Court File No. T-2058-12

FEDERAL COURT

BETWEEN:

VOLTAGE PICTURES LLC

Plaintiff

- and -

JOHN DOE AND JANE DOE

Defendants

- and -

TEKSAVVY SOLUTIONS INC.

Appellant /
Responding Party

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY
AND PUBLIC INTEREST CLINIC

Intervener

WRITTEN REPRESENTATIONS OF TEKSAVVY SOLUTIONS INC.

(*Re: Appeal of Costs Order*)

July 17, 2015

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PART I - OVERVIEW

1. On February 20, 2014, Prothonotary Aalto issued a *Norwich Pharmacal*-type order requiring TekSavvy Solutions Inc. (TekSavvy) to provide Voltage Pictures LLC (Voltage) with personal information of TekSavvy subscribers associated with over two thousand Internet protocol (IP) addresses (the "2014 *Norwich* Order").[1]

2. It is a well-established principle underlying *Norwich* orders that an innocent third party should not suffer financially for being named as a respondent, *i.e.*, that "the full costs of the respondent…and any expense incurred in providing the information be borne by the applicant."[2] Consistent with this principle, the 2014 *Norwich* Order required that Voltage pay TekSavvy "All reasonable legal costs, administrative costs and disbursements incurred…in abiding by this Order," and left resolution of any dispute regarding those costs "with the Case Management Judge."[3]

3. Voltage's unilateral decision to seek information from TekSavvy in particular—a deliberate tactical choice by Voltage that was based on the size of TekSavvy as a smaller internet service provider (ISP)—caused significant cost to TekSavvy. TekSavvy submitted clear evidence, unshaken on cross-examination, to support its costs claim. As amended, this claim was for $321,277: $153,479 in legal costs; $108,616 in administrative costs; and $59,181 in disbursements.[4] These costs were all incurred by TekSavvy in responding to Voltage's request for subscriber information, and thus in abiding by the 2014 *Norwich* Order.

4. Notwithstanding the clear order that TekSavvy be paid "all reasonable legal costs, administrative costs and disbursements," on March 17, 2015, the Learned Case Management Judge disallowed almost all of TekSavvy's legal costs, the vast majority

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[1] Reasons for Order and Order of Prothonotary Aalto, February 20, 2014 ("2014 *Norwich* Reasons" and "2014 *Norwich* Order"), Motion Record of TekSavvy Solutions Inc. (TekSavvy Record), Tab B(16).

[2] *Norwich Pharmacal Company and others v. Commissioners of Customs and Excise*, [1974] AC 133 (HL), TekSavvy's Book of Authorities (TekSavvy Authorities), Tab 2, at para. 100.

[3] 2014 *Norwich* Order, para. 3, 2014 *Norwich* Reasons, paras. 135-136, TekSavvy Record, Tab B(16).

[4] TekSavvy's original claim was for $346,480. However, its claim for costs associated with an adjourned hearing before Justice Mandamin was withdrawn at the hearing before Prothonotary Aronovitch. An Amended Bill of Reasonable Legal Costs, Administrative Costs and Disbursements reflecting this withdrawal is attached at Tab A hereto. References to claimed amounts herein reflect TekSavvy's claim as amended at the hearing of the Costs Motion before Prothonotary Aronovitch.

of its administrative costs, and all of its disbursements, ordering Voltage to pay only $21,557.50 (the "Costs Order").[5] TekSavvy is thus out-of-pocket nearly $300,000 for costs that ought to have been allowed. TekSavvy now appeals from that Costs Order.

5. In disallowing well over 90% of TekSavvy's incurred and claimed costs, the Case Management Judge erred in:

(a) adopting an inappropriately narrow and legally incorrect interpretation of the scope of the 2014 *Norwich* Order;

(b) disallowing all of TekSavvy's (i) operational administrative costs incurred as a result of the Voltage request and (ii) disbursements incurred by TekSavvy to respond to increased call volume and to distributed denial-of-service (DDoS) attacks faced as a result of the Voltage request; each on the basis that they were merely the "costs of doing business";

(c) refusing to allow the vast majority of TekSavvy's legal costs, on grounds that (i) they were related to the motion before Prothonotary Aalto, (ii) no bill of costs based on the tariff was filed and (iii) costs for TekSavvy's corporate counsel did not fall within the ambit of the order;

(d) disallowing the costs of TekSavvy's notice to its customers, which both alerted them to the existence of the proceeding, and resulted in an important quality check on the correlation that had been performed; and

(e) inappropriately refusing certain identified administrative costs as being "not identified and supported by evidence".

6. In making these errors, the Case Management Judge acted on wrong principles, erred in law and misapprehended facts. Each of the above-noted grounds is sufficient for this Court to scrutinize the Costs Order. Taken as a whole, the errors in the Costs Order indicate that this Court may and should exercise its discretion to review TekSavvy's claimed costs *de novo* and without deference. Accordingly, TekSavvy submits that the Costs Order ought to be varied and TekSavvy ought to be awarded the reasonable legal costs, administrative costs and disbursements it sought before the Case Management Judge, as well as the costs of its appearance before her and the costs of the within appeal motion.

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[5] Order and Reasons for Order of Prothonotary Aronovitch, March 17, 2015 ("Costs Order" and "Costs Reasons"), TekSavvy Record, Tab C.

PART II - FACTS AND BACKGROUND TO THE CLAIM FOR COSTS

7. The relevant facts and background leading up to the motion before the Case Management Judge (the "Costs Motion") are set out in the reasons for decision of the 2014 *Norwich* Order and the Costs Order.[6] TekSavvy provides below a brief overview of the facts germane to the within appeal.

A. Voltage's Action and Request for Information from TekSavvy

8. Voltage's action in this proceeding alleges that unidentified "Doe" Defendants have engaged in illegal file-sharing over the Internet, and thereby infringed copyright in certain cinematographic works. Voltage claims to have identified IP addresses associated with alleged copyright violations, but had no name or address information to associate with these IP addresses.

9. TekSavvy is a relatively small telecommunications provider.[7] It is not named as a defendant in Voltage's action. It incurred the costs at issue on this appeal in connection with a Rule 238 motion brought by Voltage, which sought disclosure of personal contact information of TekSavvy subscribers whose customer accounts were correlated at the time of the alleged infringement with the IP addresses in which Voltage was interested. Voltage made a deliberate tactical decision to target TekSavvy with its request given its smaller size.[8]

10. On November 1, 2012, Voltage sent TekSavvy draft motion material with a list of over 4,500 IP addresses for which it sought subscriber information, and proposing a motion date of November 19, 2012.[9] TekSavvy immediately began planning and implementing the correlation of the IP addresses.[10] TekSavvy advised Voltage, *inter alia*, that "given the mass of information that is being sought and the size of TekSavvy, it is a substantial undertaking for TekSavvy and one to which it will have

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[6] 2014 *Norwich* Reasons, TekSavvy Record, Tab B(16), at paras. 9-16; Costs Reasons, TekSavvy Record, Tab C, at paras. 1-29.

[7] Affidavit of Marc Gaudrault, sworn June 27, 2014 ("Gaudrault Affidavit"), TekSavvy Record, Tab B(2), at paras. 4-5.

[8] Transcript from the Cross-Examination of Barry Logan, October 9, 2014 ("Logan Transcript"), TekSavvy Record, Tab B(11), at pp. 46-48, QQ. 160-165.

[9] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 12.

[10] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 15-17.

to dedicate significant resources away from the operations of its business."[11] Voltage nonetheless chose to pursue its request and its motion.

