d) There is no public interest in favour of Voltage, as the particular costs incurred by TekSavvy are of relevance only to this case and do not have "far reaching consequences" for other cases. Indeed, Prothonotary Aronovitch noted that in her view, "the precedential value

[38] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at paras 112, 127.

[39] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at para 111.

of this particular assessment…is quite limited as my findings are confined to the facts of this case";[40]

(e) The Costs Motion was necessitated by the process put in place by Prothonotary Aalto and the parties' mutual inability to agree on costs, not by TekSavvy's Bill of Costs (Voltage having made no proposal on costs until its Memorandum of Fact and Law filed on the Costs Motion, and then suggesting that the costs ought to be assessed at a trivial amount);

(f) Voltage's was not "forced" to hire an expert to dispute TekSavvy's clear and direct statements regarding the time it spent undertaking the correlation, which statements were accepted as "un-contradicted",[41] and the expert evidence it filed was of no assistance to the Court and needlessly inflated the costs of the proceeding.

24. With respect to Voltage's claim that it was forced to incur unnecessary costs as a result of TekSavvy's Bill of Costs, Voltage has failed to point to any unnecessary costs that it incurred, making simply a blanket statement regarding an "exorbitant amount of work."[42] Voltage has filed no evidence or bill of costs to substantiate this claimed additional work.

25. In contrast, TekSavvy's Bill of Costs in respect of the Costs Motion was supported by evidence and demonstrates that all of TekSavvy's costs were reasonably incurred, albeit often due to Voltage's unreasonable actions. Voltage insisted on the cross-examination of TekSavvy's witnesses, forcing TekSavvy's counsel to travel to Toronto and attend at same. Yet Voltage cannot identify a single material admission it gained from the cross-examination—because Voltage was entirely unsuccessful in shaking any of TekSavvy's evidence.[43]

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[40] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at para 124.
[41] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at para 113.
[42] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 67(c).
[43] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at para 113.

26. As noted, the largest and most unnecessary expense in respect of the Costs Motion was Voltage's decision to retain two outside witnesses, an "expert" and a "fact witness" who often veered into opinion, neither of whom provided any evidence considered useful by the Learned Prothonotary. TekSavvy was forced to cross-examine Voltage's witnesses, and in so doing successfully obtained numerous admissions that severely weakened their evidence; for example, Steven Rogers admitted that the assumptions on which his evidence were based were inapplicable to TekSavvy, which caused Prothonotary Aronovitch to reject his evidence categorically.[44] Mr. Rogers further stated that an assumption on which he based his opinion was not, in fact, something he would have done—rather, he would have taken the same steps as TekSavvy.[45]

27. Voltage further argues that it ought not to be penalized "for arguments that do not find favour with the Court."[46] This submission demonstrates a misunderstanding of the relevant principles. Voltage did not raise an "argument" that did not find favour. Rather, Voltage submitted voluminous evidence which was found to be irrelevant and unreliable. Voltage is correct that a losing argument ought not to be punished. Voltage is incorrect that the evidence or Messrs. Rogers and Logan constitutes such argument.

28. TekSavvy therefore respectfully submits that Voltage's request for costs of the Costs Motion ought to be rejected.

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[44] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at paras. 110 and 111.

[45] Transcript of the Cross-examination of Steve Rogers, held October 9, 2014 ("Rogers Transcript); TekSavvy Record, Vol. II, Tab 12, at pp. 60-61, QQ. 182-188. Mr. Rogers made various other admissions throughout his cross-examination. See, *e.g.*, Rogers Transcript; TekSavvy Record, Vol. II, Tab 12, at pp. 19-20, Q. 54; pp. 27-35, QQ. 76-103; p. 31, Q. 93; pp. 55-56, Q. 167-168; p. 77, QQ. 250-251; and p. 84, Q. 276.

[46] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 70

B. Voltage Did Not Move to Appeal the Costs of the 2014 *Norwich* Order

29. Voltage argues that TekSavvy is "only entitled to $6,808.50 or less pursuant to the terms of the [2014 *Norwich* Order]"[47] and contests the merits of the $21,557.50 assessed as TekSavvy's reasonable legal costs, administrative costs and disbursements.

30. However, Voltage never moved to appeal this aspect of the Costs Order. Voltage's Notice of Motion only seeks "an Order varying paragraph 3 of the Costs Order, which states "There shall be no costs of the assessment."[48] Nowhere in the Notice of Motion is there any indication that Voltage was moving to appeal—or indeed that it objected to—the quantum of the assessment of TekSavvy's reasonable costs payable pursuant to the 2014 *Norwich* Order.[49] Voltage served and filed its Notice of Motion appealing the Costs Order several days after TekSavvy; Voltage therefore knew or ought to have known that TekSavvy was appealing the quantum of the assessment, yet chose not to itself appeal the assessment.

