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

TRANSCRIPT BRIEF

November 5, 2015

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BETWEEN:

VOLTAGE PICTURES LLC

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JOHN DOE and JANE DOE

Defendants

HEARD BEFORE THE HONOURABLE PROTHONOTARY AALTO
held at Federal Judicial Centre,
180 Queen Street West, Courtroom 4A, Toronto, Ontario
on Tuesday, June 25, 2013, at 10:00 a.m.

APPEARANCES:

Mr. J. Zibarras Mr. J. Philpott	for the Plaintiff
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Toronto, Ontario

--- Upon commencing on Monday, Tuesday, June 25th, 2013 at 10:00 a.m.

THE REGISTRAR: All rise. This special (no audio) at Toronto (no audio) court calls file (no audio) 2058-12 (no audio.)

JUSTICE AALTO: Good morning, everyone. Have a seat for a moment while I get organized.

Before we start, it would be helpful, I think, if we do an inventory of what has been filed so that I know we are all at least reading the same materials. I have got things in bits and pieces here and there, and I'm not sure if it's complete or not.

Welcome to the fray, Mr. McHaffie. I don't appear to have anything filed by you. Is that correct?

MR. McHAFFIE: That's right (no audio.)

JUSTICE AALTO: No, I appreciate that.

MR. McHAFFIE: For TekSavvy (no audio) we have not (no audio.)

JUSTICE AALTO: All right, but your submissions in part are contingent upon the outcome of my decision.

MR. McHAFFIE: Absolutely.

JUSTICE AALTO: But I -- notwithstanding that it's unlikely that I will render a decision at the end of the hearing today, I still want to hear your views on the scope of the order and the nature of the order and the conditions under which the order should be made, if at all,

if I make it at all.

MR. McHAFFIE: (no audio.)

JUSTICE AALTO: Excellent, thank you. In terms of then how we deal with argument, Mr. Zibarras is for the plaintiff, so he will lead; and Mr. Fewer, you are taking the position of behalf of the intervener that the order should not be granted, so we will hear from you next. Mr. McHaffie will save his submissions until both of you are finished, and you will have the right of reply, Mr. Zibarras, although we will see how the day unfolds.

MR. ZIBARRAS: Thank you, Your Honour.

JUSTICE AALTO: So here's what I've got. From you, Mr. Zibarras, I have a motion record.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: I have a supplementary memorandum of fact and law, which I just received this morning...

MR. ZIBARRAS: Yes.

JUSTICE AALTO: And I have tried to read. I've got the brief of authorities that came this morning.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: With it. And I have an affidavit of Mr. Philpott. Or was that --

MR. ZIBARRAS: That's from a previous --

JUSTICE AALTO: That was for the intervener motion?

MR. ZIBARRAS: (no audio.)

JUSTICE AALTO: Well, I read it anyway.

MR. ZIBARRAS: Not needed for today.

JUSTICE AALTO: So Mr. Fewer, let me figure out what I've got from you on this motion. I have read a lot of stuff. In fact, no, the Gartner -- Mr. Zibarras, the Gartner affidavit is also --

MR. ZIBARRAS: Yes, I just about to say, Your Honour --

JUSTICE AALTO: It's also yours?

MR. ZIBARRAS: That was ours.

JUSTICE AALTO: It was on the wrong pile. Mr. Fewer, I have from you a motion record; memorandum of fact and law; I have the affidavit of Mr. Cooke; I have two volumes of authorities. Anything else I should have?

MR. FEWER: Motion record. You should also find the transcript (no audio) cross-examination.

JUSTICE AALTO: Yes, and if not -- I've got that. That's in the motion record.

MR. FEWER: You have all of my materials, then.

JUSTICE AALTO: So that is all of the filings. Mr. McHaffie, you appear to have something that I don't have.

MR. McHAFFIE: I think my friend (no audio.)

JUSTICE AALTO: All right so.

MALE SPEAKER: (no audio.)

JUSTICE AALTO: All right. Leave that there for the moment.

All right, Mr. Zibarras, your turn.

SUBMISSIONS BY MR. ZIBARRAS:

MR. ZIBARRAS: Your Honour, maybe to start you off, I'd ask you to get in front of you the motion record of the plaintiff Voltage Pictures, because I will primarily be referring to that, and maybe what we can do is just turn to tab 1, which is our notice of motion.

At paragraph one we state the relief we are seeking, and in a nutshell, we are seeking an order pursuant to rule 238 of Federal Court Rules that TekSavvy Solutions, a non-party to the action, be required to disclose to the plaintiff Voltage the names and addresses of the customers associated with the IP addresses attached as exhibit B to the affidavit of Barry Logan.

I just want to take you to exhibit B of the affidavit, so that we are all on the same page about what we are looking at.

JUSTICE AALTO: If it's of any assistance to counsel, I can tell you I have done my best to read my way through all of this, but I will add this caveat: I am not particularly tech savvy. Pardon the pun. In any event.

MR. ZIBARRAS: And I will certainly try and take you through it quite carefully, so that you feel comfortable with all issues.

But really, if you look at, as I say, at tab B, what you have here is an Excel spreadsheet that lists IP addresses on the far left, and those IP addresses are all IP addresses belong to the ISP TekSavvy.

And if you look at the column "Filename", you

will see a list of film titles. And those film titles cumulatively are the same titles at tab A of the affidavit of Barry Logan.

Just to put all the parties in their place, Your Honour, Voltage is an LA-based movie production company. They have numerous films, including -- I think the most well-known is The Hurt Locker, which was an Academy-award-winning movie. These are some of their other movies. They are --

JUSTICE AALTO: One of the questions --

MR. ZIBARRAS: Yes.

JUSTICE AALTO: I know that it's adverted to in the submissions, but to what extent do I need evidence that in fact these are copyrighted works of Voltage? Mr. Logan says it, but he says it as a conclusion as opposed to a fact in the sense of it's based on something other than whatever. There's no source of his information relating to it.

MR. ZIBARRAS: Let me deal with that right away for you, Your Honour. And in fact the short affidavit I just handed up deals expressly with that issue. I want to give you context on that issue.

To give you the context I have to take you back a few steps to the start of this action.

When CIPPIC got involved as an intervener and they both to be an intervener, the materials did not include the basis on which they were going to oppose or intervene in this application. And in fact, when they were granted the

order allowing them intervener status by Madam Prothonotary Tabib, she expressly stated -- and I have --

JUSTICE AALTO: Her order is in this record somewhere. I didn't put a yellow sticky on it.

MR. ZIBARRAS: Your Honour, I may have a copy I can hand up.

JUSTICE AALTO: Where is it?

MR. ZIBARRAS: Here is a copy, Your Honour, I can hand up. Just so you know, Your Honour, one of our complaints regarding TekSavvy being allowed to be an intervener is we had no indication from TekSavvy what the basis of their intervention was, both factually and legally. And if you turn to page 2, halfway through page, it says:

"Considering that notwithstanding CIPPIC's failure to fully and specifically set out the type of evidence it night lead if it were given leave to introduce evidence, all the factual issues it would contest if it were granted leave to cross-examine on the plaintiff's affidavit, it is clear from the record..."

And she says that she still wanted to add them.

And just going back one page, at the bottom of page 1, she actually -- and this was because we had made this argument. She says:

"Considering that the proposed intervener must on a motion to intervene describe how it wishes to participate in the proceeding."

So that was our concern from the beginning,

notwithstanding that the court considered it worthwhile having CIPPIC as intervener, so they're here.

JUSTICE AALTO: Mm-hmm.

MR. ZIBARRAS: What we then did is, and now I'm going to turn you to the affidavit of Mr. Philpott, if I may.

JUSTICE AALTO: Okay.

MR. ZIBARRAS: If you'd turn to paragraph two of that letter -- of that affidavit.

JUSTICE AALTO: Yes.

MR. ZIBARRAS: You can see that CIPPIC sent the court a letter back in December stating it intended to intervene in the motion. The letter did not mention establishing proof of copyright as an issue.

On December 21, CIPPIC served the court with its materials seeking intervener status. The materials did not mention establishing proof of copyright as an issue. We then have the order of Madam Prothonotary Tabib. They were granted the intervener status.

On June 28, it served its memorandum of fact and law. That was the first time that we saw that as an issue, and what I want to add is that, at no point during Mr. Logan's cross-examination was it raised as an issue, either.

Now, I should also say that we received this memorandum of fact and law a day later than anticipated under the timetable that had been set. There was an extension granted. But it was at the eleventh hour, so that

was the first time that we saw that.

Now, our position in this motion is that -- and I will take you to the test, Your Honour, but proof of copyright ownership is not a requirement at this stage of the proceeding, and not only did none of the Court of Appeal cases require it, but it --

JUSTICE AALTO: Isn't it implicit in it, though, that if you don't have rights you don't have anything to enforce? So you've got to have rights and there's got to be some basis upon which alleging that there are rights.

MR. ZIBARRAS: Yes, and that's fine. What we did as a result is we have attached an affidavit from Mr. Michael Wickstrom. But the reason I gave you a background, Your Honour, the reason for late filing of this affidavit is because was a non-issue. But it is at tab A to the affidavit of Mr. Philpott, and that we say puts the issue to bed. They are the rights holders of those movies and entitled to proceed or pursue them.

I do want to add, Your Honour, that, again, just to explain that this affidavit only came in late, you will see that we have had this affidavit from November of 2012. But the -- which is when we started, around the time we started the action.

But as I say, and I will deal with this in the test, CIPPIC takes many positions in this application that each try to expand the obligations or duties on the moving party, and we wish to say that the typical test for

granting an order for this type of relief is a very low threshold test. The action has not begun. There have been no discoveries. There has been no full investigation. We are right at the beginning of a lawsuit, and the courts have repeatedly now confirmed through the Court of Appeal that this is not the time to put a plaintiff or applicant to full task of proving their case. It's too high a test. It's too much of on the plaintiff. It makes it difficult for a court to properly consider issues when all the facts and law are not before them.

So we have this before the court. It's now before the court, but it is our position that the test should not be expanded to require it, if that is what CIPPIC is seeking. And we are taking a similar position on much of the other submissions that CIPPIC is making about expanding the scope of what should be required at this stage.

JUSTICE AALTO: Fair enough. I understand your position, Mr. Zibarras. I'm not sure I agree with you that the threshold is very low. It is certainly lower than a prima facie case, as the Court of Appeal has stated, but there needs to be the elements of a case in order for this to have life.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: And I guess from where I sit, my concern from the court's perspective is, if, and it remains a large if until this matter is -- until I have heard full argument on this matter, if your order is granted, is this court then going to have 2000

individualized cases arising from these individuals? It's a mammoth undertaking.

MR. ZIBARRAS: I can address that concern for you as well, Your Honour, though -- and I see that CIPPIC wants to raise this issue as well. I thought the reality is, and we can -- I will deal with it; why don't we deal with it now.

I think the reality is that Voltage does have thousands of potential defendants that it can bring claims against. At this stage all it's trying to do is identify the customer information associated with the IP addresses, because without that, it can't take any further steps.

Courts have noted that that is an important step because once that -- with that information in hand, a plaintiff can decide what route to take in the litigation. Routes could involve litigation, attempts to settle litigation, or deciding not to proceed with litigation. And it all really depends on the facts of each case.

The facts of each case could vary significantly. For example, as my friend will likely point out, the identified defendant, once they're identified, could vary in the sense that it could be an individual; it could be a corporation; it could be a coffee shop. Each of those scenarios raises a different matrix, both factual and legal, and Voltage in each case considers that and decides how to handle the case. Without getting into litigation strategy, I think the short answer is it doesn't mean there are going to be 2,000 lawsuits, necessarily.

JUSTICE AALTO: But isn't litigation strategy also an implicit element of the order you're seeking? Because you have highlighted, and rightfully so, in your written representations, the BMG case.

MR. ZIBARRAS: Right.

JUSTICE AALTO: Which is the leading case in this court, and I appreciate that it has been followed elsewhere, and it is a case that binds me in this determination. But in paragraph 24 you quite nicely set out the provision of the BMG case that Justice Sexton wrote on behalf of the Federal Court of Appeal.

In the highlighted section, and this is where I think we're going to get into some debate today --

MR. ZIBARRAS: Yes.

JUSTICE AALTO: "In my view it would make little sense to require proof of a prima facie case at this stage of the present proceeding."

And that fits with where we are right now. That's where this case is at, at the moment.

"The plaintiffs do not know the identity of the persons they wish to sue."

Same as here.

"Let alone the details of precisely what was done by each of them, such as to actually prove infringement."

Same as here.

"Such facts would only be established after examination for discovery and trial."

Same as here. Now we get to where the rubber hits the road:

"The plaintiffs would be effectively stripped of a remedy if the courts were to impose on them at this stage the burden of showing a prima facie case. It is sufficient if they show a bona fide claim."

Which for purposes, until I hear Mr. Fewer, you have established.

Now, the qualification that Justice Sexton puts on all of this.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: "i.e., that they really do intend to bring an action for infringement of copyright based upon the information they obtain and that there is no other improper purpose for seeking the identity of these persons."

So we must deal with that caveat that Justice Sexton has put on your right to know the names and addresses of these people, and I have to be satisfied that, number one, you do intend to bring an action against each and every one of these individuals; and number two, there is no improper purpose for doing so, don't I? Isn't that implicit -- not implicit -- it's explicit in what the Court of Appeal has told me to do.

MR. ZIBARRAS: To respond to that inquiry, Your Honour, that portion of the judgment, which follows on the strength of test, bona fide versus prima facie, is in the context of privacy concerns, and you -- maybe I can turn

you to the decision, the beginning of the decision in BMG, which is found at tab 4 -- sorry, tab 4A of our motion record.

JUSTICE AALTO: Tab 4?

MR. ZIBARRAS: A.

JUSTICE AALTO: Yes.

MR. ZIBARRAS: So the very first paragraph at page 72 of our motion record at the top says:

"This case illustrates the tension existing between the privacy rights of those who use the Internet and those whose rights may be infringed or abused by anonymous Internet users."

That is the balancing act that these cases are all about: privacy versus copyright holders' rights to pursue or protect their IP.

If you then go to paragraph four, it carries on with the privacy theme.

"Citizens legitimately worry about encroachment upon their privacy rights."

And then if you skip a sentence to the next sentence:

"In an era where people perform many tasks over the Internet, it is possible to learn where one works, resides, or shops; his or her financial information, the publications one reads and subscribes to, and even specific newspaper articles he or she has browsed. This intrusion not only puts individuals at great personal risk but also subjects their views and beliefs to untenable scrutiny."

And it says that privacy advocates are therefore pushing for a strong prima facie case, because the concern is that this type of information will be improperly used. And the comment that's made about "the intent must be to bring an action" means, in my submission, that the intent must be to use this information for litigation purposes, as opposed to try and scraping information about a user's habits of spending preferences and use it for non-litigation purposes or for anything outside of an action. That is what the court is protecting against, and that is the reason for that sentence.

The court isn't requiring that litigation strategy be set; in other words, I mean, our whole legal system is actually based on an encouragement of, for example, reaching early settlements. There is nothing improper about early settlements; there's no rule against early settlements. I can say that each of these John and Jane Does is currently --

JUSTICE AALTO: That's true, but only --

MR. ZIBARRAS: -- part of a lawsuit.

JUSTICE AALTO: -- but only if it's a legitimate case. If -- I mean, I have read this material and I understand now that Mr. Fewer on behalf of CIPPIC has put in play the concept of copyright trolling, the concept of speculative invoicing, the concept that getting the names is simply a means to -- effectively squeezing people for funds that they may not legitimately owe. And that seems to me to, if it were true -- and I'm just raising concerns, Mr.

Zibarras. We've got to face them, so let's deal with them.

MR. ZIBARRAS: Let me deal with that, Your Honour because --

JUSTICE AALTO: Isn't that an improper purpose, if such be the case? And am't I caught by Justice Sexton's admonition that can't give you the list if it's an improper purpose?

MR. ZIBARRAS: In my submission, Your Honour, Justice Sexton did not go that far at all. In fact, he specifically warns about taking that step.

If I can turn you to paragraph 46 at page 81 of the motion record, what happened in the -- sorry, you're in the same memorandum. It's -- I'm looking at the page at the top-right-hand corner --

JUSTICE AALTO: Oh, all right. I thought you were at page 46 of the decision.

MR. ZIBARRAS: Page 81 of the stamped numbers.

JUSTICE AALTO: Yeah, I've got it.

MR. ZIBARRAS: It's paragraph 46. What happened in the motion below was in effect what you have just described, Your Honour, and I should mention that CIPPIC was involved in the BMG decision as well. They were there at the motion and they were there before the Court of Appeal. And a lot of the, what I will call defences to the copyright action that you have seen in Mr. Lethbridge's affidavit were the same types of arguments made before the court below in BMG. And it all ties in, really, to this

issue -- it in fact ties into what the test is, because at that time as well CIPPIC was pushing for a prima facie test and they said that that prima facie test was not met because there were numerous potential defences to copyright which could mean that the plaintiff didn't actually have a claim against the defendants, which I think is the concern you are raising now.

And the court specifically warned about the risks of engaging in that analysis, and that is why it also said it's improper to have a prima facie test at this stage, because there isn't sufficient information.

So the court said:

"As has been mentioned, the motion judge made a number of statements relating to what would or would not constitute infringement of copyright. Presumably he reached these conclusions because he felt that the plaintiff, in order to succeed in learning the identity of the users, must show a prima facie case. In my view, conclusions such as these should not have been made in the very preliminary stage of this action. They would require a consideration of the evidence as well as the law applicable to such evidence after it has been properly adduced. Such hard conclusions at a preliminary stage can be damaging to the parties if a trial takes place, and should be avoided. The danger in reaching such conclusions at the preliminary stages of an action without the availability of evidence nor consideration of all applicable legal principle are obvious, and I will give some examples."

Then he goes through paragraphs 49 through to 53 giving examples of exactly this kind of analysis done by the court trying at this stage to foresee possible defences or make possible findings as to whether the defendants would have defences. And it concludes at paragraph 54:

"Thus the danger of making such findings at the early stages of this case can be seen. I make no such findings here and wish to make it clear that if this case proceeds further it should be done on the basis that no findings to date on the issue of infringement have been made."

And I can take you through those examples, but Your Honour, just to put it back in the big picture, Mr. -- and I have some really concerns about Mr. Lethbridge's affidavit, which --

JUSTICE AALTO: I read your --

MR. ZIBARRAS: -- which I will raise. But Mr. Lethbridge speculates about dozens of potential defendants (sic) a defendant may have. Those defences can all properly be raised in the litigation, whether it's during the settlement stage or once litigation has begun. The thing about settlement is no one is forced to settle. I can't force anyone to settle. I can send a demand letter, and we know now what -- under the new Copyright Act what the limits are to statutory damages. I can send a demand letter and defendants have several options open to them.

What we cannot do today is prevent me from sending a demand letter based on a speculative defence that

a defendant may have.

JUSTICE AALTO: What will the demand letter say?

MR. ZIBARRAS: The demand letter will say that they have been identified as having infringed Voltage's copyrighted works by making them available online; that under the statute they are in breach of the Copyright Act; they are subject to statutory damages; they can settle early, or if they don't settle we will be pursuing litigation against them. Standard demand letter.

JUSTICE AALTO: And then they calculate what it will cost them to defend a lawsuit from you, and decide to pay you something for not defending it?