11. Voltage subsequently sent TekSavvy a revised list of 2,114 IP addresses, and informed TekSavvy that it would be proceeding with its motion on December 17, 2012, and "would not be amenable to any further delays."[12] TekSavvy employees worked diligently to undertake the necessary correlation. The correlation was unprecedented for TekSavvy and was a complicated and time-intensive process, yet by December 4, 2012, TekSavvy had completed same.[13]

B. TekSavvy's IP Look-Up Process

12. TekSavvy had never previously correlated thousands of IP addresses as requested by Voltage. Historically, TekSavvy had only undertaken a handful of such correlations, each manually completed and verified, and each related to a single IP address.[14] Such manual lookups took a key technical employee between an hour and two hours per IP address, so would not have been practical for Voltage's request.[15]

13. TekSavvy therefore had to plan and implement a totally new approach to respond to Voltage's request.[16] Setting up TekSavvy's systems to do this required the involvement of many senior TekSavvy officers and staff.[17] For verification, the search and correlation work was run twice, with the two lists compared to identify differences. Those differences were then reviewed and resolved, with the result that information for approximately 1,130 customer accounts was obtained.[18]

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[11] E-mail from N. McHaffie to J. Philpott, November 15, 2012, Gaudrault Affidavit, Exhibit B, TekSavvy Record, Tab B(2)(B), at p. 4.

[12] The motion ended up being adjourned twice and was eventually heard in June, 2013. Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 18 and Exhibit C (Tab B(2)(C)).

[13] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 11 and 19.

[14] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 9-10.

[15] Transcript from the Cross-Examination of Marc Gaudrault, October 8, 2014 ("Gaudrault Transcript"), TekSavvy Record, Tab B(5), at pp. 22-23, QQ. 82-83; Transcript from the Cross-Examination of Pascal Tellier, October 8, 2014 ("Tellier Transcript"), TekSavvy Record, Tab B(6), at pp. 18-19, Q. 71.

[16] Gaudrault Transcript, TekSavvy Record, Tab B(2), at p. 27, Q. 106.

[17] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 19 and 20. Gaudrault Transcript, TekSavvy Record, Tab B(5), at QQ. 25-30, 67-71, 80-83, 95-106, 128-141, 147-151, 174-178, 194-204 and 274-276; Tellier Transcript, TekSavvy Record, Tab B(6), at QQ. 52-56 and 71-84.

[18] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 21.

C. Notice and Error Correction

14. TekSavvy considered it appropriate and important to give potentially affected customers notice of the proceeding. It therefore performed the IP address correlation process before Voltage's motion.[19] TekSavvy sent a notice to the subscribers associated with the accounts it had identified, including language requested by Voltage. In response, TekSavvy received reports that recipients of the notice had not been TekSavvy customers at the relevant time and of other errors in the identification of subscribers, leading to a further correction of the correlation. The notification thus served as a valuable quality-control check on the information generated through the correlation of TekSavvy's large-scale and unprecedented IP address lookups.[20]

D. Costs Incurred in Communicating With Customers

15. Voltage's action involves a request for an unprecedented amount of personal information, and possibly thousands of claims for infringement of copyright. Unsurprisingly, Voltage's motion generated considerable interest and concern among TekSavvy customers and the general public. This resulted in a massive increase in inquiries, comments and complaints to TekSavvy.[21]

16. TekSavvy took steps to reduce the number of inquiries and to respond efficiently. TekSavvy created an online portal for subscribers to confirm whether their account had been identified as being associated with one of the IP addresses on Voltage's list, and sent an e-mail to all of its customers advising them of the portal and providing answers to the frequently-asked questions about Voltage's motion.[22]

E. Distributed Denial-of-Service Attack

17. The attention generated by Voltage's motion also manifested maliciously, as both TekSavvy and Voltage were the victims of DDoS attacks. TekSavvy had never

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[19] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 22.

[20] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras 22-24 and Exhibit D (Tab B(2)(D)).

[21] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 30-31, 35-36, 49, 56 and 59; Transcript of the Cross-examination of Pierre Aubé, October 8, 2014 (Aubé Transcript), TekSavvy Record, Tab B(7), at p. 7, QQ. 22-23. At one point, TekSavvy was receiving 4,000 to 6,000 calls per day, of which 90 percent were related to Voltage, and had as many as 200 telephone calls in queue.

[22] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 30-31; Gaudrault Transcript, TekSavvy Record, Tab B(5), at pp. 60-62, QQ. 219-225.

before been subject to such a large, targeted attack. Given the targets and timing (shortly before the first hearing was scheduled in December 2012), it is clear that the DDoS attacks were related to the Voltage motion, and it was only because TekSavvy was named by Voltage that it was attacked.[23]

18. The DDoS attack disrupted TekSavvy's website and internal office connectivity, resulting in increased call volumes, lost calls and wasted employee hours.[24] TekSavvy's systems were not able to respond to the attack and it was therefore forced to spend time finding and implementing a solution from a third-party provider to "harden" its defences against DDoS attacks.[25]

F. The 2014 *Norwich* Order

19. Prothonotary Aalto heard Voltage's request for a *Norwich* order in June 2013. TekSavvy attended the hearing and made submissions on the terms that should be included in any order, although it did not oppose the issuance of the order itself. TekSavvy raised the issue of costs, and requested that any order require that costs be paid before any subscriber information be passed to Voltage. However, the Prothonotary confirmed that he would not be hearing submissions on costs at the June 2013 hearing, but rather that they would be addressed through a subsequent process.[26]

20. On February 20, 2014, Prothonotary Aalto issued the 2014 *Norwich* Order, ordering TekSavvy to produce the customer information to Voltage, and providing for restrictions on its use and on the conduct of the proceeding. In his Reasons for Order, he extensively reviewed the jurisprudence on *Norwich*-type orders in Canada, the United States and the United Kingdom, concluding that the list of considerations

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[23] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 32-33. In a DDoS attack, hackers disable a website or online business by manipulating a huge number of computers to flood a targeted host with communication requests. Canipre Inc., a company assisting Voltage in this litigation, was also victim to a DDoS attack.

[24] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 32. Mr. Logan recognized the impact of a DDoS attack: Logan Transcript, TekSavvy Record, Tab B(11), at pp. 153-154, QQ. 588-594.

[25] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 33-34.

[26] Transcript of the hearing before Prothonotary Aalto, June 25, 2013 ("*Norwich* Hearing Transcript"), TekSavvy Record, Tab B(19), at 106:4-107:28 and 125:10-127:12. This transcript was not before Prothonotary Aronovitch on the Costs Motion. Voltage has advised that it does not oppose its inclusion in the motion record before the Court on this appeal; TekSavvy is seeking leave to bring a motion returnable at the hearing of the within appeal motion in this regard.

flowing from the cases included that "The party enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third-party."[27] In keeping with this, the 2014 *Norwich* Order required that "All reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by this Order shall be paid by the Plaintiff to TekSavvy."[28] In his reasons, Prothonotary Aalto noted that any disputes regarding such costs could be resolved by the Case Management Judge.[29]

G. The Costs Order and Subsequent Steps

21. Prothonotary Aronovitch, appointed Case Management Judge, directed that the issue of costs be addressed through a motion under Rule 406. On this Costs Motion, TekSavvy submitted a Bill of Reasonable Legal Costs, Administrative Costs and Disbursements incurred by TekSavvy in the amount of $321,277 related to:

(a) "information technology" administrative costs incurred in correlating the IP addresses, including the implementation of new systems designed specifically to respond to Voltage's request and the 2014 *Norwich* Order;

(b) "operational" administrative costs incurred to respond to customer concerns related to the 2014 *Norwich* Order and Voltage's request;

(c) legal costs and disbursements incurred in respect of Voltage's motion, both before and after the hearing before Prothonotary Aalto; and

(d) disbursements reasonably incurred to harden its infrastructure in response to the DDoS attack that occurred as a result of Voltage's motion.[30]

22. Voltage submitted that TekSavvy was not entitled to any costs whatsoever or, alternatively, was entitled to a maximum of $884, including legal fees.