31. Rule 359 states that a notice of motion shall set out both the relief sought and the grounds intended to be argued,[50] and the Federal Court of Appeal has held that the purpose of a notice of motion is "(1) to provide the recipient with adequate notice of the order being sought and the grounds for seeking the order; and (2) to tell the Court with exactitude what is being sought and why."[51] In this case, Voltage failed to provide either TekSavvy or the Court with any notice that it intended to challenge the quantum related to the 2014 *Norwich* Order, or the grounds for same. Accordingly, this relief is not properly before the Court and ought to be refused on that basis alone.

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[47] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 41.

[48] Costs Order; TekSavvy Record, Vol. III, Tab C.

[49] Voltage's Notice of Motion dated April 2, 2015 [identified as being dated September 14, 2015 in Voltage's Table of Contents]; Voltage Record, Vol. I, Tab 1.

[50] Rule 359(b) and (c); Tab A hereto.

[51] *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117; TekSavvy Responding Record, Tab 4, at para. 4.

C. Prothonotary Aronovitch Erred in Ordering Too Few Costs to TekSavvy, not Too Many

32. If the Court elects to consider Voltage's request to vary the Costs Order in respect of the 2014 *Norwich* Order, Voltage's position is nonetheless without merit. TekSavvy submits that, for the reasons set out in its Written Representations, the Learned Prothonotary erred by failing to assess hundreds of thousands of dollars in reasonable costs incurred by TekSavvy. TekSavvy further submits that Voltage's arguments are misplaced and must be rejected, for the reasons set out below.

(i) TekSavvy will not profit from the Norwich *Motion*

33. Voltage raises the spectre of third-parties, including TekSavvy, attempting to profit from their involvement in *Norwich* motions as a reason to deny TekSavvy costs to which it is entitled.[52] Voltage's argument assumes that an innocent third-party, having been drawn involuntarily into a proceeding through a *Norwich* Motion, will seek to exploit its (unwilling) involvement for profit. Voltage has not identified a single case in which a third-party subject to a *Norwich* order acted in such a fashion. Rather, Voltage raises the entirely hypothetical possibility that "future third parties" could "abuse" the *Norwich* order process.[53]

34. Voltage's submissions, insofar as they relate to TekSavvy, further assume that the costs claimed by TekSavvy represent significantly more than the expenses TekSavvy incurred as a result of the *Norwich* Motion. As noted above, this is contrary to the uncontested evidence of Mr. Gaudrault, who stated that TekSavvy incurred costs over and above those claimed.[54] Voltage's assertion that even the $21,557,50 that Prothonotary Aronovitch ordered payable would somehow result in a windfall for TekSavvy lacks any evidentiary basis.

35. The evidence is clear: TekSavvy was unilaterally brought into this proceeding by Voltage; TekSavvy was required to identify information associated with more than

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[52] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 41.

[53] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 41.

[54] Gaudrault Affidavit; TekSavvy Record, Vol. 1, Tab B(2), at para. 51.

2,000 IP addresses; TekSavvy had never before been asked to perform such a large-scale correlation, and its systems were not set up to perform the necessary correlation, such that entirely new systems had to be designed, from scratch, in a tight timeframe; and almost TekSavvy's entire staff was required to assist, either in performing the IP address correlation or in responding to other effects of Voltage's *Norwich* Motion (to name just a few such costs).[55] To suggest that TekSavvy could somehow profit from being compensated for this is neither supported nor realistic.

(ii) *The Cases Cited by Voltage are Distinguishable and Irrelevant*

36. The case law cited by Voltage is readily distinguished from the facts of the within proceeding and does not assist its argument. In *Aquarius*,[56] the Court found that the plaintiff (not an innocent third-party) was claiming "more than its actual costs and expenses"—in fact, the plaintiff actually admitted it was claiming a profit, above what it would normally have charged in the circumstances.[57] There is no basis for such a determination in this case, and no evidence that TekSavvy is seeking anything above the costs it actually incurred in response to the *Norwich* Motion. Accordingly, *Aquarius* has no application to the within appeal.

37. Similarly, Voltage's reliance on the decision in *Carter*[58] is misplaced. In *Carter*, the Supreme Court referred to costs incurred in the litigation as a whole by the parties to that litigation—no reference was made to innocent third-parties drawn into the proceeding by way of a *Norwich* Order. Such third-parties are subject to different considerations, as the cases cited by TekSavvy demonstrate.