MR. ZIBARRAS: That is no different to any other let addition, Your Honour. If that is not allowed -- that is not an issue for this court. That is how every piece of litigation is run.

I can start a lawsuit against my neighbour for his branches hanging over my fence, and my neighbour can decide whether he wants to settle or take it to court. And some people settle; other people dig their heels in and take it all the way to court, and then Court of Appeal, and then try to go to the Supreme Court of Canada.

JUSTICE AALTO: But isn't this -- isn't there a nuanced difference here, in that you're asking the court to assist you in that endeavour, as opposed to Voltage in and of itself deciding -- or you yourself deciding, oh, I don't like that tree hanging over my -- that limb hanging

over my fence; I'm going to sue. Isn't there a slight difference when you invoke the power of the court to effectively open a door that may not be legitimate?

One of the questions I guess I had when I was reading this stuff was, well, there's a whole -- it's possible out of this 2000 people, whether Mr. Lethbridge's evidence should be in or out or what, people may have legitimate defences to this, or people may not have been involved at all. They -- some of this tech stuff I was reading, they can inadvertently get caught up in this without any intention whatsoever to have downloaded one of your client's movies. How do we carve that person out?

MR. ZIBARRAS: Your Honour, the way any litigation works is if I send a demand letter, people can write back to me. A demand letter, I'm not putting a gun to anyone's head. If someone has a defence, they can write back to me and tell me what their defence is. And this is why I said up front.

Until Voltage can start communicating with these people, and until we start understanding what some of the defences is, we don't know exactly what our litigation strategy is going to be. I can tell you that Voltage very much intends to sue these people, but if there's an appropriate defence, the chances of that litigation going forward gets diminishes drastically.

But at this stage, there can't be a blanket shield protecting all defendants because of a possibility that one defendant may have a defence.

And again, I just want to emphasize, Your Honour, that CIPPIC materials are in the realm of speculation and possibility. I very carefully cross-examined Mr. Lethbridge on this, and -- I can take you to his cross-examination transcript, but Mr. Lethbridge had never before seen the list of IP addresses that I showed you at tab B to the affidavit of Mr. Logan. He had no personal knowledge about any of these IP addresses. He confirmed specifically that everything in his affidavit was pure speculation.

JUSTICE AALTO: Fair enough, but let's go back to my initial question.

MR. ZIBARRAS: Can I just finish the thought, Your Honour, and then I'll --

JUSTICE AALTO: Okay.

MR. ZIBARRAS: The reason I raise that is, if we follow that approach, what you're asking us to do is actually prove our case beyond a reasonable doubt before I guess the name. That is what you're asking me to do. You're saying to me, you know what, I have a reasonable doubt that someone may have a valid defence, and because you can't satisfy me about that, I'm not giving you the names of anyone's -- the names associated with any IP address.

That is what CIPPIC is trying to do. They are trying to change the test from bona fide, which just means we don't have a frivolous or vexatious intent, to we want Voltage, a copyright holder that has protections under the Copyright Act, to prove their case beyond a reasonable

doubt, today, without even knowing anything about the customer. Otherwise they don't get to get the information, and they cannot bring their claim, which is an impossible situation.

JUSTICE AALTO: I see where you're coming from, Mr. Zibarras. I guess my original question related to you have asked for this kitchen sink of names.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: Throw everybody was, because Canipre, or however you pronounce it, found all of these names relating to one of the films that your client has copyright to. But there's a link -- there's a potential link missing, and that link is whether the court should assist your client when the link as to whether or not these people intentionally were doing it or were caught up in some sort of inadvertent exercise that they knew nothing about.

MR. ZIBARRAS: Right, yes.

JUSTICE AALTO: I told you at the outset, I'm not tech savvy.

MR. ZIBARRAS: No, no, I understand, Your Honour.

JUSTICE AALTO: I could hit a button on my computer and all of a sudden something happens, and I could be caught up in that kitchen sink. Why? That is what we're trying to balance here.

Your client has rights. I don't deny that for a second. Your client has copyright in these films, and people ought not to be downloading them and potentially

gaining profit from them or otherwise. So we really do have a balancing issue here.

MR. ZIBARRAS: And Your Honour, to be honest, the motions judge at the BMG case had exactly the same concerns, and they are reasonable concerns. And I think, you know, as lawyers and judges, we are all automatically thinking ahead and trying to problem-solve, but that very concern was specifically raised and dealt with in the BMG decision. Because if you read the case below, and I actually have a copy of it --

JUSTICE AALTO: Well, I haven't read the case below, and it may be of assistance.

MR. ZIBARRAS: I've got --

JUSTICE AALTO: If I've got a copy of it, I will certainly take --

MR. ZIBARRAS: I have a copy of it as well.

JUSTICE AALTO: I did read the Court of Appeal very carefully, which is why that passage that Justice Sexton wrote resonates in this case.

MR. ZIBARRAS: I have one back, Your Honour, with highlighting. I will give you a clean.

JUSTICE AALTO: If it has highlighting, I am much happier with highlighting.

(Laughter)

MR. ZIBARRAS: What you will see if you read the case below, and I will try and find it for you right now, but the court below really engaged in a very fulsome analysis of everything to do with the act of downloading,

copyright infringement, whether it was intentional or not intentional, and came to conclusions about all of these things, or at least expressed grave concerns about all of these things.

That is exactly what the court -- the Court of Appeal overturned everything the motion judge did in that case expect the issue of hearsay, and just to turn you back to the Court of Appeal decision at paragraph 53, on that issue of knowledge or whether they did it intentionally, the court said:

"The motion judge found no evidence of secondary infringement contrary to subsection 27(2) of the Copyright Act because there was no evidence of knowledge on the part of the infringer."

Which I think is the concern that you're raising, that it might be inadvertent. And the Court of Appeal says:

"This ignores the possibility of finding infringement even without the infringer's actual knowledge, if indeed he or she should have known there would be infringement."

And they cite a section of the Copyright Act that applies to and covers off that kind of concern, and then again, I'd read you the paragraphs below about the risk at this stage of engaging in that kind of analysis and dealing with those concerns before the action's begun, before we know who the defendant is, before we know what they did, before we know whether it's one computer or

several in the household, before we know whether the household is a household or a coffee shop, before we know any of those things.

Just to put your mind at rest a little bit more, Your Honour, one of the things a lot of people don't understand about the software is it doesn't actually track people who are downloading. So if you --

JUSTICE AALTO: If I'm at my computer and somebody downloads --

MR. ZIBARRAS: It doesn't track the act of downloading. What it tracks is computers that have on their hard drives and have available for upload Voltage's copyrighted work. That is what it's tracking.

So it scans for IP addresses that have the copyrighted work available for upload, and it checks that that copyrighted work -- it actually copies it. It copies from the IP address, stores it on a shelf, and then compares it to the actual work to make sure it's a true copy.

So we are identifying people that have Voltage's work and that are making it available for upload through peer-to-peer networks, which is how we get it.

It's very simple. A peer-to-peer network is an open market, almost, if I can compare it to that, and people have their wares available, and I can go and say I want apples today, and I go take an apple, or copy an apple from whoever has one. That is how it works.

So the software is just searching all the time for Hollywood movies, and when it sees them it gets a

copy --

JUSTICE AALTO: I understand.

MR. ZIBARRAS: -- of them and stores it. And then it says, well, why are you making my work available for distribution on your computer? You know, you can make your own home movies and distribute it to whoever you want, but I made that. That's my piece of work. Why are you distributing that?

That's what we're doing. And if people have a defence -- I mean, I don't know what the -- to tell you the truth, Your Honour, when you get down to it, there are hardly any defences. It's a very clear infringement of the Copyright Act.

The other thing I can tell you, also to put your mind at ease, Your Honour, is in this case all the subscribers associated with the IP addresses have been given notice.

JUSTICE AALTO: Yes, I saw that in the -- through the TekSavvy web site.

MR. ZIBARRAS: They have been given notice of this action and of the application, and I want to hand up to you the actual -- a copy of the notice that they received, because we worked with TekSavvy in drafting the language, and --

JUSTICE AALTO: You wanted name and address; they put in personal information?

MR. ZIBARRAS: That was one issue, but we worked on it together. It was on consent. But what we

really wanted, we wanted a notice to the users to preserve their hard drives. And what we have in the notice, and I can send you a copy -- give you a copy, Your Honour. And this is the standard -- this was the generic one, and then it was filled in because we didn't the information. So the information was filled in.

And just so you know, Your Honour, the way this worked is we provided TekSavvy with the IP addresses. They processed those. It took them about five days to process them and identify the subscriber information. In the meantime, we came up with a form of letter that was acceptable to both of us. TekSavvy then populated it with the names. We weren't involved in that, and sent it to their subscribers.

There are a couple of things about this I wanted to point out for you. First of all, it makes it very clear that there's going to be a motion where their information is going to be sought to be released. They were given the date of that. That date, of course, has subsequently changed, but I understand that TekSavvy keeps informing customers about the dates, including on their web site.

It does ask its customers to seek independent legal advice, and -- for the purposes of this application, and then at the bottom of that first page, you see what we wanted in there.

JUSTICE AALTO: "Until this matter is resolved"; yes.

MR. ZIBARRAS: And why that's important, Your Honour, is the one thing about electronic -- the electronic world is there's a record of everything, so the downloading or uploading activities of people is on their computer.

I submit that these defendants in fact have very few if no defences, because the fact that they would have been engaged in this activity and that this -- this copyrighted work would be on the computers would be almost beyond dispute. There was no evidence that there was any problems with the software, in fact, just to close that off, we got an expert report of Mr. Gartner, who is independent, is not employed by any party, involved who actually looked at the source code of the programme and analysed it and said that in his expert opinion it would accurately do what it was supposed to do.

He wasn't even cross-examined. There's no competing expert report to suggest that there are any errors here.

We know that TekSavvy has already identified these people and given them notice. None of them are here saying, what IP address? What -- I don't know who TekSavvy is. And they have an opportunity to be here.

So I think that speaks to some degree as well of whether what we're requesting is so beyond what we should be doing or whether it's really right in the framework of exactly what we should be doing and what the court can order.

Just to -- before I leave the point, though,

just to emphasize the issue, the Court of Appeal has now repeatedly said -- starting with BMG, they said it's a bona fide test. You just have to show that -- and just let me deal with the bona fide test so that we're on the same page. And again, bona fide was in the context of the degree of facts and law required, and we all know the prima facie case. The prima facie case is required when I'm seeking an Anton Piller order, something extremely invasive where I'm freezing assets or getting an injunction. And that requires -- that doesn't require that I prove my case, it just requires that I show I have a strong case.

We are not even there. We are at bona fide, which the courts have interpreted that I don't have a frivolous and vexatious case.

JUSTICE AALTO: And I'm with you on that point, Mr. Zibarras. I've got the bona fide test clearly in my mind.

MR. ZIBARRAS: All right, so the point that I want to make is --

JUSTICE AALTO: The question, though, goes to the qualification of Justice Sexton on making these kinds of orders.

MR. ZIBARRAS: Just to put that qualification in context, it doesn't -- well, first of all, CIPPIC cannot indirectly get around the bona fide test and assert a prima facie or stronger than prima facie case by asserting the kind of defences it's doing, because then we have moved the target again and we are being put to task to prove our case

-- to CIPPIC's satisfaction, it would actually be beyond a reasonable doubt, and I say that because their defences are pure speculation. So all their doing is they're throwing some doubt at us; and they're saying look, if there's some doubt, the court can't assist you. And I say that's completely wrong.

And I said because of the context of the privacy issue what the court meant is you have to be using this information for litigation purposes, not, for example, to get the court's assistance to get private information of people and then use it for non-litigation purposes.

JUSTICE AALTO: No, and I agree with that point, Mr. Zibarras, and that's why Mr. McHaffie is here, to provide the fence posts around whatever order the court should make if the court is persuaded to make the order you want. So there will be significant fence posts on the information that you would otherwise obtain.

MR. ZIBARRAS: Let me cover what information we are seeking, because this is important as well if we're going to put your mind to rest on this issue. Just so you know, the software does not gather any other information other than the IP address at the specific -- at a specific time that one of Voltage's copyrights works was found available for upload on a peer-to-peer network.

If you look at Barry Logan's affidavit, he kind of deals with this, where he says at paragraph 11 -- and sorry, Your Honour, that is back in our memorandum at page 10 of the motion record.

JUSTICE AALTO: I have it. I have it.

MR. ZIBARRAS: He says at the bottom:

"The forensic software then downloaded the copies of Voltage's copyrighted works available for distribution on the peer-to-peer network."

And that is what I mean. It finds a copy of the work that's available for upload, and the software actually copies it and makes a copy of it, and records the IP address assigned to the peer by his or her Internet service provider, the date and time at which the file was distributed by the seeder or peer, the peer-to-peer network utilized by the peer. That's easily identifiable from the IP address. It's not a contentious issue, and it's certainly not in this case because they were all TekSavvy IP addresses. We don't have any that TekSavvy said that's not mine.

And the only other data it collects is the name of the file and the size of the file. And by that, if you remember when I had taken you to tab B of Mr. Logan's affidavit, that's the name. So it actually -- that is how I think you would see it if you were on the peer-to-peer network, if you did a search for, for example, Another Happy Day. You know, these files come up as "Another Happy Day 2011 DVD WEB XVID", and people go, oh, that's the movie I want to see, right? And then that's how they click on it.

And the size is important, because the size of the file also confirms that it's a full movie, because if it was the first minute of a movie, the size would be tiny.

Mr. Logan also says that of course he always confirms that it's the full movie.

That is the only information they secure. They don't have any other information associated with the IP address, so they don't have that person's spending information. I mean, frankly, Your Honour, the only thing -- the only privacy invasion here is that person's movie preference, single movie preference at that time. That is what we're making public. That person likes happy days and had it available for upload -- sorry, for download on his computer.

And I think a case that confirms kind of that balance is -- I can find it -- is the Trapp decision, which is at the last tab of our memorandum, tab E. If you turn to paragraph 134 and 135, which is on page 152 of the motion record, it shows how limited the invasion of privacy is in these cases. It says the name and address -- at paragraph 134, Your Honour.

JUSTICE AALTO: 134 of the decision?

MR. ZIBARRAS: Your Honour, yes, which is at page 152 of the motion record. I just find it easier to refer to the stamped pages.

JUSTICE AALTO: The very last page?

MR. ZIBARRAS: Yes.

JUSTICE AALTO: Okay.

MR. ZIBARRAS: It says:

"The name and address or for that matter telephone number alone in this case provide no further

insight into Mr. Trapp's private life, apart from what Mr. Trapp already exposed by his participation in the peer-to-peer network. Disclosure of this information in this case does not affect his dignity, integrity, or autonomy, any more than it is already affected by his sharing of images on his computer with other Internet users. In a case such as this where Mr. Trapp has put into the public realm on the Gnutella network", another peer-to-peer network, "information about his activities or lifestyle, and it has come to the attention of the police, the state is entitled to investigate the identity of whom it is dealing with, since it has come to the attention of the state by lawful means."

This was in the criminal context, Your Honour, but the principle applies equally. The cases such as this find that a peer-to-peer network, if you're participating in it and your making product available on it, you are anticipating that other people are going to see what you are make available. So it's not a truly private realm.

And these, by the way, aren't pay sites, like people don't pay to be involved here. It's open, so there's no --

JUSTICE AALTO: There is no fee for using the --

MR. ZIBARRAS: That's right. That's right.

JUSTICE AALTO: -- or the BitTorrent system or any of that.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: The only fee is to TekSavvy, for being able to have them as your ISP.

MR. ZIBARRAS: Right. So -- that's right. So there's no fee. And why I raise that is I think there were some cases where there were these web sites you can join for a fee, but there was a high expectation of privacy because they promised that it was private or something like that. There's nothing like that in these open peer-to-peer networks, and that is what the court is saying here.

But it's also confirming that the invasion of privacy is really limited to that one thing that you made available that we have identified.

So getting back to the point I think I was trying to make in all of this is there's no risk of Voltage securing information that goes beyond what I just described in the nature of spending habits, financial standing, sexual preferences, the kind of things that may be of greater concern, and then using that for improper purposes that have nothing to do with litigation. And if that was a concern, then the court would want to be more careful or get more involved, or maybe find that the balance wasn't met. But what we're asking for is really what's in the phone book, and it associates only with one movie.

And on that point, Your Honour, I do want to comment on a case that my friend raised on this issue of trolling and how defendants are left with no choice. But the case that my friend relied on was a comment by the court in --

JUSTICE AALTO: The U.S. case?

MR. ZIBARRAS: Yes, but it was a comment by the court in a case involving pornographic films. And the concern there was a completely different concern, because it actually described it as the -- I don't remember the word, but the social stigma was so high in being identified with having watched that kind of pornographic film that the court felt that this was strong-arming defendants into settling for any amount to avoid their names being published as having been involved in that conduct.

And sorry, Your Honour, the case I am referring to is in my friend's memorandum of fact and law.

JUSTICE AALTO: Yes, I know. I have read the excerpt.

MR. ZIBARRAS: At paragraph 59. And again, you know, the language used by the court was "paralyzing social stigma." That's the word I was trying to remember.

Having a Voltage movie, however one feels about the quality of those movies, is not going to be anywhere close to that. Another Happy Day is not going to have a paralyzing social stigma attached to it that is going to strong-arm anyone into any kind of improper settlement. So we've got an even playing field.

It's becoming -- it's a massive problem for copyright holders. It has been literally unenforced forever, so there is this sense of entitlement by the public to download other people's copyrighted work or make it available at will. It does cover the whole spectrum of

society.

Part of what plaintiffs like Voltage are trying to do is send a message that it's not okay and there will be some enforcement. In other words, this cannot go completely unenforced by anyone forever, because it has a very real cost to Voltage, and Voltage does have protection under the statutes and our laws.

And it's in a way, given the statute, it's like I parked in a spot and didn't get a ticket -- didn't pay for the spot, and I took a chance whether somebody is going to give me a ticket or not. That is really what we are dealing with, given the level of activity, the range of enforcement, and the statutory damages, and some people may be willing to take the risk; others, if they find out that there is enforcement, may no longer be willing to take the risk. And those who take the risk are potentially going to have to decide how they want to deal with the litigation.

But I think to suggest that it's an uneven playing field is misleading. The reality, the starting point, in our submission, is that you have a copyright holder that has spent millions of dollars to produce something that's theirs, and they are the only ones that are allowed to distribute it, and that is how they make their money. It's not available for everyone else to distribute it.

All right. Now, let me move on to -- I think I have covered the bona fide versus prima facie. We have also kind of covered the privacy issue, which I think I have

covered. And really my friend spends most of their time in their submissions dealing with those two things. They say that notwithstanding the Court of Appeal's decisions, they still believe it should be a prima facie test, and really most of what follows is an attempt to apply a prima facie test. So we say it all falls away.

The other thing they are doing is they are still trying to suggest that the privacy rights are paramount, and we say that CIPPIC goes too far, because what CIPPIC falls to do is really engage in the balancing act that the courts have engaged in.

I do want to emphasize, Your Honour, that this issue of balancing privacy versus the rights of copyright holders is front and centre of all of the Court of Appeal decisions. They start off by saying this is a balancing act.

JUSTICE AALTO: Balancing act.