23. Prothonotary Aronovitch heard the Costs Motion on December 8, 2014 and released her Order and Reasons on March 17, 2015, assessing the reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by the 2014 *Norwich* Order at $21,557.50. In doing so, she disallowed:

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[27] 2014 *Norwich* Reasons, TekSavvy Record, Tab B(16), at para. 134(d).
[28] 2014 *Norwich* Order, TekSavvy Record, Tab B(16), at para. 3.
[29] 2014 *Norwich* Reasons, TekSavvy Record, Tab B(16), at para. 136
[30] Bill of Reasonable Legal and Administrative Costs and Disbursements, TekSavvy Record, Tab B(1).

(a) all of TekSavvy's $153,479 claim for reasonable legal costs, save $4,500 associated with a very limited subset of communications;

(b) all of TekSavvy's $81,524 claim for operational administrative costs;

(c) $10,035 of TekSavvy's information technology administrative costs; and

(d) all of TekSavvy's claimed disbursements (totalling nearly $60,000). [31]

24. The Case Management Judge further ordered that there would be no costs of the assessment on the basis that "neither party should be rewarded for its conduct."[32]

PART III - LAW AND SUBMISSIONS

A. Standard of Review

25. A prothonotary's order may be appealed by motion to a judge of the Federal Court.[33] In general, a discretionary order of a prothonotary should not be disturbed unless (a) the question raised in the motion is vital to the final issue in the case or (b) the order is clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or misapprehension of the facts.[34] Where the prothonotary's order is clearly wrong in that the prothonotary fell into an error of law—such as basing an exercise of discretion upon a wrong principle or a misapprehension of the facts—the judge on appeal ought to exercise his or her discretion *de novo*.[35] For the reasons set out below, TekSavvy submits that this is an appropriate case for *de novo* review.

26. When a prothonotary is acting as a case management judge, additional deference may be accorded to factual findings. However, such deference is predicated on the "intimate knowledge of the litigation and its dynamics" held by the case management judge.[36] TekSavvy submits that since Prothonotary Aronovitch acted as

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[31] Costs Order, at para. 1, and Costs Reasons, at paras. 79-80, 118, 120-122, TekSavvy Record, Tab C.

[32] Costs Order, at para. 3, and Costs Reasons, at para. 129, TekSavvy Record, Tab C.

[33] *Federal Courts Rules*, Rule 51(1), TekSavvy Authorities, Tab 1.

[34] *Merck & Co. v. Apotex*, 2003 FCA 488, TekSavvy Authorities, Tab 3, at para. 19. TekSavvy does not argue that the question at issue is vital and accepts that the Costs Order was discretionary: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, TekSavvy Authorities, Tab 4, at para. 247.

[35] *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 FC 425 (CA), TekSavvy Authorities, Tab 5, at para. 96.

[36] *j2 Global Communications Inc. v. Protus IP Solutions Inc.*, 2009 FCA 41, TekSavvy Authorities, Tab 6, at para. 16.

Case Management Judge in this proceeding only in respect of the Rule 406 costs assessment, no such deference is due in the circumstances of this appeal.[37]

27. The Case Management Judge erred in refusing to require Voltage to reimburse TekSavvy for the vast majority of the costs that TekSavvy had incurred. This refusal was premised on an inappropriately narrow and legally incorrect interpretation of the scope of the 2014 *Norwich* Order and *Norwich* orders generally. This erroneous approach underlay the refusal to allow specific costs items, and was compounded by particular errors in addressing those items. The following discussion will address first the 2014 *Norwich* Order and the errors in the Case Management Judge's approach to it, will then address specific heads of costs in series, and finally will address the issue of costs of the Costs Motion.

B. The Case Management Judge Erred in Interpreting the 2014 *Norwich* Order

28. The Case Management Judge correctly characterized TekSavvy's position as being that the 2014 *Norwich* Order should have the effect described in *Norwich*: ensuring that the applicant (Voltage) bears the full costs of the respondent (in this case, TekSavvy) and any expense incurred by the third party (again, TekSavvy) in providing the information ordered to be produced.[38] However, she rejected this submission, taking a much narrower view. In so doing, she erred in law and principle.

29. The Case Management Judge's fundamental error was in her conclusion regarding the intention of *Norwich* orders and the scope of the 2014 *Norwich* Order. She determined that the 2014 *Norwich* Order was only intended to reimburse TekSavvy for its costs directly related to "abiding with the Order…to locate and produce the required contact information of the subscribers identified by their IP addresses."[39] She reached this conclusion by misconstruing the 2014 *Norwich* Order, ignoring relevant jurisprudence favourable to TekSavvy and relying on irrelevant jurisprudence to justify her decision. The result of this error is that many of TekSavvy's costs were improperly disallowed.

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[37] *Bank of the West v. "Weldga281596" (The)*, 2007 FC 1112, TekSavvy Authorities, Tab 17, at para. 8.
[38] Costs Reasons, TekSavvy Record, Tab C, at para. 36.
[39] Costs Reasons, TekSavvy Record, Tab C, at para. 56.

1) The Language and Intent of the 2014 Norwich *Order*

30. In determining the scope of the 2014 *Norwich* Order, the first place to turn is to the 2014 *Norwich* Order and Reasons themselves. Prothonotary Aalto ordered that "[a]ll reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by this Order shall be paid by the Plaintiff to TekSavvy."[40] [emphasis added] This term must be understood in the context of the 2014 *Norwich* Reasons, as well as the broader context of the *Norwich* order cases that the Learned Prothonotary referred to and relied on.

31. In contrast with the restrictive language relied upon by Prothonotary Aronovitch (discussed below), Prothonotary Aalto used expansive language, referring to "all" costs and enumerating each of legal costs, administrative costs and disbursements as eligible heads of expense. Prothonotary Aalto also:

(a) stated that "TekSavvy will be reimbursed for its reasonable costs in providing the information";

(b) noted that cases in the US, UK and Canada have held that the "party enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third party";

(c) stated that the terms of the Order were designed so "production of such information will not…cause expense to TekSavvy or others";

(d) referred to TekSavvy's request for "payment of its reasonable costs", leaving any dispute regarding "those costs" to be resolved by the Case Management Judge; and

(e) stated that "[t]he reasonable legal costs, administrative costs and disbursements of TekSavvy in providing the information will be paid to TekSavvy prior to the information being provided."[41]

32. The above language demonstrates that Prothonotary Aalto intended and ordered that TekSavvy would be reimbursed for all of the costs associated with the 2014 *Norwich* Order. There is also no indication that Prothonotary Aalto intended to

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[40] 2014 *Norwich* Order, TekSavvy Record, Tab B(16), at p. 56, para. 3.

[41] 2014 *Norwich* Reasons, TekSavvy Record, Tab B(16), at paras. 46, 134-136 and 138.

limit the 2014 *Norwich* Order to TekSavvy's technical costs of correlation, and every indication that he did not. The Learned Prothonotary was aware that TekSavvy had already incurred significant costs at the time of the hearing and he easily could have—but did not—restricted the scope of his Order to make clear that such costs could not be recovered. There is simply no basis on which to conclude that the 2014 *Norwich* Order is intended to be narrowly interpreted.

2) Norwich *Orders Generally*

33. Beyond "all reasonable legal costs, administrative costs and disbursements," Prothonotary Aalto did not enumerate what specific costs were included in the 2014 *Norwich* Order. However, it important to recognize that the order was made following a thorough review of the jurisprudence on *Norwich* Orders, with no indication that the 2014 *Norwich* Order was intended to do anything other than address the principles of reimbursement and indemnification set out therein.

34. As Prothonotary Aalto noted, a *Norwich* Order is a "discretionary and extraordinary order",[42] as it may compel an innocent third party to incur costs in respect of a proceeding to which it is not otherwise a party, and over which it has little control. Recognizing the potential unfairness of foisting such costs on the third party, Courts have consistently ordered the moving party to indemnify that third party for its reasonably incurred costs. Absent such orders, moving parties would not have the same incentive to minimize the costs they cause third parties to incur.