38. Voltage's reference to the British decision in *20C Fox*[59] is equally unhelpful to this Court. That case was decided in the context of an entirely different regulatory

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[55] Gaudrault Affidavit; TekSavvy Record, Vol. I, Tab B(2), at paras. 10, 17 to 20, 30, 36 and 51; Transcript from the Cross-Examination of Marc Gaudrault, held October 8, 2014; TekSavvy Record, Vol. I, Tab B(5), at p. 27, Q. 106.

[56] *Global Enterprises International Inc. v. Aquarius (The)*, 2002 FCT 150 ("*Aquarius*"); Voltage's Book of Authorities ("Voltage Authorities"), Tab 7.

[57] *Aquarius*; Voltage Authorities, Tab 7, at para. 17.

[58] *Carter v. Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"); Voltage Authorities, Tab 8.

[59] *20C Fox v. BT (No. 2)*, [2011] EWHC 2174 (Ch) ("*20C Fox*"); Voltage Authorities, Tab 10.

regime; for example, in determining that the costs of providing IP addresses were a "cost of doing business", the Court relied upon "recital (59) of the Information Society Directive" of the European Parliament—a body and directive that are obviously irrelevant to this proceeding.[60] It is telling that Voltage has been unable to find any Canadian authority to support its position. Moreover, in *20C Fox* the Court relied on British Telecom's own estimate of the cost of compliance, which was found to be "modest and proportionate", and far lower than the costs proven to have been incurred by TekSavvy in this case, which demonstrates that the costs of compliance for each company are different. Even still, the cost of "each subsequent notification" of a customer by British Telecom was estimated at £100; approximately $200 at current exchange rates, or less than the per-IP-address cost that TekSavvy has claimed.

(iii) *TekSavvy's Expenses Are All Proven and Reasonable*

39. Having been in possession of TekSavvy's Bill of Costs for more than a year, Voltage has not and, TekSavvy submits, cannot point to any heading of assessed costs, or even a single line item, that is exaggerated or unproven. Voltage is left to assert that "after rifling through the countless irrelevant costs claimed by TekSavvy"…"it is likely that some of its actual costs are inflated,"[61] without identifying any particular cost. Such a sweeping generalizations is no basis for reducing the costs as assessed by Prothonotary Aronovitch.

40. Prothonotary Aronovitch carefully reviewed the items claimed by TekSavvy. While TekSavvy takes the position that the Learned Prothonotary took an overly narrow view of the costs for which TekSavvy is entitled to be reimbursed pursuant to the 2014 *Norwich* Order, the result of her narrow view is that there ought to be no doubt that the costs that she found should be paid to TekSavvy were carefully scrutinized and justified.

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[60] *20C Fox v. BT (No. 2)*, [2011] EWHC 2174 (Ch); Voltage Authorities, Tab 10, at para. 32.

[61] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at paras. 60 and 64.

(a) *TekSavvy's Legal Costs*

41. Prothonotary Aronovitch assessed TekSavvy's reasonable legal costs at $4,500, limited to costs that the Learned Prothonotary found were directly associated with communicating with Voltage, carrying out the IP address correlation, and providing advice on the scope of the 2014 *Norwich* Order.[62] Voltage appears to submit that this amount was excessive, yet on its own calculation reaches a higher figure, $4,671.[63] In any event, Voltage fails to identify any item in the legal costs assessed by Prothonotary Aronovitch (based on detailed billing accounts from Stikeman Elliott LLP) that is improper.

42. In response to TekSavvy's request for the costs of the underlying *Norwich* motion before Prothonotary Aalto, Voltage argues that if TekSavvy intended to claim such costs, "it ought to have appealed the [2014 *Norwich* Order], not raised the issue before Prothonotary Aronovitch."[64] Voltage then states, without citing any authority in support of its position, that it would have been "unjust and a legal error for Prothonotary Aalto to award TekSavvy costs in the [2014 *Norwich* Order]."[65]

43. However, beyond the fact that TekSavvy understood the 2014 *Norwich* Order's reference to "all reasonable legal costs" to include the costs of the *Norwich* Motion, Prothonotary Aalto expressly stated that "Any dispute regarding those costs can be resolved by the Case Management Judge."[66] Thus, what Voltage submits TekSavvy ought to have appealed is precisely the subject matter that Prothonotary Aalto directed to the Case Management Judge, Prothonotary Aronovitch. TekSavvy followed the directed route by raising these issues on the Costs Motion.

44. Voltage also states that TekSavvy's position on this motion amounts to a "collateral attack" on the 2014 *Norwich* Order. This argument was not made by Voltage at the Costs Motion, and ought not to be raised for the first time before this

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[62] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at para 79.

[63] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 61.