MR. ZIBARRAS: They spend a lot of time considering all the privacy rights and issues and whether we should be invading, but they also conclude that in this case, because it's illegal activity that has been complained about, and because the invasion is so limited, that it is fair and proper to make those names available. Plus, as I pointed out, they said there's not really an expectation of privacy if you are going on a public peer-to-peer network.

JUSTICE AALTO: Does it make sense, then, Mr. Zibarras, since you have covered two issues which were of great concern to me when I read the materials, does it make

sense that you save the rest of your ammunition for reply? I will give you every opportunity to make all the points you want. That is not an issue. We have the whole day if we need it. I don't think we do, but in any event, it might focus the argument very clearly if we hear from Mr. Fewer and know precisely what case you have to respond to.

MR. ZIBARRAS: I'm happy to do that, Your Honour.

JUSTICE AALTO: Why don't we do that, and you and Mr. Fewer trade places, and we will take a slightly early mid-morning break while everybody gets set up. Why don't we do that.

Madam Registrar, we will take a 20-minute break.

-- BREAK TAKEN FROM 11:07 A.M. TO 11:27 A.M.

JUSTICE AALTO: All right, Mr. Fewer, your turn.

SUBMISSIONS BY MR. FEWER:

MR. FEWER: Your Honour, CIPPIC is an intervener on behalf of the public interest here. We don't act for the John Does. We don't act for the Internet subscribers who are the subjects of the order, and we certainly don't act for TekSavvy. So our position is somewhat unique. We are not here to offer a defence, copyright defence, or to plead what the Does would plead, if they were here. So our evidence and our argument has not dived deeply into things that might more properly be brought by those defendants or by those subscribers if they were

here or once they are served with an order, should an order issue.

Instead, our submissions here are geared towards really public policy decisions. The first issue that we want to submit on is: What is the right test for revealing the identity of anonymous Internet speakers?

And you've read our materials. We have gone in great deal -- we have gone into a great deal of detail into describing the value of anonymous speech and the importance of anonymous speech from a constitutional perspective.

Right off the start, I need to be very clear that the test that will come out of this case in the context of copyright will be the same kind of test that will be applied again in the context of copyright in cases of whistleblowers or leakers, people who are disclosing information that may be subject to -- information on documents, on works that are subject to copyright and would be subject to a claim for copyright infringement. So the test that we arrive at has to be robust enough to accommodate those kinds of expressive values.

At the same time --

JUSTICE AALTO: But the test we've got to arrive at, though, has been outlined for us by the Court of Appeal, the Federal Court of Appeal in the BMG case. I mean, you're not asking me to change that test? Because I'm not in the business of overruling the Court of Appeal.

MR. FEWER: Well, My Lord --

JUSTICE AALTO: There may be nuances to it that arise in this case, but I'm not about to change what they have said. If anybody is going to change what they said, they've got to change it. I've got to apply it.

MR. FEWER: I think my response is exactly as you describe, the nuance. What the Court of Appeal -- the Federal Court of Appeal did in BMG and Doe was address the wider public interest issues that had been presented to it in that case by CIPPIC, among others, and also by the Internet service providers who were there in that case on behalf of others.

JUSTICE AALTO: There were a large number of counsel present at the hearing of that case.

MR. FEWER: That's true. I feel somewhat lonely this time around. That having been said --

JUSTICE AALTO: At the next level you may gain more support; who knows.

MR. FEWER: While I'm not anticipating a rousing overturning of the BMG and Doe decision, I do want to put before you, My Lord -- My Lord; Your Honour -- the arguments that might be more properly brought before the Federal Court of Appeal.

But that having been said, when you look at BMG and Doe, what they did with respect to the public interest issues around privacy are basically it's exactly what a Norwich order ought to do, which is engage in that balancing test that -- looking at the wider interests of justice. The court didn't turn its mind in that case to the

interests of the court and the efficient administration of the justice, because that case only involved 29 Does; it didn't involve 2000 plus.

Similarly, the court didn't turn its mind to issues of freedom of expression, as the Warman case did in the Ontario Divisional Court later, because again, those issues weren't present before the court. Had the court turned its mind to those issues, certainly it would have phrased -- it would have phrased itself application of the test in a way that encompassed the wider societal interest. And it certainly -- I don't think anybody is saying that the Federal Court of Appeal denied those avenues of argument in proper cases.

JUSTICE AALTO: Okay.

MR. FEWER: More properly, our submission on what the proper tests for a Norwich order is in our materials. We say that the divisional court got it right in the Warman case, with the nuance that the court in Stewart, the Ontario Court of Appeal in Stewart, in looking at the balancing test, the balancing interests in the fifth stage of the inquiry, phrased it correctly. That's the test. That is what the court has to turn its mind to.

JUSTICE AALTO: What passage of Stewart is it? This is the Globe and Mail case?

MR. FEWER: Yes, Globe and Mail case; exactly.

JUSTICE AALTO: Specifically what of passages of Stewart do you want to draw to my attention?

MR. FEWER: Yes, it's at paragraph 25. In paragraph 25 the court reviews the tests as laid out in the lower court, and was satisfied that that test was correct, with the exception of the first paragraph. We say that the first paragraph in the lower court had been correctly laid out. That is the Warman decision.

Our issue with the manner in which the applicant has laid out the test is argued in our paragraph 39 of our factum, where we see that the plaintiff -- or pardon me, the applicant, is slavishly following the requirements of rule 238. However, even as the Court of Appeal found a decade ago, other considerations come into play. The court in that case laid out some of those other considerations, in particular the privacy interests of respondents in that case.

Now, we also say in this case --

JUSTICE AALTO: Sorry, Stewart was a much larger case in that it engaged issues of freedom of expression and privilege that don't, as I see it at the moment, at least, subject to your argument, aren't engaged in this case. We have -- in its simplest terms, and Mr. Zibarras in his materials keeps calling this a simple motion -- although looking at the number of lawyers and the volume of information I have to read and digest, this is not a simple motion -- but he says it's a simple motion. All he wants is names and addresses of people who have downloaded improperly copyrighted works, and in order to preserve copyright, he is entitled to have that information so he can

take whatever steps are appropriate in the circumstances.

That, dressed down, is exactly what this motion is about, except it now engages from your perspective, as you say, a privacy interest.

Where does the privacy interest kick in, if you're on an Internet that really has no bounds and those who are truly tech-savvy can find out all sorts of things that nobody is aware of? People can be looking at your computer and you're unaware of it.

MR. FEWER: People can be looking at your computer and you're unaware of it; that would plainly be a violation of your privacy.

JUSTICE AALTO: But they they're not seeking to look at anybody's computers except in the context of litigation. They would have no other access to it, unless they actually commence an action and under the discovery provisions, production provisions of our rules, seek to obtain copies of what might be on the hard drive relating to the copyrighted materials. They don't get it under any other, in any other way. And that's protected -- that's then litigation-privilege-protected. It can't be used for any other purpose, other than specifically for that litigation.

So that's where they're coming from, and they say name and address. What is the privacy concern there?

MR. FEWER: There's I guess two points around this. One is, regardless of the legality or illegality of the activity, there is a privacy interest in your

consumption, your review, your experimentation with content. Question of legality has not been settled in this case; right? There are merely allegations of infringement here. So to say that there's no expectation of privacy because this is just a dirty infringer puts the cart before the horse.

And the second issue -- and this is crucial, right? There's a distinction between the John Does and the Jane Does who are named in the statement of claim and the Internet subscribers who are the subject of the order that the applicant seeks. There are many circumstances under which they will be different people. There will be circumstances under which the subscriber will have no knowledge of and will not know who the John Doe or the Jane Doe may be, and will have no knowledge of the transaction at all. And yet they will still be subject to the order, and will still be visited with a demand letter.

JUSTICE AALTO: I'm sorry, Mr. Fewer, maybe I'm just being dense, but I didn't quite understand where you are coming from with that point.

MR. FEWER: We are talking about the privacy expectation.

JUSTICE AALTO: Yes, the privacy expectation, but all of these people will get notice. They've had notice, in fact. As we sit here, they've had notice that Voltage wants to know their name and address. So how are they -- how is their privacy being invaded?

MR. FEWER: The privacy is being invaded --

that is probably the wrong way that I would phrase it. I would simply say that they have privacy values here that deserve respect from the court and need to get balanced. Right? You don't need to fall so far as to say there has been an actionable invasion of privacy. Or my friend keeps saying that they have no reasonable expectation of privacy. It's a wrong phrase; right? That belongs in Charter jurisprudence, with respect to search and seizure powers, not in the civil context we are talking about here.

Here the expectation is with respect to their anonymous surfing habits, their anonymous online activity and they have a legitimate belief, a legitimate expectation that that will be kept anonymous, subject to those some of those narrow exceptions, and a properly granted Norwich order would be one of those exceptions, provided, again, properly granted. The balancing is taking place.

The third privacy invasion, and this is something that I really wish I had seen earlier. My friend handed this out. The notice that went out to Internet subscribers of TekSavvy included the paragraph -- this is what it says:

"Voltage Pictures LLC has required us to provide you with the following notice. Until this matter is resolved, you are on notice to preserve any and all hard drives or means of other electronic storage associated with your above-referenced IP address and to take no steps whatsoever to remove, erase, discard, conceal, destroy or delete from any means of electronic storage any evidence of

piracy and/or illegal downloading" -- I'm not sure what the difference between the two is -- "and distribution of Voltage Picture LLC's intellectual property."

That's a pretty wide request, and I use "request" mildly.

"In the event that it is determined through computer forensic evidence or otherwise that steps were taken to delete or in any way alter or destroy evidence of piracy activities, you are on notice that said actions will be brought to the court's attention and further associated remedies will be sought against you."

Now, this is going out to every subscriber identified by the applicant, by the IP address, whether they're an actual Doe or not.

Now, my submission to you, Your Honour, is that raises a significant privacy concern. I ask rhetorically: What is on the contents of your hard drive?

JUSTICE AALTO: As I read it, they're not interested in what's on your hard drive; they're only interested in whatever belongs to Voltage that's on your hard drive. And I'm sure that Mr. McHaffie in his submissions, the fence posts on any proposed order are going to make it quite clear that the expansive view of Voltage is not -- should not happen.

MR. FEWER: But they -- my response to that is that the impact on privacy isn't that he's rummaging around in my hard drive for something in particular, it's that he rummaging around in my hard drive. And that's the

concern. That's the concern.

JUSTICE AALTO: But -- all right, so let's look at it from the other side of the coin. How do the Voltage Pictures or the Columbias or the MGMs or whomever, how are they able to protect their copyrighted material from a bunch of people whom they don't know who download their films and have Friday night film night with a group of their friends and they don't pay to see the movie? They don't buy it from a legitimate source. They do it through this BitTorrent system. And it appears on face to be a breach of copyright, and it appears to be on face a denial of income to the producer, the film producers. That is the balancing act we've got here. How do we deal with that, then?

MR. FEWER: I would agree, and frankly, My Lord -- Your Honour --

JUSTICE AALTO: I don't mind being elevated, but, you know, you don't have to.

MR. FEWER: Spending too much time in the Ontario courts these days. You've got a round whole and square peg situation, to a certain extent. We have seen, we put in evidence -- in our submissions some of the results in other jurisdictions that have tried to resolve this, so for example in New Zealand there's a specialized court dealing with this that focuses on it, that has expertise in it, and is developing precedents for how to handle this. And it's relevant in our view to the quantum of damages. So what is that demand figure, which I'm certain we are going to come to shortly in our discussions.

My answer is, under the current law, this is the right -- this is the right vehicle. This is the only vehicle available to them if they want to sue, or if they want to send notices to stop sharing. The problem is, to get there, you have to meet the test. You have to have a bona fide intention; second, you have to meet the balancing test at the back end.

Our submission on this front is that if you're setting up a speculative invoicing scheme, you're not seeking damages. That's all you're entitled to. If you find an infringement of your copyright, you haven't won the lottery. You're entitled to damages and you can elect statutory damages or you can prove statutory damages, but My Lord, Your Honour, Prothonotary Aalto, that doesn't amount to $7,500 or $10,000.

JUSTICE AALTO: How do I get to this conclusion of speculative invoicing? Isn't that a conclusion that would be reached after a trial, after all of the evidence is led as to the intentions of Voltage in these kinds of cases? Isn't there a large element of speculation that I have to go through in order to deal with speculative invoicing as the modus operandi in this piece?

MR. FEWER: Your Honour, I think you've got two avenues to approach that. One is the onus is on the applicant to demonstrate bona fides, and that would mean proper use of the court system here.

JUSTICE AALTO: And that is something that I raised with Mr. Zibarras virtually from the get-go, because

it is of great concern to me and I will take that point. But isn't that where Mr. McHaffie and his client come in, to say if this court were to open the door that Mr. Zibarras's client wants opened, it's only opened this far and on these circumstances, and the court should control what happens next? And that's in the back of my mind: Can the court control how Voltage is able to use this information?

MR. FEWER: I'm open to suggestions as to how that can happen.

JUSTICE AALTO: I'm looking for help.

MR. FEWER: What I can tell you is, I mean the experience on speculative invoicing in other jurisdictions has not been that we do see statements of claim litigated. We searched for a Voltage case where a John Doe that was the subject of one of these orders contested the statement of claim.

JUSTICE AALTO: There was the decision of my colleague on this Bench, Justice Shore, in 2011. I don't know how many John Does or Jane Does were identified under that order, but I take it there were no claims that flowed from it?

MR. FEWER: We asked on cross-examination.

JUSTICE AALTO: Or you said you found?

MR. FEWER: We asked on cross-examination for assistance with the view that this question would be coming from the Bench, and we got no answer on that, a refused answer.

Keep in mind that that decision from Mr.

Justice Shore, that is again on one of these motions. It's not on the merits.

JUSTICE AALTO: Yes, but he had a very different record in front of him, so while initially I thought I might by bound by Justice Shore's order, I am comforted by the fact that the record I have to deal with is a significantly different record than his record.

MR. FEWER: Yes.

JUSTICE AALTO: So it's not -- it's not binding per se.

MR. FEWER: I started to respond to your earlier question about how do we look at the bona fides and I said, answer one is you look to the applicant. The applicant ought to be bending over backward to assure the court that nothing is amiss. If there is nothing wrong with granting this order, if there is nothing wrong with the business plan underlying the filing of the statement of claim and the filing of this motion, the applicant ought to be doing everything it can to assure the court of its bona fides to assure the court that there will be no misuse of judicial resources, to assure the court that the interests of justice weigh in the favour of the applicant. Our submission is that that hasn't happened in the case.

Frankly, CIPPIC was anxious to adduce evidence of what was going to happen, what was the relationship between Canipre and Voltage; how was the -- how was the venture going to pay out, so to speak. What was the nature of the relationship. Frankly, I viewed those

questions as useful questions for the applicant to have answered, but they were refused.

JUSTICE AALTO: I read a fair bit of the cross-examination, and I saw where you were coming from on those various questions and neat issue as to whether or not they were relevant for purposes of this motion.

MR. FEWER: Our submission is plainly they are, and plainly they are because they go to bona fides in some circumstances and because they go to the balance of interests in the fifth element of the Norwich test in other instances.

Some of the questions were relevant because we had a fact witness who was supporting the evidence of the applicant, and not indicating how, well, if they had an interest in the outcome of the wider litigation venture, which we thought went to credibility, among other things.

JUSTICE AALTO: How do you say -- well, I guess you would say that for them to prove they're not engaging in an improper purpose, they would have to reveal the retainer of relationships between themselves and Canipre and what precisely the outcomes are expected to be, what the business plan is that relates to this type of litigation. You would want to know all that?

MR. FEWER: I would want to know all of that, yes, Your Honour. If I looked at the other cases that have dealt with these issues, for example --

JUSTICE AALTO: Has there been any court anywhere that has gone down that road?

MR. FEWER: Oh, certainly. I didn't put this case in evidence -- in our materials. However, it is researched to in the U.K. Supreme Court decision at tab P. That decision is the rugby case. A lot of these speculative invoicing cases in the U.K. are football and rugby. In that case the court cites the Goldeneye decision, and the Goldeneye decision looked long and hard at the contractual relationship amongst the various interest at play.

JUSTICE AALTO: But on a motion such as this?

MR. FEWER: On a motion such as this; indeed. Similarly in a bundle --

JUSTICE AALTO: What part of the decision? Just help me find the passage.

MR. FEWER: Let's see, Goldeneye.

JUSTICE AALTO: Golden east --

MR. FEWER: My friend is telling me paragraph 41, and that's right. Mr. Howard referred finally to Goldeneye and Telefonica, which is an interesting case, and potentially relevant to our discussion of the importance of the dollar figure demanded to weeding out the speculative invoicing cases from those that are really going after damages, really trying to protect their intellectual property.

While I am on that point, I might as well say -- earlier I said that you're only entitled to damages; you haven't won the lottery. That is certainly the case. In Goldeneye the court there found upon a set dollar figure, and actually it was appealed up to the Court of Appeal and

they agreed on this point. There was, I think it was a relatively modest dollar figure, 750 pounds sterling, if I recall, about $1,200 Canadian, was this kind of set damages or the settlement demand that was asked. And in that case the court said you can't do that; that is speculative invoicing. Instead, you know, you're only entitled to damages, so you have to find out from each defendant what's the scope of their infringement and what damages are you entitled to.

That is how you do the business. That is how you use a Norwich order to identify a potential defendant and to engage in a resolution of your claim, if you have bona fides. If you lack bona fides, then you're on a speculative invoicing venture. You're trying to minimize your costs by asking for a gross amount of money.

This is the second key. I haven't said this, but it's plainly in our materials. The dollar figure demanded -- what makes a speculative invoicing model work isn't damages, it's the cost of defending yourself, the bother, all that stuff. The Prenda decision, the decision that my friend already referred to, it's in our materials. This is the Ingenuity and John Doe case. This is a description; right? That case happened to involve pornography. This case doesn't, but frankly that's a relatively minor difference in terms of the invoicing model.

JUSTICE AALTO: Which case is that? Where is it? Oh, is that the case that -- the U.S. case cited in your factum?

MR. FEWER: This is, yes. This is one of the U.S. cases we cite. This is Ingenuity 13 LLC and John Doe.

JUSTICE AALTO: Yes.

MR. FEWER: It's at tab F of volume 3. And in that case, it leads off that -- the entire decision is interesting reading, obviously a Star Trek fan, but the court leads off by saying:

"Plaintiffs have outmanoeuvred the legal system. They have discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defence costs, and they exploit this anomaly by accusing individuals of illegally downloading a single pornographic video. Then they offer to settle for a sum calculated to be just below the cost of a bare-bones defence. For these individuals, resistance is futile. Most reluctantly pay rather than have their names associated with illegally downloading porn. So now copyright laws originally designed to compensate starving artists allow starving attorneys, in this electronic media era, to plunder the citizenry."

JUSTICE AALTO: Mr. Zibarras hardly looks like he's starving. (Laughter). In any event.

MR. FEWER: Indeed. Perhaps a second manner in which this case is slightly different. But keep in mind: Mr. Zibarras has said there's no paralyzing social stigma attached to being caught downloading a Voltage picture, but there certainly is social stigma attached to being publicly outed as having infringed copyright in this way, and being brought to -- threatened with a settlement and being

threatened with going to court.

While we're talking about the issue of the dollar figure, my friend again has talked about what the statutory damages requirement is. My recollection is the statement of claim says this is non- -- this is commercial infringement, and so the non-commercial infringement limitation will not apply. Am you correct on that?