35. In *Norwich*, the House of Lords described the principle of indemnification as being that "the "full costs of the respondent…and any expense incurred in providing the information would have to be borne by the applicant"[43] [emphasis added].

36. Similarly, in *BMG*, the Federal Court of Appeal affirmed the motion Court's statement that "the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in

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[42] 2014 *Norwich* Reasons, TekSavvy Record, Tab B(16), at para. 35. See also *Temelini v. Royal Canadian Mounted Police Commissioner*, [2009] OJ No 4447 (SCJ), Authorities, Tab 7, at para. 18.
[43] *Norwich*, *supra*, TekSavvy Authorities, Tab 2, at para. 100.

addition to his legal costs"[44] [emphasis added]. Prothonotary Aalto made specific reference to the principles to be taken from *BMG*, including that "any order made will not cause undue delay, inconvenience or expense to the third-party or others".[45] It is important to note that of the five criteria for granting an equitable bill of discovery, this is the only criteria that takes into account the interests or, and the inconvenience and harm to, the third party. A broad approach to this protection is thus appropriate.

37. In *Stewart*, a decision of the Ontario Court of Appeal which involved IP addresses and which was referenced by Prothonotary Aalto (but was not referenced in the Costs Reasons), the Court affirmed the trial judge's decision that the third party should be compensated for "any costs of disclosure."[46]

38. Finally, the Alberta Queen's Bench in *Leahy* surveyed both Canadian and English law and determined that "the Court will consider the following factors on an application for *Norwich* relief…(iv) [w]hether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure".[47]

39. The 2014 *Norwich* Order and Reasons and the underlying jurisprudence all support the proposition that the costs to which TekSavvy is entitled should be broadly defined. The costs claimed by TekSavvy were incurred solely as a result of Voltage's motion and would not have been incurred but for that motion. In the words of *Leahy*, they are clearly "costs to which [TekSavvy was] exposed because of the disclosure".[48]

40. However, the Case Management Judge either chose not to follow this jurisprudence or misinterpreted it. For example, with respect to *BMG*, the Case Management Judge misconstrued the Court's finding, which held that the costs of responding to the motion as well as reasonable costs for providing the names were to

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[44] *BMG Canada v. Doe*, 2005 FCA 193, TekSavvy Authorities, Tab 8, at para. 35; aff'ing *BMG Canada v. Doe*, 2004 FC 488, TekSavvy Authorities, Tab 9, at paras. 10(d) and 32.

[45] 2014 *Norwich* Reasons, TekSavvy Record, Tab B(16), at para. 45(e).

[46] *1654776 Ontario Limited. v. Stewart*, 2013 ONCA 184, TekSavvy Authorities, Tab 10, at paras. 25 and 76; aff'ing 2012 ONSC 1991, leave to appeal refused, 2013 CanLii 59893.

[47] *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575, TekSavvy Authorities, Tab 11, at para. 106; aff'd in *Alberta Treasury Branches v. Ghermezian*, 2002 ABCA 101, TekSavvy Authorities, Tab 12. The Orders in question provided that "reasonable fees incurred in complying with the order[s]" would be paid: *Leahy*, *supra*, TekSavvy Authorities, Tab 11, at para. 159.

[48] *Leahy*, *supra*, TekSavvy Authorities, Tab 11, at para. 106.

be reimbursed. To the extent that the costs paid in *BMG* were more limited, it is because the order specifically so provided. Prothonotary Aalto was aware of *BMG*, referring to it in his reasons. Had the 2014 *Norwich* Order been meant to have the same limited effect, narrow wording similar to *BMG*'s would have been used, rather than the expansive wording the Order does use.

41. Despite the 2014 *Norwich* Order's clear language, and jurisprudence establishing the expansive scope of *Norwich* orders, the Case Management Judge adopted an overly narrow interpretation. With respect to the three heads of damages explicitly identified in the 2014 *Norwich* Order (legal costs, administrative costs and disbursements), the Case Management Judge, without explanation, "ascribe[d] no special significance to the fact that Prothonotary Aalto identifies three heads of costs to be reimbursed" and further stated that "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."[49] This conclusion flies in the face of the relevant case law.

3) The Case Management Judge Relied on Irrelevant Jurisprudence

42. The Costs Reasons also rely on irrelevant case law. A large part of the error in this respect appears to stem from minimizing the uniqueness and scope of the task facing TekSavvy.[50] The scale and nature of the request—and the resulting operational and legal costs of responding—were unprecedented in Canada, and entirely distinguishes the cases cited in the Costs Reasons.

43. The Case Management Judge acknowledged that a *Norwich* order is a remedy "that is out of the ordinary", but found that "orders requiring ISPs to provide contact information for their subscribers are not new or uncommon."[51] Yet the four cases cited on this point do not support a conclusion that the costs associated with a request for an unprecedented volume of customer information—raising the very issues regarding "copyright trolls", privacy, *fides*, and limitations on the order that Prothonotary Aalto highlighted in his decision—should be narrowly considered. *York University v. Bell*

[49] Costs Reasons, TekSavvy Record, Tab C, at para. 54.
[50] Costs Reasons, TekSavvy Record, Tab C, at para. 49.
[51] Costs Reasons, TekSavvy Record, Tab C, at para. 49.

Canada,[52] for example, dealt with only a handful of IP addresses, and the parties were able to agree on the "nominal" costs of obtaining the information. The Costs Reasons ignore the Court's reference to requiring "no prejudice to the responding party",[53] and instead cite the decision for the proposition (not found in the case) that only narrow costs are to be awarded. There is no reference in *York University* to the costs actually incurred by the (large) ISPs involved, nor were any incurred costs disallowed.

44. Similarly, in *Pierce v. Canjex Publishing*,[54] only a handful of IP addresses were at issue, such that any costs involved were likely to be nominal. In addition, the Court there specifically limited the payment of costs to those incurred for the "retrieval, production and delivery of identifying information."[55] In the 2014 *Norwich* Order, there was no such limitation.

45. *Voltage Pictures LLC v. Jane Doe*,[56] an earlier proceeding involving Voltage, is also distinguishable. First, as in *Pierce* (but in contrast to the 2014 *Norwich* Order), the Order specifically provided that only "expenses incurred…in collecting the personal information" were to be repaid.[57] Second, the motion related to far fewer IP addresses, and there was no evidence of any additional costs associated with the motion given that the respondents made no appearance and did not apparently incur massive increases in call volumes and other costs given the limited numbers at issue.

46. What is clear from a review of the cases cited in the Costs Reasons is not that *Norwich* Orders are narrowly interpreted, but rather that when the Court intends such an interpretation based on the particular facts of a case, the order is specifically worded to reflect that intent. It is submitted that the Case Management Judge's approach to the 2014 *Norwich* Order was inconsistent with the Order itself, and the cases and principles that Prothonotary Aalto himself referenced in making that Order, which refer to indemnification of the third party for all costs and expenses arising.

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[52] *York University v. Bell Canada Enterprises* (2009), 99 OR (3d) 695 (SCJ), TekSavvy Authorities, Tab 13.
[53] *York University*, *supra*, TekSavvy Authorities, Tab 13, at para. 19.
[54] *Pierce v. Canjex Publishing Ltd.*, 2011 BCSC 1503, TekSavvy Authorities, Tab 14.
[55] *Pierce*, *supra*, TekSavvy Authorities, Tab 14, at para. 32.
[56] *Voltage Pictures LLC v. Jane Doe*, 2011 FC 1024 ("*Voltage 2011*"), TekSavvy Authorities, Tab 15.
[57] *Voltage 2011*, *supra*, TekSavvy Authorities, Tab 15, at Order para. 3.