[64] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 38.

[65] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 38.

[66] 2014 *Norwich Reasons*; TekSavvy Record, Vol. II, Tab B(16) at para. 136. [emphasis added]

Honourable Court. In any event, there is no merit to Voltage's submission. The Supreme Court of Canada has stated that:

> The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route.[67] [citations omitted; emphasis added].

TekSavvy has followed the "designated appellate…route" set out by the *Rules* and by Prothonotary Aalto. TekSavvy has never argued that the 2014 *Norwich* Order is invalid or that it ought not to be enforced, nor has TekSavvy taken an "institutional detour". Rather, TekSavvy and Voltage have differing opinions as to the interpretation of the 2014 *Norwich* Order, which led to both the Costs Motion and the within appeal. Pursuing a valid appeal is not a collateral attack.

(b) *TekSavvy's Technical Costs*

45. Prothonotary Aronovitch held that TekSavvy was only entitled to be reimbursed for $17,057.50 of the technical costs it incurred in abiding by the 2014 *Norwich* Order. In reaching this conclusion, the Learned Prothonotary considered the costs claimed by TekSavvy and their necessary relationship with providing TekSavvy's customer information to Voltage, and rejected many costs that TekSavvy has submitted, on its own appeal, ought to have been allowed: the cost of the system upgrade TekSavvy was required to undertake to respond to Voltage's request and to address malicious attacks on TekSavvy's network infrastructure; costs associated with the notice sent by TekSavvy to its customers as a result of Voltage's motion; and costs associated with TekSavvy's increased staffing necessitated by Voltage's motion. As with TekSavvy's legal costs, the Learned Prothonotary carefully scrutinized TekSavvy's costs, such that the (unduly limited) costs that were assessed were plainly substantiated.

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[67] *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; TekSavvy Responding Record, Tab 3, at para. 28; citing *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 and *Garland v. Consumers' Gas Co.*, 2004 SCC 25.

46. Voltage takes issue with the costs TekSavvy was forced to incur to provide the customer information, stating that "project management and the creation of new servers…should be considered a cost of doing business."[68] It is not clear what is meant by Voltage's reference to "creation of new servers"; however, if it is intended to refer to the systems TekSavvy was obliged to put in place to respond to the 2014 *Norwich* Order (which included setting up a new SQL server), Voltage is in error. This effort was not part of TekSavvy's business, it was exclusively a task undertaken to respond to Voltage's request for information. It is hard to understand how it "is made clear by the caselaw" that this is a cost for TekSavvy to do business, when Voltage has not cited a single Canadian case that stands for that proposition. Moreover, Prothonotary Aronovitch specifically found that Voltage had to take TekSavvy as it found it, and reimburse TekSavvy for the steps undertaken to fulfill the information request.[69] The evidence from TekSavvy was unambiguous and unshaken: the system TekSavvy designed was not a cost of doing business, and was not a cost TekSavvy would have incurred but for the *Norwich* Motion.

(iv) *No Evidence of "Inflated" Costs*

47. Voltage baldly asserts that "some of [TekSavvy's] costs are inflated" and states that the Court should award TekSavvy "a more reasonable, rounded amount, such as $5000.00, for the costs of compliance" with the 2014 *Norwich* Order.[70] Voltage does not provide any evidence whatsoever to support this statement, nor can it point to any of TekSavvy's costs that are "inflated". It is apparent that Voltage has picked a "round" number from thin air, in the hope that this Honourable Court will accept it. Given that Voltage has had over a year in which to identify specific costs that it alleges are "inflated" (including nearly six months since the Costs Order was released), and given that Voltage has failed to do, it is submitted that the Court must reject Voltage's suggested costs figure.

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[68] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 62.

[69] Costs Reasons; TekSavvy Record, Vol. III, Tab C, at para 114.

[70] Voltage Memorandum; Voltage Record, Vol. II, Tab 5, at para. 64

PART IV - CONCLUSION

48. Voltage is seeking relief that is not properly before this Court and to which it has failed to demonstrate any entitlement. For all of the foregoing reasons, as well as the reasons set out in TekSavvy's Written Representations on its own appeal motion, Voltage's motion to vary the Costs Order ought to be denied and TekSavvy ought to be awarded its costs of this motion.

PART V - ORDER REQUESTED

49. TekSavvy seeks an Order dismissing Voltage's appeal motion, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

NICHOLAS MCHAFFIE
ALEX SARABURA
Of Counsel for TekSavvy Solutions Inc.

PART VI - TABLE OF AUTHORITIES

Tab	**Authority**
2.	*British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52
3.	*Rahman v. Public Service Labour Relations Board*, 2013 FCA 117