JUSTICE AALTO: I didn't think this fell into the commercial --

MR. FEWER: Our submission is plainly it doesn't, and I may be confusing this case with one of the other cases such as MGM, so if I'm wrong about that, my apologies.

JUSTICE AALTO: It's tab 3. I didn't read it as being the commercial, but they are claiming damages, statutory damages pursuant to section 38 (1) and section 35 of the Copyright Act. Paragraph 17 and 18 of their --

MR. FEWER: Yes, so it doesn't. Why I say that, then, my recollection was correct that 38.1 is the general statutory damages provision. They haven't restricted themselves to the non-commercial, so they have opened themselves up to a claim for the general statutory damages claim, which is of course up to $20,000 per infringement.

JUSTICE AALTO: I would have thought that with individuals that they are seeking, that I read it as not been commercial, as being individualized.

MR. FEWER: Our submission would be would

certainly be that these are non-commercial infringers, and that they would be subject not to the general statutory damage regime but the non-commercial infringement regime.

JUSTICE AALTO: Even if they're having Friday night at the movies with their friends on downloaded movies, I still don't see that as, quotes, commercial.

MR. FEWER: Absolutely.

JUSTICE AALTO: Mr. McHaffie is rising to help you with this.

MR. McHAFFIE: (no audio) self-evident (no audio) sole purpose of the (no audio) the allegation (no audio) important (no audio).

JUSTICE AALTO: That. Thank you, Mr. McHaffie. I jumped to damages without reading paragraph 16, but even although it says "commercial gain", I still don't think Friday night at the movies with a bunch of your friends is commercial in the sense that one uses the phrase "commercial", but in any event.

MR. FEWER: But the operative --

JUSTICE AALTO: We don't have to decide that here, but it's one of the --

MR. FEWER: No, but my point, My Lord --

JUSTICE AALTO: -- (inaudible) to this.

MR. FEWER: My point, My Lord, Your Honour, is that the subscriber who received the notice, they may. They don't have the benefit of our ruminations here in the courtroom. All they've got before them is the notice.

JUSTICE AALTO: Fence posts. Mr. McHaffie

has been busy making notes.

MR. FEWER: With some -- well, perhaps before we end, we can talk about what the content of any such letter that would go out to subscribers would be, should this court decide to issue an order.

My own view is that it would be wise to include a draft of such a letter as an appendix to any order that issued, and that the parties should have the opportunity, of course, to agree, and, for lack of a better word, negotiate the terms of that order and the attached letter.

And in fact this is how the issue of the 750 pounds sterling rose to the fore in Goldeneye. This is the route that the court there followed. The terms of the order were negotiated. The terms of the letter being sent to subscribers was also negotiated and before the court, and the court in that case said you can't have 750 pounds sterling. That is not supportable by the theory of why we have Norwich orders. It's not bona fides.

I am hopping around wildly in my submissions, and I apologize for that.

JUSTICE AALTO: Quite all right, Mr. Fewer. I like really drilling down to what really is at stake here in dealing with that issue, because it's going to turn on that at the end of the day.

MR. FEWER: Let me talk very briefly about the difference between bona fides and prima facie. Now, reviewing our submissions, despite the amount of time that

we took in crafting this over the last month, my view is that you always need to have bona fides. That's got to be there. If you don't have bona fides, if you don't have goodwill towards the court, for lack of a better phrase, you don't get the order. You've got to have bona fides.

Whether you also need to make out a prima facie case will depend on the circumstances. There will plainly be circumstances, and these are the circumstances that Justice Sexton referred to, and also the court in Stewart, where you will not be able to make out a prima facie case because it's truly a third-party discovery motion. You don't know whether you have a case or not, and you need the order to determine whether or not an action will lie.

In those circumstances, it does lie within the discretion of the court to do justice among parties. That is the objective here, to do justice among the parties, and have a lesser standard to allow the order to fall, if the balance of interests at play favour it in the absence of a prima facie case.

But much as the court in Warman said in the lower court in Stewart, where there are significant privacy interests at play, or expressive interests at play, or again, for lack of better words, interests that lie at the heart of those tasked with administering justice in this land, where those issues are at play, we ought to be requiring a prima facie case. We ought to be asking of applicants who come to the court for this extraordinary

order, exceptional order, that they have got the goods. That they can make out a case. They come in with good will, with good bona fides, and they can make out a case.

This is important. This is not -- I don't think this is insignificant, but particularly when you take into account the other interests that CIPPIC cares about, around things like anonymity, high value anonymous speech, the whistleblower cases, the defamation defence cases, such as public -- public interest publications and whatnot. All of these cases, the onus is reversed. In all of these cases, the defendant, the ultimate defendant has to come before the court at some point and provide the evidence, and the huge problem in these cases is they're almost always ex parte. If you look at -- if you look at the cases that have dived down into what the test is and what are the values and interests at play, they are cases today they are case where exceptionally, an Internet service provider has stepped up and said we've got a concern or where there's been an intervener such as CIPPIC, the I think Goldeneye case, again. I keep coming back to that. Obviously I should have put it in my materials. The Goldeneye case is another case where an intervener stepped up before the court and presented its view.

That's the exception. That seldom happens, and in fact in the last two of the orders that came out of the Federal Court, they were unopposed. And it's a shame that CIPPIC did not find out about those applications in time. We would have filed an application to intervene, to

provide a better record before the court and to give the court a better understanding of the issues at play in front of it.

It is difficult. There may be some cases where the interests of justice are so significant, particularly in the case of anonymous speech, whistleblowing, leaks, where the value of the speech is so high, has clear constitutional value, and yet no one has stepped up, that the court ought to demand not just a prima facie case, and not just bona fides, but that it will overcome defences that could be raised against it.

One of the challenging aspects of these cases is most often these cases involve the press, and the press is there to step up and assert privilege, right? To assert the Wigmore test, because there the interests between the speaker, the person who has the expressive --

JUSTICE AALTO: The onus.

MR. FEWER: Yes, exactly, the subject of the order, and the press are very closely intertwined. It should be clear that that is not what is happening in these cases, in these file sharing cases, in the speculative invoices cases in particular. There the Internet service provider isn't going to step up and step into the shoes of the John Does and the Jane Does, and certainly not advancing defences and defeating, attempting to defeat the motion. Their concern instead, typically, is with their business, making sure that these orders don't turn into a debilitating drain on resources. And make no mistake: They are a drain

on resources.

JUSTICE AALTO: Oh, I'm aware of that. That is why I asked the question about 2,000 cases in this court dealing with copyright infringement.

MR. FEWER: Yes.

JUSTICE AALTO: A mammoth undertaking dealing with cases of that -- that number of cases.

MR. FEWER: Exactly. The -- I lost my train.

JUSTICE AALTO: We are dealing with the source and the --

MR. FEWER: Oh, right. My apologies. I think the point has been made, that the interest of the John Does are not the same as the ISPs', and that is not the case where Wigmore tests arise. And so unfortunately, to a certain extent, the case law that has evolved in those circumstances isn't always -- it's not the Wigmore test that you want to apply in these kinds of cases. Instead you're looking at other interests, and those are the interests that we discussed, about the proper administration of justice; is the court system being used as a tool in a profit-making scheme; is the intent of the applicant in these cases to make money off of the court system, the judicial system, the costs of justice, instead of to be compensated for -- to be properly compensated for damages they have suffered as a result of the infringement?

My friend Mr. Zibarras -- I swore I would stay away from analogies, but he brought up the ticket analogy, the parking ticket analogy.

JUSTICE AALTO: The parking ticket, yes.

MR. FEWER: And Mr. Zibarras -- correct me if I'm wrong -- said, you know you parked there. You knew it was -- you knew it was illegal the park there. You stayed an extra hour. You should have only been there for one; you were there for two, so pay your ticket or not, and face the wrath of the court system.

The problem is the province isn't going come down on you for 7,500 pounds sterling, they are going to come down on you for $40. They are going to come down on you for the cost of the ticket.

What they are not going to do is say, aha, you owe us $40, but it will cost you at least $10,000 to hire a lawyer and defend this, and we are going to demand much more because we are.

JUSTICE AALTO: They can --

MR. FEWER: Because we can.

JUSTICE AALTO: -- fleece them for more money than what conduct requires.

MR. FEWER: Now, I think most people would say that that's improper. The state ought not to be doing that. The province ought not to be doing that, or the city ought not to be doing that. The exploitation isn't -- has nothing to do with the wrong, at the end of the day. The wrong, the legal wrong -- and you parked there; right? You're in the wrong. There's no doubt about it, but that is just the entree into the opportunity. The opportunity is the exploitation of the cost of defence, right? Once

they've got you, you're in for a pound, not a penny. You're in for a pound, so they can extract the pound.

JUSTICE AALTO: I see where you're going with this, Mr. Fewer, I guess, and do we have the cart before the horse in the sense that Voltage has said we need this information for litigation purposes? That is the only reason they get it, if they get it, and because there appears to be a copyright infringement based upon the evidence of Mr. Logan and all of the downloading that has gone on. How do you ever get to prove that it's speculative invoicing?

How does a case get before us to show that Voltage has in fact been using the good will of the courts improperly? Because that's your argument: they are effectively going to be using the good will of the court in an improper fashion.

But at this juncture, it is not all speculation to look at it in that way?

MR. FEWER: That would be true if -- that could be true, if this were a new phenomenon or a new player area in the game of speculative invoicing, but we do have a record. We do have a record of Canipre and Voltage.

Now, you asked this question right at the beginning of my submissions, Your Honour, and I said, number one, the applicant has to show bona fides. The onus is on the applicant to allieve (sic) the court of any concern that this is the case.

And number two, there is evidence there;

right? Voltage is a player in the speculative invoicing game in the United States. We put in evidence in the affidavit of Mr. Cooke of a series of cases amounting to 28,000 John Does in the United States, and we haven't found a copyright judgment in any of them.

We also put in our materials a number of cases where John Does have been sued by Voltage, and in those cases the courts have expressed their dissatisfaction with the model that Voltage is doing.

So we've got cases where they're doing this. We've got -- I would have loved to have had sample letters to be able to show you that we're going to be demanding a dollar figure, but we never got that.

JUSTICE AALTO: Or a Jane Doe or John Doe from Justice Shore's proceeding in which they got names and which you could demonstrate that is what they are doing.

MR. FEWER: Yes.

JUSTICE AALTO: But I don't have that evidence in front of me. That is part of the problem I've got. I haven't got that evidence in front of me.

MR. FEWER: You don't have that evidence here in Canada.

JUSTICE AALTO: I've got -- no, I've got lots of smoke, I mean, in sense that you're raised the U.S. proceedings and the others, and I'm very sensitive of what you're saying. This isn't an easy issue, by any means. But we operate in courts on evidence. And there's lots of speculation in here, but where's the evidence?

MR. FEWER: I will point you to two more items. Number one is we've got that case in the U.S. where a demand letter was put before the court, and it's in the judgment, and that demand letter, I recall that the ask was $7,500 U.S.

JUSTICE AALTO: Yes, but was that the pornographic film case?

MR. FEWER: No, no, that was a Voltage case.

JUSTICE AALTO: Was that the Hurt Locker case?

MR. FEWER: I'm not sure it was a Hurt Locker case or one of the other ones.

JUSTICE AALTO: You see, here we have a legitimate film producer. I mean, The Hurt Locker is not part of this proceeding. Many of their other movies appear to be, but The Hurt Locker is a film that many, many people wanted to see and lots of people will go out of their way to find means by which to download it, and those are the people that Voltage are trying to get at to stop. That is where this whole balancing comes in.

MR. FEWER: Your Honour, you raise a very interesting point. You said that these are the people they're trying to get at to stop. Now, in our submissions -- this is an excellent point. If you want people to stop file sharing, you tell them to stop file sharing. In most of this litigation, this kind of litigation, being copyright infringement, the first thing you send is a cease and desist order, or cease and desist letter. That is not what

happened in this case. The first thing that happened was a statement of claim was filed. That is evidence, in my submission, of a speculative invoicing scheme.

JUSTICE AALTO: But their answer to that is going to be, I would think, in part, we don't know who these people are who are downloading. The only way we can get to the people who are downloading is if you, court, tell TekSavvy to give us the names and addresses. Here we go round the mulberry bush, again and again and again.

MR. FEWER: But we made -- this is an excellent point, because we have actually been around this part of the mulberry bush in the past. On the second adjournment order, my understanding is that TekSavvy had offered to send out that cease and desist. My friends argued that no, we can't have any further delay. Infringement is ongoing. We've got to stop it right now. The response was TekSavvy was oh, well, if that's the issue, we can send a letter to the John Doe -- or to the -- not to the John Does, my apologies, to the subscribers telling them to stop sharing. We can address your ongoing infringement issue.

JUSTICE AALTO: Mm-hmm.

MR. FEWER: Now, my understanding, and Mr. Zibarras can correct me if I'm wrong, but that letter never went. Voltage did not provide that correspondence to Voltage -- or pardon me, to TekSavvy, and TekSavvy did not need to fulfil that undertaking.

If this was really about infringement and

stopping the damages, we would have seen a cease and desist right off the top.

There's a phase for it: In Canada we call it notice notice. You give notice of the copyright infringement to the Internet service provider; the Internet service provider passes it along to the subscriber. Notice and notice. In the United States they have a different regime; it's called notice and takedown. There's a regime where by allegedly infringing content is -- must be taken down on receipt of a notice through the Internet service provider.

So there's a tool to get at just the issue that you have raised, and if this was really about copyright infringement, respect for copyright, stopping the damages, these steps would have been taken immediately. They never were. Instead we saw a statement of claim followed promptly by this motion.

JUSTICE AALTO: I have thrown you off your script, Mr. Fewer.

MR. FEWER: My script is long gone, My Lord.

(Laughter)

JUSTICE AALTO: But you have got to the things that at least that are of great concern to me.

MR. FEWER: Excellent. I will speak briefly to the attack on Mr. Lethbridge's, or Prof. Lethbridge's affidavit. I realize that's a response to what Mr. Logan put in, put in on the same terms that Mr. Logan put in his materials. Mr. Logan, I understood, was not tendered as an

expert, either. If the Lethbridge affidavit is struck on that ground, Mr. Logan's affidavit goes as well.

JUSTICE AALTO: I'm not certain, Mr. Fewer, that we need spend a lot of time on the affidavit. I don't think it's going make a tidal wave difference on how this thing turns out.

The issue is very focussed. You have both been addressing it, and I have been trying to drive us towards that so that I can have a better understanding of the legal ramifications and the evidentiary ramifications of what is being sought on this motion.

MR. FEWER: Just let me review my last-minute notes, see if I've missed anything that I absolutely had to say.

JUSTICE AALTO: If there is, I certainly want to hear it. And here, I will make this proposition to you, Mr. Fewer: If you come across a point that you didn't make and you really want to make, I will give you the chance to make it after Mr. Zibarras's reply. I'm not -- I run my court a bit differently from time to time, as long as I get the real meat of the issues dealt with.

MR. FEWER: In that case, I will sit down and turn the reins over to Your Honour.

JUSTICE AALTO: Thank you, Mr. Fewer. That was very helpful, putting it in context. Lots of things I have heard -- Mr. Zibarras, do you want to --

MR. ZIBARRAS: Or to Mr. McHaffie?

MR. McHAFFIE: (inaudible)

JUSTICE AALTO: I want to -- no, I want to save Mr. McHaffie for last. You will get a chance to reply to him, not to worry.

MR. ZIBARRAS: Thank, Your Honour.

JUSTICE AALTO: I just want to, while it's fresh in my mind, the arguments from Mr. Fewer, I want to hear your reply so I've got a context. Then we will deal with Mr. McHaffie.

REPLY SUBMISSIONS BY MR. ZIBARRAS:

MR. ZIBARRAS: Your Honour, my friend Mr. Fewer started off his submissions by posing the question what is the right test. And in my submission -- well, he noted right away, I think his words are we are slavishly -- we Voltage are slavishly following the current requirements under the rule in order to get the information we are requesting. But he said that that shouldn't be the test, and I think Your Honour noted that you're not in business of overturning the Court of Appeal.

My submission just generally to Mr. Fewer's submissions is this really isn't the time to be changing the test, and we are slavishly following what is required of us of the test. And that cannot be a moving target.

The Court of Appeal on more than one occasion has carefully considered it, the test, and come up with what they consider to be a fair test in all the circumstances. That should apply here, and this court is bound by that test, notwithstanding Mr. Fewer's concerns that he might have about whether that test sufficiently protects

infringers.

I guess my basic concern with Mr. Fewer's submissions is what I would describe as an attempt to vilify or criminalize the action of rights holders, which I find to be and our client finds to be the biggest affront in this whole proceeding.

The fact that CIPPIC, who is supposed to be impartial and here to assist the court, is purporting to take the position that an entity that Voltage Pictures, which is a recognized established, highly regarded film company, should be viewed so poorly as to -- and the suggestion, I think, that the court has to take a paternalistic role and monitor its conduct in the litigation without any evidence of improper conduct. And I will point out that the only real evidence my friend has, and he pointed to you was a demand letter in a U.S. proceeding for $7,500, which falls far short of what my friend is suggesting or speculating is some kind of speculative invoicing scheme.

And just so that the court understanding what a speculative invoicing scheme is, it's a scheme based on several factors. One of them is it's almost always in the pornographic film industry, and I have already described the reason for that. And the case that Mr. Fewer took you to was that Goldeneye decision, which was another one of those cases. It was in the pornography industry, and relating to those movies. So again, it's the paralyzing social stigma attached to that.

The other thing that was noted in those case (sic) is the antiquated copyright laws. That is important. Mr. Fewer kind of skimmed over it, but I want to focus on it a little bit because the importance of the antiquated copyright laws is disproportionate statutory damages that were applicable under the old statutory regimes, that could make an individual liable for each infringement for tens of thousands of dollars.

What would happen is every time that movie was uploaded it would be another infringement, so damages could go into hundreds of thousands if not millions of dollars, which would be the type of demands that were made.

Under our new copyright regime, all infringements get captured and are maxed out at $5,000. So two of the factors that Mr. Fewer warns the court against don't even apply here, have no application. And that is why I said earlier in my submissions, we don't have an uneven playing field here, and it is not a proper balancing of everyone's rights and interest, which is what the courts are trying to do in each of those cases, to suggest or attempt to vilify the rights holder in these circumstances.

There's no social -- well, I say there's no -- there's a very minimal social stigma which has to be balanced above serious economic harm, and there's very modest damages which has to be balanced against massive economic harm, given the scale of the piracy problem to copyright holders.

So to suggest that this scenario in any way

requires the court to oversee a rights holder's ongoing conduct in a litigation is just -- it really is an affront. It's unprecedented in this type of case. There is no evidence of Voltage engaging in any improper conduct.

My friend did mention one case where he said that the conduct of Voltage was questioned. It was another U.S. case, but the only issue the court was questioning or criticizing was on issues of joinder, which is a very complicated area of law in the U.S., and issues came about the joinder of different defendants in the same group. It has no application to what is before you today. It was a discrete issue, and that's it.

We strongly, again, object to the characterizations, but we also object to CIPPIC's -- I don't know how to describe this, but relentless attempts to rehash a test that is decided and binding. And they were there when it was decided.

They have tried this before. They have made the same arguments before. They have convinced motion judges before, only to have those decisions overturned, and we take objection to them continuing to do that with no new or better evidence, but continuing to spread this fearmongering and suggestion that it's improper for a rights holder to protect their interests, and not taking into account that the context is completely different from any other the cases where these concerns are raised, and not taking into account that there is no evidence of any improper conduct by Voltage.