This error in principle informed the Case Management Judge's approach to the particular administrative costs, legal costs and disbursements claimed by TekSavvy.

C. The Case Management Judge Erred in Disallowing TekSavvy's Costs

47. The Case Management Judge disallowed over $300,000 in costs that were incurred, claimed and supported by evidence filed by TekSavvy. These costs fall into four main categories and will be addressed in this order: (1) operational costs ($81,524) and disbursements ($55,457) that were determined to be merely "costs of doing business; (2) legal costs and disbursements ($152,703); (3) costs of TekSavvy's notice to customers ($4,522) and (4) certain additional discounts to TekSavvy's administrative costs ($5,512).

1) The Case Management Judge Erred in Refusing to Allow Certain Costs on the Basis that They Were Merely the "Costs of Doing Business"

a) TekSavvy's "Operational" Administrative Costs

48. As set out above, as a result of Voltage's request for subscriber information, TekSavvy was required to respond to a massive increase in inquiries, comments and complaints. This required dedicating significant resources from senior management to contact centre associates to respond to these inquiries, communicate with affected and non-affected subscribers regarding Voltage's motion and create an online "portal" to allow TekSavvy's subscribers to obtain information regarding Voltage's motion.[58] These tasks required almost 2,000 work hours—hours taken away from TekSavvy's usual operations that simply would not have been required but for Voltage's request—at a cost to TekSavvy of $81,524.

49. There is no dispute that these costs were incurred. However, the Costs Reasons simply state, without substantial reasoning, that the "operational" administrative expenses were "in effect, TekSavvy's costs of marketing, promotion, and customer relations, which I consider to be TekSavvy's costs of doing business"[59] and conclude that they fell outside of the 2014 *Norwich* Order.

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[58] The specifics of these costs were set out in TekSavvy's Bill of Costs and supporting evidence. See, *e.g.*, Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 30-36 and 56-59 and Appendix B; Aubé Affidavit, TekSavvy Record, Tab B(4), at paras. 2-7 and Appendix A.

[59] Costs Reasons, TekSavvy Record, Tab C, at para. 120.

50. The Costs Reasons do not cite any authority for the disallowance of TekSavvy's "operational" administrative costs,[60] nor any evidence to support the characterization of same as mere "costs of doing business". In fact, the evidence was entirely to the contrary: the costs and hours that were incurred were those of individuals taken away from doing TekSavvy's ordinary business. Far from being typical "marketing, promotion, and customer relations" costs, these costs would not have been incurred but for Voltage's motion.[61]

51. The 2014 *Norwich* Order ordered TekSavvy to be reimbursed "all reasonable administrative costs". There was no evidence that TekSavvy's costs were unreasonable. Quite the opposite: as TekSavvy's CEO, Mr. Gaudrault noted, had they not been incurred, TekSavvy's reputation would have changed considerably and it would have stood to lose a significant number of customers.[62] It would be contrary to the principles of indemnification set out in the *Norwich* order cases discussed above to conclude that costs that were incurred directly as a result of a request for subscriber information are simply "costs of doing business". If responding to the exigencies created by such a discovery request were simply "doing business," then this important requirement for a *Norwich* order would be rendered meaningless. These costs fall both within the 2014 *Norwich* Order and the principles set out in the *Norwich* order cases, and ought to have been ordered to be paid by Voltage.

52. In this regard, the absence of substantial reasoning with respect to a significant costs item undermines the conclusions in the Costs Reasons. As the Supreme Court of Canada has stated, "reasons perform an important function…and…where that function goes unperformed, the judgment itself may be vulnerable to be reversed on appeal."[63] This Court has similarly recognized the importance of reasons in reviewing a prothonotary's order:

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[60] None of the *Norwich* cases cited by either Prothonotary Aronovitch or Prothonotary Aalto refer to an innocent third party being responsible for significant costs as a "cost of doing business". There is some reference in the cases cited by Voltage to the correlation cost being a "cost of doing business", but no broader principle emerges.

[61] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 30 and 36.

[62] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 36.

[63] *R. v. Sheppard*, 2002 SCC 26, TekSavvy Authorities, Tab 16, at paras. 4 and 43-46.

> While a lack of reasons alone does not automatically give rise to a hearing *de novo* on an appeal from a Prothonotary's decision [citation omitted]…in this case, I am unable to ascertain from the record before me whether the Prothonotary acted on a wrong principle or a misapprehension of the facts. [64]

b) TekSavvy's Network Hardening

53. TekSavvy incurred a cost of $55,457 to implement system upgrades and hardening to its customer-facing systems, to respond to the significantly increased inquiry volume and to sustain DDoS attacks such as that received in the wake of Voltage's motion. As Mr. Gaudrault stated, prior to Voltage's motion, TekSavvy had never been subject to such a large targeted attack, and these expenses would not have been required or incurred if not for Voltage's request.[65]

54. The entire disbursement was disallowed on the basis that "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."[66] Again, this conclusion errs in interpreting the scope of the 2014 *Norwich* Order, attributing costs directly and only incurred owing to Voltage's information request to simply "doing business," when the evidence was clear that they were not costs of "doing business" at all.

55. It is unreasonable to conclude that a "cost of doing business" for TekSavvy is the risk of being named an innocent third party in an unprecedented proceeding and thereafter suffering a DDoS attack. As for the conclusion that such hardening was part of "maintaining" TekSavvy's system, the evidence is that, in fact, the hardening was only undertaken to respond to the DDoS attack and increase in call volumes, and would not otherwise have occurred.

2) The Case Management Judge Erred in Disallowing the Vast Majority of TekSavvy's Legal Costs

56. TekSavvy claimed $157,203 as its reasonable legal costs, consisting of $106,584 in fees and $3,724 in disbursements of Stikeman Elliott LLP and $46,895 in

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[64] *The Weldga281596*, *supra*, TekSavvy Authorities, Tab 17, at para. 7.
[65] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 33-34 and 61.
[66] Costs Reasons, TekSavvy Record, Tab C, at para. 122.

fees of TekSavvy's corporate counsel, Christian Tacit.[67] The vast majority of these costs were disallowed, with only $4,500 of Stikeman Elliott's costs and none of Mr. Tacit's being accepted. This disallowance effectively negated the explicit reference in the 2014 *Norwich* Order to TekSavvy's entitlement to its reasonable legal costs.

a) Stikeman Elliott LLP Costs

57. The Case Management Judge did not take issue with Stikeman Elliott's bill of costs itself, finding that it was "appropriately particularized and fully supported by itemized invoices and ledgers…"[68] However, she nonetheless disallowed most of TekSavvy's legal costs, based on her interpretation of the scope of the 2014 *Norwich* Order and her exclusion of the costs of the motion before Prothonotary Aalto. Those costs should have been allowed.

58. The Case Management Judge disallowed TekSavvy's request for what she termed "substantial indemnity" costs. The use of this phrase demonstrates that she failed to appropriately consider TekSavvy's costs or the terms of the 2014 *Norwich* Order. A request for partial or substantial indemnity costs is made by a party in the context of a normal, opposed motion. In the within proceeding however, TekSavvy is an innocent third-party, unilaterally joined by Voltage and not a party to the proceeding. As such—and as the *Norwich* jurisprudence and the 2014 *Norwich* Order make clear—TekSavvy is not subject to the normal cost regime, but is rather to be made whole for the costs incurred as a result of its involuntary participation.

59. Moreover, the order to pay "all reasonable legal costs" of TekSavvy is not a typical order of costs, but a special requirement in the context of a *Norwich* Order to indemnify the innocent third party in respect of the costs it was put to because of the request for information. The term is used in the manner described by the Ontario Superior Court of Justice in *Fontaine*:

> The term "reasonable legal costs" [as used in the Indian Residential Schools national settlement agreement]…does not

[67] TekSavvy originally claimed $177,821, but at the hearing of the Costs Motion abandoned its claim for the costs of an appearance before Justice Mandamin, *i.e.*, $15,041 in Stikeman Elliott fees and $6,500 in Christian Tacit fees, plus HST.

[68] Costs Reasons, TekSavvy Record, Tab C, at para. 68

> reference a costs regime under the civil rules of court of any province. It does however mean that a party will be reimbursed in full for its legal costs, subject to one qualification: those costs must have been reasonably necessary.[69] [emphasis added]

60. The Case Management Judge unduly narrowed the scope of the applicable *Norwich* jurisprudence with respect to costs. For example, citing *Fontaine*, she stated that she was required to determine whether costs were "'reasonably necessary' to give effect to the Order."[70] By adding "to give effect to the Order", the Case Management Judge erred and improperly limited the effect of both *Fontaine* and the 2014 *Norwich* Order itself, which simply states that all reasonable legal costs of abiding by the Order are to be compensated.

61. This conclusion regarding legal costs conflicts with *Norwich* order cases that provide for indemnity for legal costs, including *Norwich* itself ("full costs") and *BMG* ("in addition to its legal costs"). Far from being unusual, the *Norwich* jurisprudence demonstrates that such "but-for" compensation is, in fact, the common measure of reimbursement. As such, there would be no reason for Prothonotary Aalto to make specific reference to same, particularly considering that he was alive to the costs already incurred by TekSavvy (as Prothonotary Aronovitch recognized). Rather, only if Prothonotary Aalto intended to deviate from the usual *Norwich* standard would one expect him to make specific reference to a narrower standard.

62. The Case Management Judge also narrowed the effect of *Norwich*, *BMG* and *Leahy*. For example, with respect to both *Norwich* and *BMG*, the Costs Reasons draw a distinction between costs being awarded to the respondent on a motion who would be subject to discovery (and who would be entitled to full costs) and an ISP, who is only entitled to the costs of providing information.[71] However, this distinction misinterprets those cases and ignores the fact that in this proceeding, TekSavvy was both the responding party and was engaged in a much more significant exercise than merely providing a small number of IP addresses.

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[69] *Fontaine v. Canada (Attorney General)*, 2012 ONSC 3552, TekSavvy Authorities, Tab 18, at para. 7.
[70] Costs Reasons, TekSavvy Record, Tab C, at para. 56.
[71] Costs Reasons, TekSavvy Record, Tab C, at paras. 42-44.

63. Limiting the costs of abiding by 2014 *Norwich* Order to very minimal costs associated with the correlation proper would also be inconsistent with the term of the Order that the "reasonable legal costs and disbursements of TekSavvy shall be paid prior to the release" of the customer information requested by Voltage.[72]

64. The Costs Reasons also ignore the fact that nowhere in the 2014 *Norwich* Order is there any reference to the *Rules* Tariff, partial indemnity costs or substantial indemnity costs. If Prothonotary Aalto intended for TekSavvy's costs to be awarded on any such scale, he could easily have so ordered. Instead, he stated that all of TekSavvy's reasonable costs were to be paid.

65. In contrast, if the costs disallowed by the Costs Order are excluded from the scope of the 2014 *Norwich* Order, TekSavvy, an innocent third party, will have incurred significant costs associated with the request to assist Voltage in its litigation, with no way whatsoever to recover those costs. This is contrary to the basic principles of *Norwich* orders, which require that the responding party not be put to "undue … inconvenience or expense",[73] and ought to be "indemnified for costs to which the third party may be exposed because of the disclosure".[74]

66. The Costs Reasons conclude that TekSavvy had "conflated the legal costs of the motion with the legal costs of abiding by the Order", and disallowed any legal costs associated with addressing and attending on Voltage's motion.[75] The Case Management Judge determined that "[h]ad 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" and stated that TekSavvy has not provided any cases to the contrary.[76]

67. The assumption that Prothonotary Aalto's order for "all reasonable legal costs…incurred by TekSavvy in abiding by this Order" did not include costs related to the motion itself (including the motion to intervene and motions to adjourn) was based

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[72] 2014 *Norwich* Order, TekSavvy Record, Tab B(16), at p. 56, para. 4.
[73] 2014 *Norwich* Reasons, TekSavvy Record, Tab B(16), at para. 45(e).
[74] *Leahy*, *supra*, TekSavvy Authorities, Tab 11, at para. 106.
[75] Costs Reasons, TekSavvy Record, Tab C, at paras. 69-73.
[76] Costs Reasons, TekSavvy Record, Tab C, at para. 55.

in part on the mistaken assumption that there was a "failure to address the costs of the motion" before Prothonotary Aalto.[77]

68. As noted above, at the appearance before Prothonotary Aalto, the issue of costs was in fact spoken to, albeit briefly. During submissions of Voltage, Prothonotary Aalto indicated that he was "not going to decide it today and I won't decide it as part of the order, other than if I grant your order there will be a costs component and we will have to figure out how to make the calculation." He also noted that at the moment, he had "bigger fish to fry" than submissions on costs.[78] Similarly, during TekSavvy's submissions, counsel referred to the costs that had been incurred, citing a figure dating from the earlier January hearing date. Prothonotary Aalto recognized that quantum was going to be an issue, and recognized the some mechanism would be necessary to address them, but in response to discussion about potential submissions on costs, said simply "Let's leave that for another day."[79]

69. The Case Management Judge did not have the transcript of the hearing before Prothonotary Aalto before her, as it was not until the oral argument of the Costs Motion that counsel for Voltage suggested for the first time, surprisingly, that TekSavvy had had an opportunity to request costs but missed the opportunity.[80] However, the Case Management Judge asked for and received submissions regarding what had occurred before Prothonotary Aalto, including in particular with respect to the request for costs, and was expressly advised that "during the course of it, it became clear that [addressing costs] was thinking a step too far ahead in terms of what was before Prothonotary Aalto."[81]

70. Unfairly, though, having received Voltage's assertion that TekSavvy had missed the opportunity to request costs before Prothonotary Aalto—submissions that

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[77] Costs Reasons, TekSavvy Record, Tab C, at paras. 72-73.

[78] *Norwich* Hearing Transcript, TekSavvy Record, Tab B(19), at 125:10-127:12.

[79] *Norwich* Hearing Transcript, TekSavvy Record, Tab B(19), at 106:12-108:4.

[80] Transcript of the hearing before Prothonotary Aronovitch, December 8, 2014 ("Costs Hearing Transcript"), TekSavvy Record, Tab B(20), at 96:28-97:7; 120:11-14 and 136:14-19. Indeed, in its written submissions, while Voltage had disputed the quantum of costs, it had not argued that costs of the motion were not recoverable since the 2014 *Norwich* Order was silent as to such costs.

[81] Costs Hearing Transcript, TekSavvy Record, Tab B(20), at 27:25-29:19; see also 15:25-17:28 and 99:18-25.

are not reflective of what transpired before Prothonotary Aalto, as set out above, and which are absurd considering that even then Voltage knew TekSavvy was seeking reimbursement of considerable costs—the Case Management Judge refused to allow counsel for TekSavvy to respond to that assertion by further clarifying that before Prothonotary Aalto costs had been left for another day, such that there was no "opportunity" to request costs that had been missed:

> MR. MCHAFFIE**:** The question of not requesting costs, my friend said we did not request costs at the hearing. Again, I was surprised to see that what was said at the last hearing before Prothonotary Aalto is at issue now. The Court does have its record of it. I think we may even have filed a transcript, [un]official transcript, with the Court to the extent that it was a decision.[82] There was direct discussion [of] costs, Madam Prothonotary. I took a look. I don't want to give evidence, but I think it's in the Court file. If I'm going too far, then please.
>
> PROTHONOTARY ARONOVITCH: You are, indeed, going too far.
>
> MR. MCHAFFIE: Okay.
>
> PROTHONOTARY ARONOVITCH: The question was there was certainly no order as to costs in the order, and that is plain from the order. However, what submissions were made with costs and whether he considered the costs of the motion, if there is evidence on that, it would have been germane and should have been in these motion records, and I'm not going to entertain that now. I'm going to take it that no submissions were made on costs of the motion.[83] [Emphasis added]

71. It follows that the conclusion that Prothonotary Aalto did not intend to address the costs of the motion was based on a misapprehension of the facts, as well as procedural unfairness, and should be set aside.