And again, not balancing the interests, which is the ultimate failing of CIPPIC's position. Because if you believe CIPPIC and accept what they are proposing, Voltage is being excluded from ever being able to properly protect its copyright works in Canada, which really is trying to create a haven for piracy in Canada, which can never be a scheme that any intervener should be requesting the court's assistance in.

I think it's also incorrect to suggest that the bona fide tests, which if you look at the case law just really goes to -- you know, the degree of -- to which the facts and law support your case, to try and suggest that on top of that you've got to prove -- it becomes a kind of a beauty contest where only some plaintiffs that meet some goodness test get to protect their rights is going further than what the courts have said.

The bona fides just goes that, you know, you have a case, have a product that's being infringed, and you're trying to protect it and the Copyright Act allows you to protect it, or any other cause of action you have allows you to protect it. And that is all you're trying to do, and you're going to use information you get for litigation purposes. That's it.

By trying to take it further, again my friend is -- and he doesn't couch it in these terms, but he's shifting the test back to prima facie. One way or another, he's trying to get it back to that same point, and he has said it himself. He's try to change the test, and he's

coming at it from every angle he can.

But the ultimate purpose, because if you go with literally anything my friend proposed, you're indirectly changing the test.

JUSTICE AALTO: Except for the caveat that Justice Sexton puts on the bona fides test, which is where we started our colloquy this morning.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: And I've got your point on that.

MR. ZIBARRAS: Right.

JUSTICE AALTO: I see. I understand where you're coming from, where Mr. Fewer is coming from, and I've clearly -- I've clearly got the flavour of this issue.

MR. ZIBARRAS: And I think the only point I'm trying to make is the bona fides, the extent of the application of that to in Justice Sexton's thinking --

JUSTICE AALTO: He says it will be on --

MR. ZIBARRAS: -- is it just applies to the litigation, that's right. It's not how are you going conduct yourself in the litigation. There's absolutely no expression of that by the Court of Appeal, and the only -- my friend is taking you to some cases that have some expression of that, but it's not Justice Sexton. It's not our Court of Appeal. It's courts that are extremely concerned about a whole separate group of plaintiffs involved in an entirely separate type of litigation involving pornographic films, and they view that area as

having enough problems -- and I said the two issues they have is the paralyzing stigma and the antiquated copyright acts that have massive damages associated, so that someone could be put in a position technically that you have downloaded 20 pornographic films; under the antiquated act, you not only are on the hook for damages for each movie, but that movie has been downloaded again by a million people across every continent who are accessing the same peer-to-peer network, and we've tracked that movie -- and this happened in one case. The producers of the movies actually had some technology where they could track if that movie was being downloaded and where it was going and uploaded, and they tracked a movie that a subscriber to a pornographic web site, he downloaded the movie from the web site and they tracked how many times that movie was then downloaded again when he put it on a piracy web site. And that movie got downloaded again thousands of times.

So his damages, the damages they could claim under those copyright acts at that time were in the millions, and this individual would have been faced with a potential lawsuit for millions of dollars.

So the demand letter says we are going to sue you for millions of dollars; alternatively you can pay us $120,000, and if you don't, we are going to publish your name in a lawsuit and publish the names of the pornographic films that you watched which are not the most savoury.

Very different scenario, and certainly may have different concerns that the court has to balance.

When they are doing that on a massive scale, the court says this might be a speculative invoicing type of scheme. It doesn't mean that it stops all other copyright holders, patent holders, people that took the photographs of athletes. None of them can take steps to identify people that are breaching their Copyright Act because of what is happening in one pornographic case. It completely loses sight of the balancing act, and that is what we are dealing with. We are dealing with IP.

My friend also, and again, just to show how he's not taking into account the realities of our current situation, he several times describes what we're doing as a lottery, and he says they haven't hit the lottery yet, implying that as soon as I get the names we have hit some lottery.

What he is doing is using words that really were used in these cases that I just described, where repeated violations come with cumulative damages that could be in the millions. And you're going after millions against each defendant.

As I said, we've got new legislation that limits all infringements to $5,000. That is not a lottery. No one that wins $5,000 describes it as a lottery. We are not in that realm.

To tell you to truth, I question whether -- I mean, I told you earlier that Voltage has to take some steps to protect its intellectual property, because the message to date, especially after the BMG decision, is that you can

copy -- you can distribute copy-pirated works with complete immunity because no one is going to disclose your contact information. That is how the public interpreted BMG, which isn't actually what the BMG case said at all, but it did halt enforcement in Canada, and piracy exploded.

And on that point, my friend tried to criticize Voltage as well for not sending a cease and desist notice. I respectfully submit that our notice actually did ask people to cease and desist. The one we read earlier had that paragraph that we put in, and not only did we say please preserve your hard drive, but we also asked them to desist from engaging in -- I can't remember the exact language, but I think we also asked them to stop making our works available.

I can say that cease and desist letters have been used repeatedly by rights holders in Canada, and what has happened is they get received; they get ignored. When the people receive them see that there's no follow-up, they think well, I can ignore it. It's the same as a collection agency calling you and saying you owe money. If you don't pay we are going to do something, and you kind of sit and you think, all right, let me see if they do something. And when they don't do something, you just say okay, I'm going to ignore the collection agency, because they can call me several times and e-mail me, but they never do anything. And until they do something I'm going to keep doing what I have always been doing.

And I think Your Honour commented that

CIPPIC's asserted concerns about how the litigation will play out is pure speculation. There is no evidence, and again we say the only evidence is helpful to Voltage, because it shows that a demand letter was sent out in a very reasonable amount. $7,500 in a U.S. proceeding where statutory damages are far higher than what they are here is in my submission is a very reasonable number.

What we don't know about that case is how many infringements there were for that particular defendant. We don't know what stage of the settlement negotiations that demand letter was sent in. As you likely know, Your Honour, most settlement discussions start pretty low. If there are additional steps that have to be taken because there's no settlement reached, plaintiffs will often increase the claim settlement amounts that they seek, saying here's a number but you have to agree with this within 30 or 60 days. If we don't reach a settlement before -- within 30 or 60 days, we have to take additional steps. If we have to take additional steps, then the number may go up and it may no longer be available on the table.

So I don't know where the 7,000 --

JUSTICE AALTO: -- back into the realm of speculation.

MR. ZIBARRAS: Right, but again I just want to make the point that the fear mongering that is being drummed up here is really Mr. Fewer's fears or CIPPIC's fears, but not based on any evidence.

And again, I say it's an affront to an entity

like Voltage that is coming to Canada to enforce its rights and is being vilified in this way.

Just a couple of other points, just to put your mind at rest about the type of people that will get caught up in this. And this goes back to an earlier comment that you made, but I do want to address it. And this kind of gets a bit more into the technicalities of peer-to-peer networks and file sharing, but there is a certain level of sophistication that comes into play when people engage in these activities. It's not a -- for example, it's a simple thing of an e-mail pops into your e-mail and you click on it, and all of a sudden there's a downloaded Voltage movie on your hard drive; right?

The way peer-to-peer networks work is typically you have to go and download the software that allows you to access and use the peer-to-peer network. That is the first step. That has to be on your computer and running.

So you already have an intent or an interest in engaging in this type of peer-to-peer sharing.

The next thing you have to do is you typically have to go -- know what you're seeking, and go to another web site and download that. So if I want to watch a Voltage movie like Hurt Locker, I then -- I've got the peer-to-peer network running; I then have to go and find that movie and download it. So that is another step. It gets downloaded and then it's on my computer, and I'm still running the peer-to-peer network. That's when our software

finds it.

So there are a couple of steps that someone with some level of sophistication has taken in order for them to even pop up in our system.

So it's not really a case where, boy, we are going to be sweeping up old grandmothers and people without computers. I mean, it doesn't work that way.

Mr. Lethbridge, again, gets into while some possibilities that might exist, which we say they might; they might not, anything is possible, but the reality is someone has taken those steps. Someone has taken those steps. It didn't happen by itself. Someone took those steps.

The other reality is because there's a hard drive, we can forensically examine that hard drive and get an even better understanding of who took those steps or how.

For example, one of the issues that Mr. Lethbridge raises is there might be some kind of bot net on your computer that is being programmed to do this, and he said the chances of that are very low, but it's a possibility. And I said, well, if that's the possibility and I have a computer forensic expert, they will find evidence of that as well. Right? There's no shrouds of fog and mystery. It's all pretty clear.

But if you look at the numbers and the statistics, the chances are that 99.9 per cent of these people did exactly what we say they did, so we are not in realm of fantasy.

Downloading is a massive problem. There's statistics that show billions of movies and songs are being illegally downloaded. To suggest that we are somehow a crazed plaintiff that has to be closely monitored and directed and overseen in this context is literally allowing the inmates to run the asylum, for want of a better analogy.

JUSTICE AALTO: Thank you, Mr. Zibarras. Mr. Fewer, I offered you the opportunity to check your notes and see if there was something that you didn't tell me that you should have told me.

CONTINUED SUBMISSIONS BY MR. FEWER:

MR. FEWER: Yes, Your Honour. There are three things they needed to talk about.

JUSTICE AALTO: Fine. Mr. Zibarras, you will have an opportunity to reply to the three things.

MR. ZIBARRAS: Thank you, Your Honour.

JUSTICE AALTO: Mr. Fewer, what are the three points?

MR. FEWER: One, on the statutory damages regime; two points here. $5,000 is the max, but that is not something that you can pick out and claim. Again, how the courts have interpreted the statutory damages regime is that it's got to approximate real damages. Parliament has acknowledged that sometimes be expensive and difficult to prove damages. How the courts have interpreted the statutory damages regime is we're going to say, all right, what's close?

So it's not a case where the plaintiff can

simply say non-commercial infringement; you will owe me 5,000. That is not the case. Instead it's a range, and the court will try and approximate the statutory damages in that range.

And you have my submissions with respect to what I think is appropriate range for these kinds of cases, and again I point to the New Zealand file sharing case.

So the 7,500, yes, my submission is that is in fact a speculative invoicing game. That is orders of magnitude beyond what a plaintiff could legitimately expect, if they went to court and proved damages.

JUSTICE AALTO: Point two?

MR. FEWER: Again related to this is where does is this $5,000 come from. It actual comes out of BMG and Doe. It comes out of --

JUSTICE AALTO: What?

MR. FEWER: It comes out of BMG and Doe. It comes out of a parliamentary intent not to permit copyright, framework legislation. Copyright is framework legislation, marketplace framework legislation. Can be used to attack consumers in precisely the way that it is being used in this case.

Second point; I won't go into great detail, but I will take issue with a characterization of CIPPIC as vilifying or fearmongering or attacking rights holders in any way in this application. Our submission is that the laws ought to be used properly, and a speculative invoicing regime is an improper use of our courts and the copyright

laws. If this is a speculative invoicing scheme -- my submission is that there's enough evidence to support an inference -- there is a failure on behalf of the applicant to give the court the comfort it requires to conclude that it's not a speculative invoicing scheme, and there's a refusal to answer on all of those questions on cross-examination that would have given the court that comfort.

You can pull those two things together and say, on a balance of probabilities, this is an improper purpose.

JUSTICE AALTO: Point three?

MR. FEWER: Yes. It goes to evidence, evidence, evidence, evidence. Mr. Zibarras just talked about piracy exploding after BMG and Doe. Frankly, there's absolutely no evidence to support that. If we had been engaging in this kind of evidentiary game, you would see the opposite. You would see that the amount of peer-to-peer file sharing that is taking place over the past decade as falling as the marketplace creates greater opportunities for people to get content through legitimate means.

Similarly, mass economic harm I think was the quote that Mr. Zibarras provided us. No evidence whatsoever of that in this proceeding, and I think it would be very difficult to come up with that evidence.

My final point; it goes to evidence. I should have addressed this on the get-go. I have no recollection of saying that I would not make an argument about whether there was -- whether copyright had been

established but the plaintiffs. My intent, once -- from the get-go, once CIPPIC decided to get involved, was to apply BMG and Doe and to modernize it, in the sense of bringing the analysis that the court engages in into -- basically into this decade. A number of courts elsewhere in Canada, outside of Canada, have been engaging in this kind of analysis. This is the first opportunity that the court is availing itself of to take a good look at the test.

This is not trying to change the test, it's really trying to harmonize Federal Court of Appeal approaches Norwich orders.

Frankly, I think that BMG and Doe is not inconsistent with what we have seen in other jurisdictions, although there are differences from court to court. You can see a dialogue. Frankly, this is my submission this morning. You can see a dialogue happening between the various courts about how to approach these kinds of cases, because are not easy. These are difficult issues. My proposition is that the Federal Court of Appeal's decision in BMG and Doe, almost a decade ago now, is not the final word in the Federal Court on how these cases are going to be responded (sic), and it's completely within the power of this court to have regard to what other significant -- other major courts, the Ontario Court of Appeal, the Ontario Divisional Court, the House of Lords -- well pardon me, the Supreme Court of the United Kingdom; got to keep up with those changes -- and the Court of Appeal in the U.K., again, how they have been responding to these kinds of orders.

It would be a mistake in my view to not look outside the four corners of BMG and Doe to inform oneself of how to approach these cases.

And again, the key points on BMG and Doe, not inconsistent with the way -- with the direction these other cases are going. BMG and Doe had a very narrow, focussed balancing test that it put into play on the fifth branch of the Norwich Pharmacal test, looking exclusively at privacy, but those were the issues that were before it. Really, it's the interests of justice: What balance do the interests of justice require? Plainly, that got to be responsive to the interests at play in the case before it, and our submission is in this case it's not merely privacy. We also have the interests -- for lack of a better word, let's call them civil rights of defendants and the administration of justice. These are issues before the court.

I do not think in Canada we want our courts to be used as a tool in speculative invoicing schemes. That is a legitimate consideration in the balancing test.

JUSTICE AALTO: No, I'm not disagreeing with you, Mr. Fewer. I have raised that issue with both of you in the context of this hearing, and I am going to have to wrestle with it and deal with it. And I will.

MR. FEWER: Those were my three points.

JUSTICE AALTO: Thank you, Mr. Fewer.

MR. ZIBARRAS: I will be very short.

JUSTICE AALTO: Then I want to hear from Mr. McHaffie before lunch.

CONTINUED REPLY SUBMISSIONS BY MR. ZIBARRAS:

MR. ZIBARRAS: A couple of things. Just to get back to the in the U.S., the demand for $7,500, as I understand it, my colleague Mr. Philpott just checked and the maximum damages in the U.S. is $150,000 for an infringement under their Copyright Act, so just to put in perspective what the proportion is.

On the refusals to answer, there were a couple of problems that we had with the questions, but the main point I want to make is the plaintiff in this case is Voltage. Mr. Logan and Canipre are a consultant that Voltage retained for the very discrete purpose of coming up with a list of IP addresses in a geographical area confirming that they all had -- that the product they had was a product of Voltage's works.

What CIPPIC was doing was it asked to examine Mr. Logan, and instead of cross-examining Mr. Logan on any -- or hardly at all of any of the things that he was actually deposing to, it started to get into questions about Mr. Logan's financial circumstances, his financial relationship with Voltage, which really cannot possibly have any relevance in this case.

And then it did attempt to ask Mr. Logan what Voltage's litigation strategy was, which I mean I think he ended up answering my undertaking he doesn't know. He is not Voltage.

CIPPIC did not ask to cross-examine Voltage, which really would have been the proper party to cross-

examine if it had those concerns, and CIPPIC's failure to do that is not an excuse or, nor does it allow CIPPIC to ask the court to make some kind of adverse inference.

Again, the test that Voltage has to meet is laid out. We slavishly followed it, as Mr. Fewer points out. We had to show a very -- basically that our case is not frivolous and vexatious and that we intend to go to litigation or start an action, and we have established that. There's not an ongoing reverse onus, as my friend calls it, to put our whole case down, our whole litigation strategy. He certainly could have investigated it, but he had to ask Voltage those questions. And I don't know if the court really should be getting into that analysis in these circumstances.

And again, that goes to my submissions about this isn't a speculative invoicing scheme, so we don't even get there. But that was our objection to everything.

JUSTICE AALTO: Thank you, Mr. Zibarras.

Mr. McHaffie, it's almost one. I'm in your hands as to how long you're going to be, so people might be hungry here, but I'm not. I can keep going.

MR. McHAFFIE: I do have a number of points (no audio) certain (no audio) to you (no audio).

JUSTICE AALTO: And Mr. Zibarras is going to have to -- here's what we're going to do, Mr. McHaffie. I have to look after court staff, too, and make sure everybody stays awake and attuned. We will take an abbreviated lunch, say 35 minutes or thereabouts, and my question: Does Mr.

Zibarras know what you're going to be doing or proposing or otherwise?

MR. McHAFFIE: (No audio) flavour so he is (no audio).

JUSTICE AALTO: That's what I was going to suggest, that you at least give to Mr. Zibarras at least where you are going with your submissions, and that will help him focus his response, and we will deal with it after lunch.

MR. McHAFFIE: Could either do it at lunch. If I do my introduction? What I was going to say --

JUSTICE AALTO: Five minutes.

MR. McHAFFIE: -- the interest of TekSavvy is, and then flesh it out, perhaps, that might help.

SUBMISSIONS BY MR. MCHAFFIE:

The interest of TekSavvy, obviously, is as an ISP which to some degree, like the court, is getting caught in the middle, a little bit, here. There's a plaintiff, the right holder on the one side; there is the defendant, in the sense of the actual John Doe who is alleged to have done the infringing; and then in the middle is -- there's actually two people, there's the ISP, TekSavvy, and there's the ISP's customer, who is the person who actually pays the bills. And whether that's the father or mother of the family whose kids are engaged in this or it's the --

JUSTICE AALTO: Or the coffee shop.

MR. McHAFFIE: -- landlord. so there's all these sorts of possibilities. There's just to recognize

that, and this is the point that Mr. Fewer was making, that those are not the same person, and I've got the interests of TekSavvy is with its subscribers.

And its interest from the outset has been really on two concerns: One is the issue of notice to those individuals that there was a court process going on, and I've got something to say about that and the notice that Mr. Zibarras gave you a copy of and how that plays into the picture; and then the other is this question of the fence posts. What is form of the order? What's going to happen here, going forward?

I think it's fair to say that one of the things that Mr. Fewer was suggesting that this court does is learn from the experience of other courts. TekSavvy has learned from this experience in a big way. This has been a big issue for them that they have had to deal with facing this litigation. They have learned from that, and what I would like to do during the course of discussing those fence posts is talk about, A, why we need the fence posts; and B, what the scope of them are, the extent to which this court is going to be called upon to become engaged in this litigation process because TekSavvy is going to be caught in the middle at the front end, but there's going to be more at the outset and its customers, who are kind of on the receiving end are not who we are representing, but obviously who have an eye out both for their privacy interest but also their broader interests; they are our customers.

JUSTICE AALTO: Very good.

MR. McHAFFIE: Those are the issues I would like to speak to.

JUSTICE AALTO: We will deal with them after the lunch break. Back at one -- extend it a little bit. 1:40, and we will deal with it then.

--- BREAK TAKEN FROM 1:00 P.M. TO 1:42 P.M.

JUSTICE AALTO: All right, Mr. McHaffie, we are going to talk about fences.