72. To the contrary, Prothonotary Aalto was alive to the issue of costs, and explicitly deferred all determination of costs to the case management judge, to be included in his reference to "all reasonable legal costs". There is no indication whatsoever that he intended to carve out pre-motion legal costs from the terms of his order. Indeed, given the scope of the 2014 *Norwich* Order, had Prothonotary Aalto intended to do so it is reasonable to conclude that he would have explicitly done so.

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[82] Mr. McHaffie was incorrect on this point as no transcript had been filed.

[83] Costs Hearing Transcript, TekSavvy Record, Tab B(20), at 137:18-139:19.

73. It is submitted that this is not a case where an order is "silent as to costs" and should therefore be treated as an award of no costs.[84] Rather, the 2014 *Norwich* Order expressly includes legal costs, in a way clearly not intended to be *de minimis*. In any event, the Federal Court of Appeal has recognized that in some circumstances costs can be awarded despite not being mentioned in the original Order. In *Wedow v. Canada (Solicitor General)*, the Court of Appeal stated:

> Having regard to the silence of the Motions Judge on the issue of costs, we are unable to determine whether he turned his mind to that issue. We think it appropriate to return the matter to the Motions Judge so that he may determine whether there were reasons for denying costs…[85]

74. Similarly, in *Lubrizol Corp. v. Imperial Oil Ltd.*,[86] the Court of Appeal awarded costs in the cause despite it being unclear whether such costs had been requested on the motion under appeal. In considering the 2014 *Norwich* Order, it was thus open to the Case Management Judge (and is to this Court) to award costs or return the issue to Prothonotary Aalto even if the Order were silent as to same, which it is not.

b) Christian Tacit's Costs

75. The Costs Reasons disallowed TekSavvy's entire claim on behalf of Christian Tacit on the basis that either (a) the costs did not fall within the ambit of the 2014 *Norwich* Order (on which point they are incorrect, for the reasons set out above), or (b) Tacit's services in relation to that Order "cannot be identified or quantified on the evidence."[87] In making this statement, the Case Management Judge misapprehended the evidence before her and committed an error of law.

76. TekSavvy acknowledged that because Mr. Tacit worked on a monthly retainer, he did not have individual time ledgers attributable to Voltage's motion. However, Mr. Tacit specifically allocated the time he spent each month in responding to

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[84] *Exeter v. Canada (A.G.)*, 2013 FCA 134, TekSavvy Authorities, Tab 19, at para. 14.
[85] 2002 FCA 431, TekSavvy Authorities, Tab 20, at para. 3.
[86] (1989), 26 CPR (3d) 461 (FCA), TekSavvy Authorities, Tab 21.
[87] Costs Reasons, TekSavvy Record, Tab C, at para. 80.

Voltage. The only evidence on the Costs Motion regarding Mr. Tacit's time was TekSavvy's sworn affidavit evidence and Mr. Tacit's invoices which detailed the time associated with this proceeding. Mr. Tacit's invoices were provided to the Court and Voltage did not cross-examine on them at all.[88] Voltage having failed to challenge this evidence in any way, the time should have been taken as proven.

77. In addition, to conclude that none of Mr. Tacit's time was allowable is unreasonable and an error of law. This Court has held that in conducting an assessment, a "paucity of evidence makes it difficult…to be satisfied that each expenditure was incurred further to reasonable necessity. The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion…However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd" [emphasis added].[89] By denying any recovery whatsoever for Mr. Tacit's costs, costs that were supported by evidence and which were actually expended, the Costs Reasons achieve just such an absurd result.

c) The Case Management Judge Erred in Failing to Calculate TekSavvy's Costs of the Original Motion in Accordance with the Tariff

78. Having concluded that TekSavvy's legal costs were not to be fully reimbursed despite Prothonotary Aalto's Order that TekSavvy be paid "all reasonable legal costs incurred…in abiding by the Order", the Case Management Judge noted that TekSavvy had not submitted a bill of costs based on the tariff under the *Rules*. She held that "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."[90]

79. As set out above, TekSavvy was not required to calculate its costs in accordance with the tariff, given the principles of indemnity arising from the cases on *Norwich* orders and Prothonotary Aalto's order for payment of "all reasonable legal

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[88] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 44-46 and Exhibits H and I (Tabs B(2)(H) and B(2)(I)).

[89] *Red Label Vacations Inc. (Redtag.ca) v. 411 Travel Buys Limited (411travelbuys.ca)*, 2015 FC 743 (AO), TekSavvy Authorities, Tab 22, at paras. 43 and 44. In that case the discussion related to disbursements but the same principles are equally applicable to legal fees.

[90] Costs Reasons, TekSavvy Record, Tab C, at para. 76.

costs." In any event, however, given TekSavvy's evidence it was a further error to conclude that TekSavvy's costs could not be assessed in accordance with the tariff. Both the tariff and TekSavvy's Bill of Costs are clearly itemized, and it would be reasonably simple for the assessing judge to apply the tariff to the Bill of Costs. In the alternative, TekSavvy submits that it would be inappropriate if it was punished for not having provided a Bill of Costs in accordance with the tariff because of a good-faith belief that such was not required pursuant to the terms of the 2014 *Norwich* Order. Accordingly, TekSavvy should have been provided with the opportunity to submit a Bill of Costs in accordance with the tariff, rather than having its costs simply disallowed.

80. Finally, the Case Management Judge also disallowed certain legal costs claims without ascertainable reasons. In respect of certain items on Stikeman Elliott's legal Bill of Costs (in respect of, *e.g.*, "reviewing draft and revised press release"), the Case Management Judge stated simply that she "need not comment on the entries"; after citing three examples, she stated "These and other similar items are irrelevant to the implementation of the Order and not recoverable."[91] It is not possible to determine which Bill of Costs entries are covered by this blanket proposition, making it impossible for TekSavvy or the reviewing Court to determine which costs the Case Management Judge intended to exclude and which were included.

3) The Case Management Judge Erred in Disallowing Costs of the Notice

81. TekSavvy's claim for technical administrative costs included $4,522 in costs of providing notice to affected customers. These costs were disallowed on the basis that the notices were not required under the *Rules*, that TekSavvy therefore acted "voluntarily" and that whether TekSavvy "acted out of altruism or self-interest is irrelevant."[92]

82. In making this determination, the Case Management Judge failed to address the question raised by terms of the 2014 *Norwich* Order: whether the notices (and

[91] Costs Reasons, TekSavvy Record, Tab C, at para. 77.
[92] Costs Reasons, TekSavvy Record, Tab C, at para. 64.

associated expense) were reasonably necessary to abide by the Order. Although not expressly required under the *Rules*, notice is not precluded and is consistent with the basic premise of the *Rules* that notice be provided to those whose rights are potentially affected.[93] Thus, by advising its customers of the potential impact on their rights, TekSavvy acted reasonably.

83. Additionally, there was no basis to reject TekSavvy's evidence that the notices performed a valid verification function.[94] The evidence was clear that the notices did perform this function, preventing disclosure of incorrect information. Whether it was the dominant purpose of the notices ought not to be determinative of whether some or all of the cost was reasonably incurred in abiding by the 2014 *Norwich* Order.