MR. McHAFFIE: Fences. And I'd like to put the fences in two categories, one which is a bit more retrospective, and the issue of notice and the notion of how we learn from this case going forward; and then the second is how we deal with any order that might be issued by the court.

Those two come from the context of TekSavvy being caught in the middle, and I think everyone recognize this is new, a new case, notwithstanding that we have BMG, we have had the Montreal case, in terms of scope, and therefore in terms of public attention and so forth, this is a new case that everybody is trying to deal with, and certainly the impact on TekSavvy has been significant because of that.

So I just want to give a little bit of background on the issue of notice and why I'm asking what I'm going to be asking for with respect to notice. When TekSavvy first learned of this, it -- its first efforts were to ensure that the subscribers who identified through the ISPs got notice of the process and they were aware that this

was happening, and that is where its early efforts were.

And my friend said oh, it suggested it was easy. It was just five days. That's not true. It was a significant undertaking over a much longer period that required several reruns. Systems had to be put in place. There was a lot of dedication. Mr. Gaudrault, the CEO of TekSavvy, who is in the courtroom today, won't be speaking to that issue, but certainly has spoken to me about that issue. It's a significant undertaking for an ISP, particularly -- perhaps less so if you are looking at five names; more so if you are look for 2,000. Much more so if you are looking for 10,000, 20,000, the millions that have been referred in the evidence that this -- so we have to be prospective.

That was all done in advance by TekSavvy, rather than awaiting the order that says find the names and give it to them, because of the importance of notice.

It was unclear to TekSavvy at the time what the legal circumstances of that notice were. In past cases like BMG and the Unitel (ph) case, the Voltage case from Montreal, that prior notice had not been given. There does not appear to be any legal obligation on the part of an ISP to give such notice, but there was discussion between my friend and I as to whether there was even a legal opportunity for the ISP to give such notice if, as was the case with TekSavvy, it chose to do that work up front.

And so having this court's view on that, which I think is an important issue: Do the Does get notice

of this motion? Are they required to, if the ISPs are prepared to give that notice? Is the plaintiff required to allow -- does that get built into the process for this part of the case?

Because TekSavvy and other ISPs are going to be on the receiving end of other motions like this, and having guidelines and what is set up in terms of what the obligations and the opportunities on the part of the plaintiff and the ISP will be very helpful.

So that is my request. It doesn't come on a ruling on what happened here, because ultimately there was agreement, my friend said. Yes; if you can send something out, we give you the time to do that provided you. And that's --

JUSTICE AALTO: That's all in Mr. Philpott's first affidavit, isn't it? That exchanges between parties?

MR. McHAFFIE: Yes.

JUSTICE AALTO: Yes, I have read all of that.

MR. McHAFFIE: That's correct, that lead to this notice that you have been handed today.

That leads me to the second aspect of the question of notice that I think is useful: What can be done with that for a Doe? My friend stood up today and said well, one sign that we've got a slam dunk case or close to it is that no Does have come forward. There are two issues there: one is my friend is saying this is not the time to deal with defences, and yet he points to the fact that no Does have come forward with defences that say that proves

his case. But the second issue is, can and how do such ISP subscribers come forward without identifying themselves?

This is where I get to that question of learning from some of the international context where certainly in the United States there have been cases where lawyers have come forward on behalf of John Does who remain unidentified John Does and are given the opportunity to challenge such an order while still being a John Doe.

My friend suggested and not in argument today, but when we were talking about these things, and this is why I raise them, that that might not be possible, that as soon as you come forward you have rendered the whole thing moot because you have just identified yourself as one of the people.

Obviously I can understand the concern of any of the John Does who received this notice, that if that is the case and I come forward to the court then everybody automatically knows who I am, maybe I better not come forward to the court.

If this court puts forward some indication that that would remain a possibility and that part of the whole purpose of notice and the reason that we have got a system of notice as a general rule is so that people can come to the court without already having issues decided against them, then in my submission that would be helpful for the looking forward, learning from this case for the court's assessment of how the procedure in the next case might go.

The other aspect is obviously my friend says you can draw something from the fact that nobody showed up. The fact that nobody shows up I think you may be able to draw something, and it's the whole concern that my friend expressed about defendants not having enough resources to come before the court and deal with these issues. But that's just trying to counter the notion that the fact that TekSavvy sent out notices somehow leads to some kind of conclusion on the merits.

The third aspect about notice leads me into the fence posts and the importance of notice at the front end and the back end being as accurate as possible.

This, the two pager that you've got, was sent out by TekSavvy on the information that it had, and it included that two paragraphs that Voltage asked us to include. That two paragraphs makes specific reference to -- I mean, it's my -- I don't think my friend's right that it makes reference to cease and desist; it's all about preserving evidence. But it talks about any evidence of piracy and/or other illegal downloading. If you look in that italicized passage at the bottom, it talks about -- it's all about evidence. Don't erase discard, conceal, destroy any evidence of piracy and/or other illegal downloading and distribution of Voltage Pictures.

The average reader would look at that and say this is about downloading. My friend is now saying no, no, we're not grabbing people who are downloading, we are grabbing people -- we have only, in fact, got evidence of

people who have made available.

So already there's a concern here that what's being told to our customers through our means is in fact not the case that is now being put forward by the plaintiff.

And it's rife in the materials, that there's discussion of -- you saw all that stuff from Barry Logan that Mr. Fewer put forward, all these other articles that say we've got millions of downloaders, that it's all about downloaders. Well, today I heard kind of for the first time oh, no, no, it's only about those who make available, and that is going to be different in terms of how we cast our damages and so forth.

So that aspect of the notice that was already given, and you can appreciate that while the Internet is a wonderful medium for the dissemination of information, it seems to be a much better tool for the dissemination of misinformation. Things can spin out of control very quickly, and certainly that is part of what TekSavvy has had to deal with in terms of dealing with the public and its own customers' reaction to this case.

I don't think anybody will disagree with the statement that a system where potential defendants or even potential subscribers who may have factual information are not properly informed of what's going on or properly informed of rights is not the right system.

And that leads me to fence posts, and this has to do with if this court is going to issue an order, how are we going to deal with it?

And I think in order to set the stage for that, we need to address both why we need the fence posts and then what those fence posts would be.

In the why we need the fence posts, there's the general case, and then the specific case of this particular case by Voltage.

In the general case we can look at BMG itself and look at that question of balancing. The balancing that was at issue in BMG is different. It's different for this reason: In BMG, there were individual users with usernames, and people were being identified by user name, like Kazoo with capital letters and small letters and so forth, that were at issue. Those were the Does. Those were the identified infringers.

As I mentioned in my little introduction, there's another entity here, which is the TekSavvy subscriber whose interest are also in the balance who may or may not be the Doe. And so that balance becomes important. The privacy rights of that individual become important. And I think the pornography issue -- obviously there are concerns with that, but whether the mother of the household is a justice of the peace or the father of the household is an upstanding member of the community and their kids -- because kids are kids -- or their visitors -- because visitors are visitors -- have been doing something, there is an issue about saying you have been engaged in illegal downloading, whether it's in a letter -- certainly if it's in a lawsuit, that that matters, and we ought not to be

going off half-baked in terms of the knowledge level and saying this is all the same as Sony BMG. We know who the people are.

A lot of cases, and when we deal with defamation cases and things like that, again, you know what the person is. It's the person that they are after and not just the location.

And everybody is in agreement now that going after anything but the location is speculation. What you draw from that is a different question. Different people call it different things, but my friend himself and his -- in the cross-examination said once -- we've got the ISP. Who is actually doing it is -- I think it was speculation and guesswork was his language, and then he accused Mr. Lethbridge of saying it's all speculation. Of course it is speculation. That is the whole point. That is the whole concern, is that getting behind that ISP is speculation at this stage.

Now, whether that lands on the stage of you get the order or it lands on the stage of you don't get the order, that's where my friends to have that argument. I'm making the argument as to why that increases the nature of the fence posts, the protections that are described in BMG.

"However, says the court in BMG, caution must be exercised by the courts in ordering such disclosure to make sure that privacy rights are invaded in the most minimal way."

Paragraph 42 of BMG. You'll be familiar with

that.

I would say that is even more so where you don't know that the privacy rights, the individuals whose privacy rights are going to be invaded are in fact the Does or not.

99.9 -- I have no idea where my friend comes from. There's the average family of four who has one Internet access is a TekSavvy subscriber, you're already down to 25 per cent as to who the actual defendant is in copyright infringement, compared to who the subscriber is. So for my friend to be starting throwing 99 number around saying we know who these people are, and in 99 per cent of cases it's going to be infringement, and it's going to be by the person we identify, it defies common sense.

And the legislative scheme is not the same as a ticket, where the owner of the car is liable for where car is parked, or any other kind of strict liability things. The owner of an ISP is under no strict -- or sorry, the owner of an IP address is under no strict liability to ensure that all others who engage in that or who use that are not infringing copyright.

So all that to say this is why we need fence posts in the general case, for this kind of a case. Multiply that by 2,000 in this case -- or actually, it will just be -- just so that you know, from a factual perspective, we have already indicated to our client that in terms of number of people that we can actually identify, I think it's about 11 or 1,200 of the 2,000, and that has to

do with the way those who are more savvy in the tech than you and I, what information they have and what information they don't have. But at least 1,200 in this case. 2,000 requested. In the next case, 5,000? 10,000? A million?

But that concern about protecting the privacy rights of those whose information is going to be ordered does get multiplied.

I talked about the specifics as well: Why in this case? And I said that we have learned from experience and I think it's fair to say that we know a lot more now than we did then, when this first came to light, even in November of last year.

One of the things that we know is about Voltage in particular, and that's the Oregon case that you heard referred to. That was six weeks ago and I was surprised to hear my friend say $7,500 was a reasonable ask, given what was at stake there.

The court who had jurisdiction over that said that they were seeking to abuse the process of the court. The court that had jurisdiction said $7,500 isn't reasonable; it's an abuse of process -- with respect to not pornography, not other people, with respect to Voltage Pictures in the United States.

So we know more about why in the specific case there ought to be fence posts and there ought to be fairly strict fence posts on this case.

The same is true with respect to that original notice that was sent out. The same is true with

respect to -- and I guess the way to describe it is that some of the issues my friend raised as to why you ought not to be granting this order in terms of the bona fides of Voltage -- and open a parentheses: part of this is just academic interest. When we talk about bona fides, I think there's a standard of what case you prove, prima facie and bona fides -- and tell me if you don't want to hear this from me, but I have been listening in the back.

JUSTICE AALTO: Mr. Zibarras is going to have full opportunity to reply.

MR. McHAFFIE: All I wanted to say is that when I read the other cases that talk about the bona fides, it seems to be part the substantive and part of the translation. The good-faith part of it is not just the purely substantive on your case that might be compared to prima facie case. There's also, as you described them, the exceptions in the other part that have to do with how this is going to be used. And they actually say the intent of the plaintiff. That goes beyond the merits of the case.

So when I was looking at those cases and hearing the discussion today, it seems to be there's a two-part aspect of that; one that is on the merits, not a zero threshold, but a lower threshold than prima facie case, but there's also the is it bona fide.

And as you would expect; I mean, no court is going to accept something that appears to be an abuse of process, as we saw in Oregon, regardless of what the standard of the test is. And that fits into basically any

test regardless that this court is what this court is looking at it. There is an implicit -- oh, plus, you can't abuse the process of the court aspect of it that's going to fit in. And it comes in expressly in Sony BMG. But it would fit in anyway. You can't use any test of this court for that purpose.

The last reason in terms of why I say we need the fence posts are the reputational impacts on TekSavvy and ISPs, or the potential reputational impacts on TekSavvy and ISPs in general, as to how they get involved in this and the part that they are then forced to play.

Obviously, anytime this court issues an order to produce something, the person ordered to produce it has to produce it and better produce it, subject to appeals and setting aside and so forth. So from that perspective they are bound. Nonetheless, they become an agent of the plaintiffs involved in this case and unless there is protection, and they are the ones that have the information, and questions get -- why are you keeping this information in the first place? All that kind of stuff starts to come out over and over. Why should the ISPs be keeping information?

And the answer, A, technical reasons; B, what if it's not Voltage asking for it, but the child pornography parts of the police, doesn't necessarily satisfy everybody. So everybody gets whipped up into a bit of a frenzy about this, which is part of that initial balancing I was talking about, that there is an additional party which is the responding party.

And it goes to what response are you going to take? Does that mean that you have to oppose? Does that mean you have to consent? Does that mean you have to undertake a separate level of scrutiny? If the this court is able to put down fence posts that make the ISP satisfied that even if the information is handed over their customers will be treated fairly under the law, obviously they are more reputationally protected.

So that then brings us to okay what fence posts, then. But it does provide the framework of why I say the fence post should be -- I'm not sure if wide or tall, but there should be a pretty strong fence.

I note as a bracket around this that we've asked for the form of the order for about -- the draft form of order from my friends for about six months. Back to December I was saying, do you have a form of order that we can talk about and use as -- so we can try and deal with these issues? I still haven't seen one, so we are sort of in the abstract here. And so --

JUSTICE AALTO: You're all in the abstract until I make a decision.

MR. McHAFFIE: Exactly.

JUSTICE AALTO: Once I make a decision, some of this might be easy.

MR. McHAFFIE: And some of it may -- exactly. Some of it may be completely moot, and you'll certainly be able to say yea or nay one way or the other, absolutely. But in terms of what we could perhaps have dealt with, I

think we're agreed that names and addresses only.

JUSTICE AALTO: That is all I've heard about.

MR. McHAFFIE: Is all we are going to get. The original ask was greater than that, just so that you know. The original ask was for more information, but names and addresses only I think is important because of, A, the nature of what it is saying it's going to be needed for and the potential for the use of telephone numbers and e-mail addresses in other manners that aren't under the scrutiny. Obviously it's only going to be those known by TekSavvy.

And the question is then going to be what is going to be -- how is that information going to be protected, and in my submission the court should require TekSavvy to demonstrate that it is taking the steps necessary to keep that information confidential, and not share it with anyone other than TekSavvy and its lawyers necessary for any litigation.

JUSTICE AALTO: From your perspective --

MR. McHAFFIE: Not TekSavvy and its lawyers, Voltage and its lawyers. Sorry, Voltage. That's why --

JUSTICE AALTO: Mr. Zibarras has to know this; otherwise there would be no litigation.

MR. McHAFFIE: That's right, exactly. So it should be Voltage and its lawyers and it's going to be subject to a confidentiality order.

And this is where paragraph 45 of the BMG case comes up, and there's some specific guidance that I would ask you to implement in this case.

JUSTICE AALTO: Just let me find BMG again. It's over here. Paragraph 45?

MR. McHAFFIE: Yes.

JUSTICE AALTO: Got it.

MR. McHAFFIE: Okay. So "in any event, if a disclosure order is granted specific direction should be given as to the type of information disclosed," I think we're all on board there, "and the manner in which it can be used." Now, we'll come back to that because that's a big -- a bigger issue.

"In addition, it must be said that where there exists evidence of copyright infringement, privacy concerns may be met if the court orders that the user only be identified by initials or by makes a confidentiality order."

And I think that is an appropriate way to deal with that privacy concern on the assumption that we've got over the first hurdle, that the privacy concern ought to be interfered with, that in the order to ensure that it's done in the most minimal way, that you've got identification by initials, and confidentiality orders that covers things.

Then the question is also what happens to information at the end of the day. Obviously this isn't the last step in the process. You don't need to perhaps look at what's going to happen farther down the road, but there should not be an ongoing database held by Voltage or Canipre or anybody in which they are preserving the private confidential information of our customers, or any ISP's

customers.

Perhaps the biggest issue, though, coming out of this paragraph is that the manner in which it can be -- Oh, actually, there's one that I think we also have to identify as a process thing, and that is costs. Most of these orders recognize that the reasonable costs of the ISP have to be paid. I think you're getting a sense as to what the costs of TekSavvy have been in this case. They have been substantial. I don't think you're going to be hearing submissions today on what those actually are, but --

JUSTICE AALTO: No.

MR. McHAFFIE: But no matter how big -- the number that we have put forward to my friend is a substantial number. Back before the January hearing, I think it was 160 or $190,000. It was a significant number, and it was clear that that, even that would not be making TekSavvy whole. My friend said that's way too much; we've not agreed to anything since there, in part because there's no order requiring anything.

And so that issue of what costs are -- and I think in particular when those costs are to be paid, which in my submission should be before the issuance of the data, before the data is passed over, not exclusively but in part because Voltage is a U.S. company and in the same way that we deal with security for costs, we ought not to have a situation where having passed over all of the information that Voltage needs, TekSavvy is then in a process of having to chase down a foreign plaintiff for that kind of an award.

So that I would just flag as an issue.

And I think my friend and I had some brief discussions as to how else that might be addressed, whether it's through payment into trust or payment into court, but the main concern is that there is not that issue about security and there ought to be an upfront cost payment.

JUSTICE AALTO: So obviously quantum is going to be an issue.

MR. McHAFFIE: Yes.

JUSTICE AALTO: If an order is made and we are going to have to build some mechanism to determine quantum if the two of you can't sort it out. We will wait and I will probably hear submissions on how we deal with quantum, but I have noted that quantum is likely going to be an issue at some point in this piece.

MR. McHAFFIE: And it could well be through the same sort of process that is done, if parties are unable to agree to costs then I will accept two pages of submissions in five days. One thing you don't want is another $100,000 costs on costs.

JUSTICE AALTO: No, but I'm sure from Mr. Zibarras's standpoint he will say, well, what's the evidence that you in fact incurred those costs? How were they incurred? And do we need -- I hope I'm not just creating another hearing, but do we need evidence of what the costs are that you have incurred, and how do you put that evidence before the court and is there going to be cross-examinations. Let's leave that for another day.

MR. McHAFFIE: Those are excellent questions, and I think you're quite right. He has raised those issues quite fairly to say what's the backup for that and should -- this court shouldn't make any orders before that issue has been dealt with.

So as I said, I think the biggest, then, remaining issue out of paragraph 45 on the manner in which it can be used goes to this issue of litigation oversight. My friend has said there's absolutely no reason for any sort of litigation oversight. Again, here I think we can learn from the experience of other courts, both in the general and in the specific. Where there has been no lawsuit litigation oversight, this plaintiff has sent out letters which a foreign jurisdiction has said are seeking to abuse the process of the court.

Yes, the case is tab U in my friend's book of authorities. This is in the blue book of authorities.

JUSTICE AALTO: Is this the Oregon case?

MR. McHAFFIE: The Oregon case, yeah.

JUSTICE AALTO: Volume 2? Volume 1?

MR. McHAFFIE: It's in volume 4 of 4, part 2 of the book of authorities.

JUSTICE AALTO: That will be tab?

MR. McHAFFIE: Tab U.

JUSTICE AALTO: Tab U.

MR. McHAFFIE: And this is, as I said, this is from six weeks ago. The chief judge of the U.S. district court for the District of Oregon, and you will see from page

1, Voltage Pictures LLC. And if you turn to page 8, you will see the letter, the description -- the initial description of the letter from the plaintiff, Voltage Pictures, the demand for $7,500 that my friend described as reasonable, and then starting at page 10 and 11, you will see the conclusion of the court with respect to it:

"Accordingly plaintiff's tactic in these BitTorrent cases appears to not seek to litigate against all the Doe defendants, but to utilize the court's subpoena power to drastically reduce litigation costs and obtain in effect $7,500 for its product which in the case of Maximum Conviction," one of the titles, "can be obtained for 9.99 on Amazon or 3.99 for digital rental."

And he goes on, and my reference was on page 11:

"It has now become apparent that plaintiff's counsel seeks to abuse the process and use scare tactics and paint all Doe users regardless of degree of culpability in the same light."

So the concern is -- and then the other thing I think -- this is something we just heard today. You asked the question: What are you going to say in your letter. And my friend's first response -- I wrote it down very carefully -- was "you have been identified as having infringed." That is what they're going to write in their letter, says my friend, when he's asked about it. Now, admittedly, he has not got the draft letter in front of him, but that is his first reaction: "You have been identified

as having infringed."

My friend knows that's not what has occurred. If these letters are going to TekSavvy subscribers, they are not going to people who have been identified as having infringed. If one looks at --

JUSTICE AALTO: The only reason we're here is that there is an allegation in the evidence -- that's tab B -- that there has been an infringement of some sort.

MR. McHAFFIE: Infringement associated with the IP address, and this goes back to the John Doe versus --

JUSTICE AALTO: That's --

MR. McHAFFIE: -- that is the issue I am raising now.

JUSTICE AALTO: All right. I see the difference in what you're saying.

MR. McHAFFIE: And there's a big difference to someone receiving a letter, sophisticated or not, saying we have evidence that you have infringed and there is evidence that the IP address that is associated with your account has been used in the infringement. Well, my friend's first reaction as to the letter we are going to send out was you have been identified as been infringed and we are going to make a monetary demand, and he kept coming up with that $5,000 maximum non-commercial infringement.

There's no suggestion that it would be $5,000 as the maximum, but what's likely to be awarded given that we're talking about a movie that's 9.99 is less than that.

So the concern that already existed at the

get-go, looking at other cases, we learn even more from what this company is doing in Oregon, and we learn even more during the course of today as to what my friend says he intends to write to these people, our customers.

And remember that "you have been identified as having infringed" -- identified by whom? That snaps back again to TekSavvy, and these reputational issues become problematic. TekSavvy identified you as being a subscriber associated with this IP address, yes; but again, having a system or a potential process in which thousands of people are going to receive a letter that mis-describes not only the evidence but their legal rights, or potentially does, is a problem.

Now, this court doesn't have ongoing supervision of every letter written in every litigation; they cannot possibly. But where someone comes to this court to say give me 2000 names, order a third party to give up 2000 names and we are going to send them a letter, because that much is clear; we are going to send them a letter -- they are not even saying we're just going to sue them, they are saying we are going to send them a letter, then it is fair for this court to step in and say what letter, as you ask.

And there's two ways of going about it. One is to chart trying to lest what that letter now might say. Can it accuse them of infringement? Can it make demands for money? Does it have to spell out the question marks that remain, regarding who the actual infringer is and the fact

that it's not known? Does it have to? Or the other way of going about it is for Voltage to come forward and say this is the letter we intend to send. Here's our evidence that we're bona fide. And it hasn't been done yet, and that was what Mr. Fewer was arguing shows that they haven't established its bona fides. But if there's going to be a process in which these orders are put forward, maybe there's learning to be done from other courts to say we need to know that any order that we issue is not going to be the instrument in this game of excessive demands.

In terms of learning what other courts are doing, my friend talked about the Oregon case as being only a question of joinder. That was the legal issue, but not the factual issue that was being dealt with. But joinder is an issue here, too. Literally, you've got a case with 2000 defendants. That is normally you have to deal with issues of joinder there. Are there common issues? Sufficient common and factual issues to deal with? It's sort of like a reverse of defendants class action. I don't want to get into too much theory, but to say those issues don't arise in Federal Court is wrong.

But the other learning that can be done is that there have been cases in the United States in which the courts have dealt with this by saying, yes, you've got a complaint. And this is a concern fairly expressed by my friend, to say what do I do as a copyright holder to enforce my rights, and figure out where to go from here, given that we are trying to chase things down. And when we were

talking about the balance before, one of the things that kind of got lost between -- there's the balance between the rights holder and the potential infringer, privacy rights and so forth. There's also what we call proportionality in the context of litigation as to the, what's the nature of the infringement here? Copy of a 6.99 movie isn't a hit and run. Or you might say I know the make and model of the car; give me the owner, so I can find out the driver.

Well, when a kid is on the side of the road, you're prepared to take a few more steps.

We're talking -- in terms of what the actual evidence is, not what the overstatement by my friend about billions of dollars of losses -- we're talking about individual cases of downloads of movies.

So there's a proportionality issue there in terms of how to try to cope with this, and one of ways that the court, in the U.S. at least, has dealt with some of them, is by saying let's have a test case. We can't go ahead with 2000 of those, but if one or more come forward, they can remain identified as Does, and we can figure out what it is we're talking about. And that way everybody, including Voltage, will have a better basis on which to go forward to say okay, in this sort of circumstance the damages might be X or Y; the cost might be X or Y; you know a little bit more rather than 2000 at once.

You see it in immigration cases anytime this court has to deal with a whole bunch of similarly situated cases. They say let's deal with this one first so that...

And frankly, this case itself is an example, because there's a case in Vancouver before this court where a similar request has been made of another ISP. That is adjourned sine die at the moment. Everybody is learning from these cases as they go, and a test case would allow -- this one is the test case on the order itself. There may well be test cases on infringement.

JUSTICE AALTO: That's for the pressure.

(Laughter).

MR. McHAFFIE: In terms of fence posts, that is how I sort of see. There are some specifics as to what's going to be done with the -- what information should be provided.

The when, we don't really need -- I don't think there's a significant issue in terms of production, the time of production, because as you know, we have already gone through that. The only issue on the when is the costs issue.

And then how is it going to be protected by Voltage. We can either impose an obligation to ensure that it's protected or require them to demonstrate, and then the real question, to my mind, is how is it going to be used. And the general statement it's going -- it's only going to be used for litigation or the equivalent to the deemed undertaking that you might get in discovery in my submission does not go far enough in this case for both the general reasons expressed in BMG and the general concern about the courts, regardless of evidence of any particular plaintiff,

but also in the specifics.

JUSTICE AALTO: Thank you very much, Mr. McHaffie. That was very helpful.

Mr. Fewer, do you have anything to add to what Mr. McHaffie has said? Because I want to wrap this all up with Mr. Zibarras having the last word as the moving party in this piece.

MR. FEWER: I have nothing to add to what Mr. (no audio)

JUSTICE AALTO: Thank you, Mr. Fewer. Mr. Zibarras, unless you say something that Mr. McHaffie takes issue with, you get last word -- no, I get last word. (laughter) You get second-last word.

CONTINUED REPLY SUBMISSIONS BY MR. ZIBARRAS:

MR. ZIBARRAS: Thank you, Your Honour. There were quite a few points raised, and more than I was anticipating, so I will try to catch all of them. Some of them as I was taking them down, I think went back into substantive issues that we covered previously.

JUSTICE AALTO: Yes, Mr. McHaffie strayed beyond his fence posts. If you feel the need to reply, go right ahead. I want everybody's take on this so I've got a full picture to deal with.

MR. ZIBARRAS: Right. I do have a different view to Mr. McHaffie on whether this case is distinguishable from the BMG decision because of the additional avatar or label. My submission would be that the use of an avatar or label is an extra layer of distance that the courts had to

contend with which fortunately they don't have to contend with here, but it doesn't necessarily confirm that the person using the avatar was the subscriber.

It's the same issue as before. The kid could have an avatar. The kid could be using the subscriber's computer and downloading something. The subscriber is still the person going to be identified. It's the same issue that BMG has looked at. It's not proper today, based on those kinds of speculations to not allow this to proceed.

So the distinction my friend raised I just don't think is a correct one in that respect, so I don't think it should add anything to the analysis we are doing. I don't think it changes the test under BMG or requires a different approach in this case.

Now, my friend took it a step further and he said, because of that, because we have the actual infringer could be different from the subscriber, this court has to get more involved here or there have to be greater protections of privacy. That's not what the Court of Appeal has said.

All these arguments were made before the Court of Appeal in the BMG decision. You can read it in the court below, which I gave you; you can read the Court of Appeal, and the conclusions were the ones I took you at paragraph 52 or three or four or five or six, somewhere there, where the court said it's very dangerous for the court --

JUSTICE AALTO: -- examples and all of that,

yes.

MR. ZIBARRAS: -- to get into that analysis at this stage. That is to be hashed out in the litigation. It's not a consideration. The court can't -- what it does is what I spoke about before, Your Honour. If you get into that analysis, you're turning this into almost a criminal case where the test is beyond a reasonable doubt and you know, we have to prove our case beyond a reasonable doubt to even get the information, which is an impossible scenario because I can't prove the case beyond a reasonable doubt because I don't know who the subscriber is or how many people are in the household, what have you.

Now, on that point, I'm going to get back to these cases that keep getting raised about the conduct of the Voltage, and I appreciate that Mr. -- I appreciate that Mr. McHaffie is listening to us today and wants to weigh in on this, but I do caution the court again about the submissions that were made about the impropriety of Voltage's actions. Because in both these cases, the issue is one of joinder and if you, for example, go to tab U, which Mr. McHaffie took you to --

JUSTICE AALTO: (Inaudible) child and the Christmas movie, which wasn't really a Christmas movie.

MR. ZIBARRAS: Yes. The paragraph at page 11, it says towards the bottom, it says:

"Participation in a specific swarm is too imprecise a factor absent additional information relating to the alleged copyright infringement to support joinder under

rule 20A."

So that is really what is court is looking at here. This is not a motion where the issue of joinder is considered, and if you read these cases, Your Honour, the real concern the court had was that -- I guess the argument was made and it was accepted to some degree by the court that Voltage or parties bringing these kinds of actions are avoiding the filing fees of starting separate actions in circumstances where there are not common issues amongst all the defendants. That was the concern.

Now, there are potentially different defences that can be raised in this litigation. One of the things we anticipate will happen is once we are able to identify the subscribers, to the extent that there are defences put in, we they think that the defences will fall into various categories, and of course we would be of the view that you can't -- if there was an attempt for joinder, and these are things we are all considering, assuming it's not different actions, as you'll see there, some of the cases that were put in by my friend Mr. Fewer through the affidavit of his colleague, shows that there are some Voltage cases which are just against one defendant.

JUSTICE AALTO: And there were others that were against groups of --

MR. ZIBARRAS: Correct.

JUSTICE AALTO: -- Does. I see that. I saw that. I tell you, Mr. Zibarras, we may be too far down the road to be talking about this at this juncture, but if an

order is made to divulge information and there is subsequently litigation, that litigation will all be case-managed by one case management judge in this court.

MR. ZIBARRAS: Perfect.

JUSTICE AALTO: No, that's the solution that I've got for that.

MR. ZIBARRAS: Right.

JUSTICE AALTO: But I haven't got there yet. I've got to get through what is happening on this motion.

MR. ZIBARRAS: Okay.

JUSTICE AALTO: We will deal with that later on down the road.

MR. ZIBARRAS: The reason I raise this is because my friend is pointing to comments made in a separate motion, and I also want to -- he does at page 10 raise this issue about the $7,500 amount being a disproportionate claim for a movie that can be obtained for 9.99. With all due respect to the judge making that comment, probably on submissions before him or her, damages aren't always about making the plaintiff exactly whole for the cost of the video.

JUSTICE AALTO: It can be a deterrent element, too, the amount.

MR. ZIBARRAS: Correct.

JUSTICE AALTO: I appreciate that.

MR. ZIBARRAS: Correct.

JUSTICE AALTO: But that is just a comparison the judge is using about how it appears to be completely out

of whack to be claiming $7,500 infringement for something you can obtain for $4.

MR. ZIBARRAS: Right.

JUSTICE AALTO: And a court on hearing all of the evidence on an infringement case may say, well, that's inappropriate.

MR. ZIBARRAS: Yes.

JUSTICE AALTO: It was inappropriate conduct. That conduct requires to be recognized, it will be recognized by a larger damage report. So I know where you're coming from on that point.

MR. ZIBARRAS: So I just -- I think my only comment, then, on that is those issues can't be determined today and certainly can't be used to try and, again, invoke the court's ongoing oversight in this litigation at this stage. Certainly if there are issues that get raised, they will get raised at the appropriate time,

But the concern is by trying to do that you're pushing everything back into a different test, because the balancing act in this case does not support this unprecedented request that Voltage, or any future copyright holders, because they are asking for a finding or a decision or a ratio that in circumstances where the identity is unknown, you're in this -- you're going to have judicial resources overseeing the plaintiff's litigation strategy.

I can also say that in Canada, unlike in the U.S., there's always the cost consequences; so that kind of conduct does sometimes or may sometimes be dealt with in

cost consequences later, so it may not need to be dealt with up front as importantly.

Just to get down to the issue of notice, the issue of notice has been an interesting one in this case. I don't know that we really have a position, but I just want to make some observations which might be of assistance to the court.

I think the starting point is in this case because notice was provided. Any finding on the issue is moot or at best obiter, because there was notice. I would submit that the issue should not or does not need to be dealt with, as there are probably more considerations than really are before the court today. This issue of notice that my friend from TekSavvy raises is not really the subject matter of a factum or materials or case law or an opportunity for us to do fully responding materials as well, and I think it can have broad-reaching effects.

So what I would say is the BMG decision, the Court of Appeal, this issue of notice was before it because the respondents in that case were arguing that because notice was a requirement under the rules, and I will take you to the paragraph, it's paragraph 24, so that is in our memorandum at the stamped page 76. So it's paragraph 24, and it says:

"Rule 238(2) provides that notice of the motion must be served on the other parties. Since the identities of the other parties are presently unknown to the plaintiffs, service is not possible and the respondents

argue, therefore, that rule 238 does not provide a procedure to discover the identities."

What they were trying to do in that case is kind of flip it on the plaintiff and say you can't even use that because the rule requires notice. The court in dealing with it said, look, obviously it's an impossibility and any way the courts have said that -- they haven't applied that strictly, so really what the court did was find that notice was not required in these circumstances.

Now, they didn't deal with it as directly as I guess my friends want to deal with it, but I think BMG is good law for the proposition or confirms that notice is not required.

And just to take a step back, just to put everything in perspective, this is the one time and the one unique motion where the only reason we're here is because we can't go to those defendants directly. So this whole issue of notice is a complete -- is completely -- I don't know what the word is, it's a non-issue. Just the very nature of the reason I'm here makes it a non-issue.

The other concern that turning it into an issue raises is who pays for the cost of notice, because I can tell you that Voltage doesn't want to do that. And I can also tell you that Voltage will say it's not required to give notice, because it's not required under the extant case law. And if it knew who the people are and could give notice, it wouldn't have to take this step. So we don't want to turn it into two-step if we don't have to.

My real concern is that --

JUSTICE AALTO: I guess the policy issue in this is that these Jane Does and John Does, their privacy rights are being affected. Do they not have a right to participate in this proceeding if they were so instructed? You know, in terms of this case, it's now moot because some form of notice has gone out to them and you've shown it to me and it's on the web site of TekSavvy, and there isn't a Doe or group of Does who've sought to retain counsel to appear here, perhaps because they want to see how this whole thing unfolds, first of all. I don't know. Maybe they will seek to intervene if this goes to appeal. Who knows?

But they haven't -- they have a right, and courts are very careful to preserve individuals' rights where they are being affected, so I hear you on the issue of notice. I don't know if BMG takes it as far as you say it does. I'm going to read it very, very carefully, but the trouble I find with your submission is that you are dealing with people's rights, and once you start doing that, they should have the ability to know it and respond if there they're so advised.

MR. ZIBARRAS: As I said, Your Honour, as I said in the beginning, I don't know that we take a position, I'm just pointing out some observations. On the issue of a right to be here, all I'm saying is that the Norwich Pharmacal orders have been around for some time. They're all this type of thing. We don't know who the John Doe is; we're going to a third party and asking them to let us know.

And I don't think there is an example where a court required notice. So that's all I'm saying.

And the other observation I was making is, again, because we haven't hashed it out today, I think it's dangerous to make a decision. And one example I will give you of the kind of competing interest that may be at play was the one we raised when CIPPIC indicated that it wished to give its customers notice. And we ultimately consented -- sorry, TekSavvy indicated it wanted to give its customers notice. And we ultimately consented. We are fine with it.

But one of the conditions we said is, when I start litigation, I can take steps to preserve evidence, which is a concern to us, and it's always a concern in cases of piracy, fraud, infringement, because especially where you're dealing with electronic evidence, because electronic evidence can be deleted like this. There will be evidence of a deletion, but it's still deleted. So you don't know the scope of the problem. You don't know -- you can't get confirmation of the problem. It's just an absence of evidence. And preservation is always important to the court.

So the concern we had is, look, we're happy to give -- we're happy if you want to voluntarily give notice. We're happy for you to give notice, but the concern we have is about preservation of evidence. And that is why you saw that language that we insisted on adding.

So there are considerations like that that we just as an observation may go against kind of an early

warning system, if I can call it that way, between ISPs and customers that could result in destruction of evidence or other steps being taken; I don't know.

The long and the short of it is, Your Honour, I don't know where the issue should land. I don't think it's kind of hashed out sufficiently in this case for the court to weigh in on it, and in any event, it's moot. So I would encourage this court not to enter the fray on that issue. And I think they can do that without being afoul of the existing case law and where we are.

The other issue that my friend raises, this issue of costs, and I would request that -- we would basically -- we were frankly shocked when we got a number that high for many reasons. We haven't asked them to do anything yet. Whatever they have done they have voluntarily done. The only task that they would be required to do if the order was granted, which they have already done, is this process of identifying the customer information, name and address associated with an IP address.

Now, bear in mind, that is their customer information. And --

JUSTICE AALTO: And I thought in part Mr. McHaffie's argument was there is a cost factor involved in taking the 2,000 pieces --

MR. McHAFFIE: Correct.

JUSTICE AALTO: -- of information you provide, going through all of their records, and I don't know whether they've gotten 10,000 subscribers, a 100,000,

or a million subscribers, but being -- there is a time component.

MR. ZIBARRAS: Correct.

JUSTICE AALTO: And a cost component in going into that database and saying does this marry up with that.

MR. ZIBARRAS: Right. And we've agreed that we would pay the reasonable costs of that exercise, and we continue to agree to that.

My concern is that you just don't get the $190,000 from doing that exercise, and what I base that on is in this case, because they wanted to give notice to their customers, we provided them with our list of IP addresses, the final list. Five days later they had confirmed that they had translated that into customer contact information, and the letter went out.

So we have a temporal limit as to how long it took them -- and you know, I don't know have evidence what the process was, but it only took them five days. I can't imagine at what rate they have got someone at TekSavvy -- and it's -- this is essentially an administrative job.

JUSTICE AALTO: Tongue in cheek, I will suggest maybe Bay Street lawyers' rates?

(Laughter.)

MR. ZIBARRAS: Bay Street lawyers would drop everything to make that much money in a week. It's an astronomical amount.

JUSTICE AALTO: It may very well be, and that is why I said to Mr. McHaffie, we have got to do this in

stages and the costs sound to me like an issue we will have to create some sort of process to determine, and I hear you.

MR. ZIBARRAS: Right.

JUSTICE AALTO: I'm 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 cost component and we will have to figure out how to make the calculation.