4) The Case Management Judge Erred in Excluding Administrative Costs

84. The Case Management Judge excluded TekSavvy's technical costs for "Preparation of information for court" ($1,190) and half of the costs of "Second check/QA verification" ($4,322) on the basis that they were "not identified and supported by evidence", and because at the hearing of the Costs Motion TekSavvy did not explain what was meant by "QA verification."[95]

85. In doing so, the Case Management Judge erred and reached a conclusion contrary to the evidence. These costs were in fact clearly identified and supported by evidence. With respect to the "Preparation of information for court", Mr. Gaudrault's affidavit clearly explained the term, stating that the administrative costs associated with information technology included "associated preparation of information for the Court (namely, extraction of the compilation of the lookup results and creating a Microsoft file for disclosure)."[96] Prothonotary Aronovitch asked a question regarding this line item during the hearing, and this was further explained.[97]

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[93] Rules 3 and 238(2), TekSavvy Authorities, Tab 1; *Stoney First Nation v. Shotclose*, 2011 FCA 232, TekSavvy Authorities, Tab 23, at paras. 9-10; *Barlow v. Canada*, [2000] FCJ No. 282 (FCT), TekSavvy Authorities, Tab 24, at paras. 62-63.

[94] Costs Reasons, TekSavvy Record, Tab C, at para. 65.

[95] Costs Reasons, TekSavvy Record, Tab C, at para. 118.

[96] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 53.

[97] Costs Hearing Transcript, TekSavvy Record, Tab B(20), at p. 47:13-20.

86. Similarly, Mr. Gaudrault's affidavit made clear that the search and correlation process involved the correlation being run once and 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."[98] This description was shortened to "Initial Lookup" and "Second check/QA verification" in the Appendix to Mr. Gaudrault's affidavit, but clearly related to the same process.[99] Indeed, during the course of the hearing, the Case Management Judge stated that she "followed that from Mr. Gaudrault's affidavit," and further clarity was also provided in response to a question from the Court.[100] The Case Management Judge was therefore simply incorrect to assert that TekSavvy failed to explain what was meant by "QA verification".[101]

D. The Case Management Judge Erred in Refusing to Award TekSavvy its Costs of the Motion Before Her

87. TekSavvy claimed $80,420 as its costs of the Costs Motion, costs that were increased considerably by Voltage's filing of irrelevant and unsupported expert evidence that was not accepted by the Court. TekSavvy's claim for costs was supported by an itemized Bill of Costs in accordance with the *Rules*.

88. The Case Management Judge denied TekSavvy its costs of the appearance before her, on the grounds that "TekSavvy, without justification, has greatly exaggerated its claim." In so doing, the Case Management Judge made no reference to any of the factors set out under Rule 400 regarding costs.

89. This Court has consistently held that parties ought not to be penalized, and costs ought not to be refused, for bringing arguments that do not find favour with the Court, absent an abuse of process.[102] Although the Case Management Judge stated that

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[98] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at para. 21.

[99] Gaudrault Affidavit, TekSavvy Record, Tab B(2), at Appendix A–Administrative Costs–Information Technology.

[100] Costs Hearing Transcript, TekSavvy Record, Tab B(20), at p. 47:21-48:17.

[101] Costs Reasons, TekSavvy Record, Tab C, at para. 118. To the extent that the Case Management Judge's reference was to not knowing the common abbreviation "QA" for "quality assurance", no questions were asked on this. In any case, the term used is irrelevant, as the evidence clearly explained that the line item related to the second correlation and comparison exercise.

[102] *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2008 FC 817, TekSavvy Authorities, Tab 25, at para. 3; *Sanofi-Aventis Canada Inc. v. Novopharm Ltd.*, 2009 FC 1139, TekSavvy Authorities, Tab 26, at para. 8.

TekSavvy had unjustifiably exaggerated its claim, this is not borne out by the facts and evidence before her. There was no dispute that TekSavvy had incurred all of the costs it claimed, nor that TekSavvy had actually incurred further costs that it did not claim. Indeed, the evidence was that the claimed costs did not reflect the full costs to TekSavvy of Voltage's motion.[103] The Case Management Judge simply concluded that TekSavvy was not entitled to recover all of the incurred costs. However, as was made clear by TekSavvy's written and oral submissions, TekSavvy had a reasonable interpretation of the scope of Prothonotary Aalto's Order, based on relevant jurisprudence. The fact that the Court did not agree with TekSavvy does not make it unreasonable or an abuse, and is insufficient justification for denying TekSavvy its costs of successfully obtaining costs well in excess of those proposed by Voltage. TekSavvy's position, even if found to be aggressive, was not an abuse of process and did not deserve sanction.

90. Had the Case Management Judge considered the Rule 400 factors, she would have had to conclude that they strongly favour TekSavvy. For example: the issue was important (Rule 400(3)(c)); TekSavvy faced no liability (Rule 400(3)(d)); TekSavvy was forced to undertake a tremendous amount of work (Rule 400(3)(g)); there were public interest and privacy rights at stake justifying TekSavvy not merely consenting to provide the IP information without appropriate checks (Rule 400(3)(h)); Voltage's conduct, particularly its "expert" evidence, unnecessarily lengthened and complicated the proceeding (Rule 400(3)(i)); and there was no justification for Voltage hiring an "expert" witness (Rule 400(3)(n.1)).

91. Moreover, Voltage's conduct in the costs assessment militates in favour of awarding costs to TekSavvy. It has been held that a party making meritless reputational allegations, especially reputations of dishonesty or fraud—which would encompass Voltage's allegations that TekSavvy is a "pirate haven", amongst other bald claims—should face a sanction in costs.[104] Even in its written submissions and at

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[103] For example, the time spent by TekSavvy's CEO, Marc Gaudrault, in responding to the motion and subsequently is not included in TekSavvy's costs: Gaudrault Affidavit, TekSavvy Record, Tab B(2), at paras. 36 and 52 and Appendices A and B.

[104] *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, TekSavvy Authorities, Tab 27, at para. 26.

the motion, Voltage continued to impugn TekSavvy, an innocent third-party. Voltage's evidence and submissions in this regard were given no weight by the Court—exactly as TekSavvy submitted ought to be the case[105]—and were described in the Cost Reasons as "extraneous," "unreliable" and "largely irrelevant". TekSavvy was forced to incur the cost of responding to this unnecessary and unhelpful evidence, including the associated cost of cross-examinations. Voltage's conduct ought to have been sanctioned by the Case Management Judge and remains worthy of sanction by this Court with an award of costs in TekSavvy's favour.

PART IV - CONCLUSION

92. The costs incurred by TekSavvy were reasonable, supported by evidence, were in line with the costs of litigation[106] and, most importantly, were entirely within the scope of the 2014 *Norwich* Order. By disallowing the vast majority of TekSavvy's costs, the Case Management Judge erred in law and fundamentally misapprehended the evidence before her. It therefore falls to this Court to correct these errors and ensure that TekSavvy is awarded the costs to which it is entitled.

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[105] Costs Submissions of TekSavvy Inc., TekSavvy Record, Tab B(17), at paras. 75-84.

[106] The amount TekSavvy seeks in total amounts to approximately $152 per IP address ($322,138 revised claim/2,114 subscribers), a modest amount in the context of purported litigation against each defendant.

PART V - ORDER REQUESTED

93. TekSavvy seeks to have paragraph 1 of the Costs Order varied to award TekSavvy the costs claimed in its revised Bill of Reasonable Legal Costs, Administrative Costs and Disbursements. Alternatively, TekSavvy seeks an Order varying paragraph 1 of the Costs Order so as to Award TekSavvy such additional portion of its reasonable legal costs, administrative costs and disbursements as this Court deems appropriate.

94. TekSavvy further seeks an Order setting aside paragraph 3 of the Costs Order and awarding TekSavvy its costs of the Costs Motion, and seeks its costs of this hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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