MR. ZIBARRAS: I think as long as we do that, it might have to be a pretty thorough process if we're so far apart, which we --

JUSTICE AALTO: May or may not be, but I will hear submissions on that point down the road. At the moment I've got bigger fish to try.

MR. ZIBARRAS: Right. And there was the other comment made about the confidentiality issue and you were taken to that sentence in the BMG case. I think the important thing to note from that as well is --

JUSTICE AALTO: It's the scope of the confidentiality, and is the deemed undertaking rule sufficient in the circumstances. Any information gleaned as a result of this process is covered by the deemed undertaking rule, that it's not used for any other purpose -

MR. ZIBARRAS: Correct.

JUSTICE AALTO: -- other than the purposes of this litigation. We have to look at whether that's sufficient, but I think that is all Mr. McHaffie was asking to do, was how do you use it and what the fence posts should be regarding confidentiality.

MR. ZIBARRAS: The only point I want to make on that is one I made earlier, where in this context -- and this was in the Trapp decision -- in this context the invasion is so narrow that, because we are only dealing with one film at one particular time, and just the name and address, I would suggest that this isn't necessarily the time to engage broader protections such as only identifying the individuals by initials.

I think what the court was trying to do with that reference was allow some discretion in cases where broad amounts of information were being disclosed, and it could happen. The one interesting thing about this case is while we might have 2,000 IP addresses, the information associated with each IP address is the lowest it's going to be, whereas there are other circumstances where you may only have one defendant but thousands of infringements, which would probably open up a lot more information about that one person.

And I guess if a court finds that in a situation like that some of that information may also be embarrassing in nature, or what have you, they can identify that person by initials; or in the case of for example a whistleblower situation, there is an interest in protecting the individual that goes beyond just protecting illegal activity, you may increase the confidentiality, the confidential nature of the disclosure. But I would submit that that is not where we are today in this case.

JUSTICE AALTO: I guess in a general sense,

is there anybody else who needs to know who these people are, other than your client and you?

MR. ZIBARRAS: I think that's not the starting point. The starting point in litigation is not -- it's a public process. The starting point is that it has to remain public, and there's some very recent case law on that that actually pushes it to the public side. I don't have it before me and that's another concern --

JUSTICE AALTO: You're not talking Sierra Club?

MR. ZIBARRAS: -- sorry?

JUSTICE AALTO: You're not talking the Sierra Club, the Sierra Club case and the confidentiality that flows from that in the Supreme Court of Canada?

MR. ZIBARRAS: I may be, but I don't -- I'm not even that familiar with it.

JUSTICE AALTO: One unique aspect of this court is that we frequently deal with confidentiality orders because of the nature of the cases that come before the court, whether they be in the immigration field or whether they be in the intellectual property field. But in any event, I have your point and I understand the nature of the confidentiality that would have to be addressed in this circumstance.

MR. ZIBARRAS: Unless you have any further questions?

JUSTICE AALTO: I think I am questioned out.

MR. ZIBARRAS: Thank you. Thank you, Your

Honour.

JUSTICE AALTO: Thank you. Thank you all very much. It has been a very interesting day and I have a lot to digest beyond that which I knew when I walked in this morning,

I was quite right when I made the observation this morning that I was not going to decide it today. I wish to think through much of what you've said and try and pull it together in something that makes sense for all of the participants in this piece, and I'm hopeful that I will have a decision for you in the reasonably near future, but it won't be next week. I'm going on holiday. Thank you. We're adjourned.

-- Whereupon hearing concluded at 2:46 p.m.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability,
accurately transcribed from a pre-existing recording
the foregoing proceeding.

_____

Catherine Keenan, BA (Hons), MA
Computer-Aided Transcription
July 10th, 2015

Court File No. T -2058-12

FEDERAL COURT OF CANADA

BETWEEN:

TEKSAVVY SOLUTIONS INC.

Appellant

- and -

VOLTAGE PICTURES LLC

Respondent

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONOURABLE MADAM PROTHONOTARY R. ARONOVITCH
held at Thomas D'Arcy McGee Building,
90 Sparks Street, 7 Floor, Ottawa, Ontario
on Monday, December 8, 2014 at 9:30 a.m.

APPEARANCES:

NICHOLAS MCHAFFIE	for Appellant
JAMES ZIBARRAS	for Respondent

Also Present:

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Ottawa, Ontario

--- Upon commencing on Monday, December 8, 2014 at 9:30 a.m.

PROTHONOTARY ARONOVITCH: Mr. Zibarras, when you make your submissions, you may rise, but Mr. McHaffie you will stay seated.

MR. ZIBARRAS: Good morning.

MR. MCHAFFIE: Good morning.

PROTHONOTARY ARONOVITCH: Mr. McHaffie.

SUBMISSIONS BY MR. MCHAFFIE:

MR. MCHAFFIE: Thank you. As you know from the materials, we're here today to deal with the assessment of the "all reasonable legal cost, administrative costs, and disbursements incurred by TekSavvy in abiding by the order of Ontario," of February 2014. In making our submissions, we filed two volumes of a record. That includes our representations as well as a book of authorities. I'll also, likely, make a brief reference to my friend's memorandum of fact and law and his book of authorities that came in separately. What's clear from those materials is that there's a widely divergent view of what's covered by the order and whether the costs incurred and claimed by TekSavvy are reasonable. We submit that the costs as claimed and submitted by TekSavvy are both covered by the order, and are reasonable from both an objective perspective and when looking in the context of the particular case that we have in front of us and the cases that deal with Norwich Order generally, as well as when viewed in the context of the litigation that Voltage intends to bring.

Prothonotary Aalto's reasons refer to the order being designed so that production would not cause expense to TekSavvy as well as to the other Norwich Order cases in which principles upholding that third party harmless arise. The costs at issue and the evidence that I'll be taking you to show that the costs were incurred by TekSavvy solely as a result of being brought into this by Voltage. This isn't something that TekSavvy asked for or wanted. This was Voltage's choice, and, as I'll get into, it was a very tactical choice by Voltage. It was Voltage's choice to pursue thousands of claims against holders of IP addresses, a unique case for civil claims in Canada, and it was Voltage's choice to focus on TekSavvy as the recipient of this motion. And that choice cost TekSavvy, an innocent third party, time and money. Those are costs that Voltage, in our submission, undertook to pay and should be the party paying.

As we flagged in our written submissions, the overall costs that we're talking about add up to or divide out to about $164 per IP address requested which is a fairly modest number compared to the overall costs of litigation that Voltage has indicated it intends to bring, so, while the number may seem high as a cost number on a first look, when one actually looks at the context of litigation that it relates to, it's fairly modest when you're talking about 2,000 potential claims, and that's something that Prothonotary Aalto flagged.

So what I propose to do, without belabouring

any points that you're familiar with already, is to go briefly over some of the procedural facts and background, to speak to the order itself and the reasons for the order of Prothonotary Aalto as well as the other cases that deal with Norwich Order and the principles that these costs aspects of Norwich Order are designed to cover, and then deal with the specific costs that are itemized, individual costs.

From a procedural perspective the timeframe was from about October of 2012 through to the decision in February 2014. The October 2012 timeframe covers -- and I'll turn to it later on -- an initial exchange between Mr. Logan, who is a principal of a company called Canipre -- and there is the timeline that we are -- I think it's pretty much the last page of the whole --

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: Before the November 1st date on which TekSavvy first received their draft motion materials there was an exchange that dated back into October between, originally, Mr. Logan of Canipre and TekSavvy in the form of Mr. Tacit, as well as Mr. Misur. I'll be taking you particularly to that because there's a submission my friend makes that I feel I have to respond to, but, ultimately then, through November there's this period that there's a first initial set of draft motion materials, and that's the one that you'll have read. It had about 4,000 IP addresses associated with it. There was an initial return date of, very shortly after that, November 17th. That was then adjourned to, or agreed to adjourn to, December 10th

and ultimately December 17th. During that timeframe, however, if one can turn up in the first book -- and I haven't put together a compendium in front because of the videoconferencing, so we're going to have to flip through, unfortunately, it is a little bit -- in our first volume at page 115 behind tab 2(b).

PROTHONOTARY ARONOVITCH: Sorry, did you say 2(b)?

MR. MCHAFFIE: 2(b), just like Hamlet; 115 is the page number in the volume. Sorry, so 115 is in the middle of Volume 1.

PROTHONOTARY ARONOVITCH: Thanks.

MR. MCHAFFIE: This is an e-mail exchange --

PROTHONOTARY ARONOVITCH: Too bad you didn't put together your compendium.

MR. MCHAFFIE: Yes, I know. I felt it would be unfair to my friend to have --

PROTHONOTARY ARONOVITCH: There is always service in advance of motions.

MR. MCHAFFIE: That would have been a lot, I can see already, a lot more convenient. I'm sorry that it didn't happen. So this, on page 115, is an e-mail exchange between Mr. Philpott, of the Voltage law firm, and myself. And the one aspect of this that I want to flag for you is in the middle of the third paragraph of my e-mail of November 15th about five or six lines from the bottom it talks about:

"Once this information is confirmed, I understand that TekSavvy expects to be in a position of

having completed the data compilation within 10 to 15 business days. In this regard, you will appreciate 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 to dedicate significant resources away from the operations of its business(pg. 115, Affidavit of Marc Gaudrault sworn June 27, 2014)."

I flag that because that was at the outset of the process, an express indication to Voltage that they ought to have understood and, in fact, we made clear to them that this was a significant process that was going to be undertaken, and to the extent that they thought, mistakenly or otherwise, that it was not, they were being told directly right at the outset of the process that it was going to be a significant undertaking that required -- sorry, substantial undertaking that would require dedication of significant resources. Voltage chose, nonetheless, to proceed, and chose to give its undertaking to pay reasonable costs in that circumstance.

During around this period from November 14th through to, ultimately, December 4th, the correlation was undertaken. The first part of that was structural in setting things up and then, on November 28th, there was the revised list that was given. November 28th, there was a list of approximately 2,110 names that was given as a revised, shortened list. That's the one that the actual cross-reference lookup takes place. Between November 28th

and then that December 4th date the final lookup of those addresses took place. On December the 10th -- and then that's when you hear my friend has repeated a number of times, talked about "four business days," it would be between that November 28th and December 4th. There was a weekend in there as well as the two days, November 28th and December 4th.

On December 10th, TekSavvy provided notice to the individuals who have been identified, and this is something that you'll hear from my friend about and I will make submissions about, but it is an important factor for two reasons. TekSavvy was the one who insisted that those who may have been affected by this order that was being sought by Voltage ought to receive notice of. And that notice was sent out on December 10th, and it had the two, in my submission, positive results of a) giving those people who were affected by the potential order notice of what was happening --

PROTHONOTARY ARONOVITCH: How many people were notified on December 10th?

MR. MCHAFFIE: About 1,100, and the reason for that is that there were about a thousand names that could not be correlated, so of the 2,110 a thousand-odd were notified because those were the ones who could be identified.

PROTHONOTARY ARONOVITCH: And how many names were actually arrived at by December 4th?

MR. MCHAFFIE: That's the same. It's the --

PROTHONOTARY ARONOVITCH: The ultimate number?

MR. MCHAFFIE: Ultimately, the total number that could be given was about 1,100.

PROTHONOTARY ARONOVITCH: And they were the ones notified on December 10th?

MR. MCHAFFIE: That's right.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: The second positive effect of that notification was that there was feedback coming from those who had received it that made it clear that there had been errors made in the initial correlation process, so it acted as a fail-safe and a check on the information that was undertaken the first time by TekSavvy. And the corollary of that is that if the initial round had simply been passed over to Voltage, then there would have been individuals who were misidentified and individuals who ought to have been identified who were not. The notice process allowed that correction to happen.

PROTHONOTARY ARONOVITCH: I remember it was something like 45 were notified who shouldn't have been and 92 weren't who should have been. And how does that change over the --

MR. MCHAFFIE: Not -- about 50, I believe or something like that.

PROTHONOTARY ARONOVITCH: That's why I've asked you the ultimate number.

MR. MCHAFFIE: Yes, the number --

PROTHONOTARY ARONOVITCH: There is a new number that was arrived at after this further correlation or after this correction to who was sent, who wasn't sent?

MR. MCHAFFIE: Not by a significant factor. I think that the only number that I've got is that it's set out in Mr. Gaudrault's affidavit which is the total number of 1,100-odd, but it may be that there was a change by a factor of about 50 individuals. That would be the extent of it because there were 42 who were sort of on the list who ought not to have been, and as you say 92 that were not identified that should have been, so whether that 1,100 became about 1,050, I don't know. I don't have evidence on the specific numbers in each of those.

After that notice occurred, then the motion moved forward. Actually, what happened is the actual final motion record was received after that, but there was obviously discussion going on beforehand to give a draft. The motion record was served on December 11th. The first attendance on December 17th ended up being adjourned at the request of CIPPIC, who indicated that they intended to seek leave to intervene, and so that adjournment was granted. Voltage also requested an adjournment because the errors had just arisen or come to TekSavvy's attention.

PROTHONOTARY ARONOVITCH: On that attendance before Justice O'Keefe, did the costs of adjournment come up?

MR. MCHAFFIE: No.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: And the same is true with respect to --

PROTHONOTARY ARONOVITCH: Justice Mandamin, that appearance, no costs?

MR. MCHAFFIE: There was no order as to costs.

PROTHONOTARY ARONOVITCH: There was no order as to costs, or the issue didn't --

MR. MCHAFFIE: It did not come up one way or the other. There was no discussion. There was no statement, no order as to costs. The costs of the adjournment was simply not addressed, to my recollection. It's a question that I want to look back to make sure that I'm not mis-stating their orders, but to my recollection there were no costs either addressed or ordered.

So the history between that December 10th timeframe and then, ultimately leading to June 25, 2013, dealt with those adjournments. I do want to flag the adjournment in both cases, December 17th and January 14th, were adjournments that were requested by CIPPIC. TekSavvy's request for an adjournment because of the error was specifically not spoken to by Justice O'Keefe. He said: I don't need to deal with that because I'm adjourning at the request of CIPPIC, so I'm not speaking to that. The second one was also requested by CIPPIC. In both cases Voltage opposed those adjournments, and TekSavvy had to attend in order to be ready in the event that the matter did proceed.

Then, during the February to June time

period, there was the granting of leave to CIPPIC, the filing of the affidavits by CIPPIC and by Voltage, and, ultimately, the hearing before Prothonotary Aalto. Then the decision came out in February of this year.

PROTHONOTARY ARONOVITCH: You had attended at the motion to intervene?

MR. MCHAFFIE: It was done in writing. We did attend at the cross-examinations during the February to June timeframe that were on the motion proper, not on the request related to intervene itself. That was simply done in writing.

PROTHONOTARY ARONOVITCH: Were any costs held within Madam Tabib's order?

MR. MCHAFFIE: Not to my recollection, except costs of CIPPIC. I think it was clear that as a term of the intervention that CIPPIC was not seeking costs.

I'll take you, if I could, then, to the order of Prothonotary Aalto, address some of that, and then broaden out to the background covering the Norwich cases that he referred to and some other ones that deal with the issue of what cost orders in Norwich cases are intended to cover.

As you know, Prothonotary Aalto concluded that the conditions were met for the Norwich Order. His reasons are contained in tab 14 of our second volume. That is the same volume with the timeline in it. I'll just take you to a few passages which I think help address the question of what the order was intended to do and intended

to cover. The first passage is paragraph 35 on page 472 of the record. This is Prothonotary Aalto's conclusion paragraph before getting into his analysis, and at the middle of that he says that:

"Such an order is a discretionary and extraordinary order. For the reasons discussed below, given that Voltage has demonstrated a bona fide case of copyright infringement, a Norwich Order will be granted. This Order will be granted with qualifications intended to protect the privacy rights of individuals, and ensure that the judicial process is not being used to support a business model intended to coerce innocent individuals to make payments to avoid being sued (Voltage Pictures LLC v. John Doe, 2014 FC 161)."

And there is reference later in Prothonotary Aalto's order to the low-cost, low-risk kind of business model that is being considered here. Going on --

PROTHONOTARY ARONOVITCH: What's the point you're trying to make there?

MR. MCHAFFIE: I'm just trying to get to the passages in Prothonotary Aalto's order that deal with the additional --

PROTHONOTARY ARONOVITCH: Is this relevant?

MR. MCHAFFIE: This is relevant, in my submission, to what the additional protections were intended to do and what the costs order was intended to do. And the cost order would have intended in part to ensure that the judicial process wasn't being used for this low-risk,

low-cost business model that was described. It's simply a reference to the additional provisions contained in the order and the qualifications that are -- what they're intended to cover.

Prothonotary Aalto then goes on and discusses BMG and, as you can see, that discussion goes on for some time, and one can see in paragraph 44 he talks about what comes out of BMG:

"Finally, the Court suggested the need to consider the costs of the party required by the order to co-operate and disclose the sought after information, in this case, TekSavvy."

And going on in paragraph 45:

"The principles to be taken from BMG are as follows: e) any order made will not cause undue delay, inconvenience or expense to the third–party or others."

In paragraph 46, he describes what Voltage was arguing and talks about the various points, a, b, c, d, e, that he has just described from the BMG case, and the last part of that is that: "TekSavvy will be reimbursed for its reasonable costs in providing information."

It then continues a fair discussion of not only BMG and the whole issue of prima facie case but other cases from the United Kingdom and the United States, and if one turns to 134, which is on page 505 of the record, a non-exhaustive list of considerations flowing from those cases, U.S., U.K., and Canada, has been set out and over the page at paragraph D is the material one for our purposes

today:

"The party enforcing the Norwich Order should pay the legal costs and disbursements of the innocent third-party."

The application of that is in paragraph in 135:

"TekSavvy will not release any information in the absence of a court order; that it is fair that Voltage have access to the information to enforce its copyright; and, given the terms of the order made, production of such information will not delay, inconvenience, or cause expense to TekSavvy or others."

In my submission, that underscores what this costs order was. He's taken that language although he hasn't used the word "undue" from the principles that we saw earlier, that the intention of the order was that it would not cause expense to TekSavvy or others.

I'll flag paragraph 136 as well, not just to toot my own horn here, but to respond to a submission that my friend made which is that TekSavvy made no material submissions at the hearing of the case. I just sort of flag that in Prothonotary Aalto's view the submissions that TekSavvy made were helpful, and he then goes on and talks about the issues that --

PROTHONOTARY ARONOVITCH: How, exactly, did this happen? I'm having a -- I realize I'm asking you to give evidence, but you appeared at the motion. You didn't make formal written submissions, as I understand according

to his evidence, but you made some submissions?

MR. MCHAFFIE: That's right. What happened was -- and we expressed to the Court early on that our concern was not to oppose the request for the order itself --

PROTHONOTARY ARONOVITCH: -- privacy of your subscribers.

MR. MCHAFFIE: Yes.

PROTHONOTARY ARONOVITCH: You made some opening remarks, closing remarks.

MR. MCHAFFIE: There was about 40, 45 minutes of remarks on what were called the "signposts" at the hearing. I think that was the term that was used. It's not used in the final judgment.

PROTHONOTARY ARONOVITCH: And you made these remarks without the benefit of written submissions?

MR. MCHAFFIE: Yes, to Prothonotary Aalto.

PROTHONOTARY ARONOVITCH: Thank you. And you spoke to the order, I take it?

MR. MCHAFFIE: Yes, and that's really what it was.

PROTHONOTARY ARONOVITCH: The form of the order?

MR. MCHAFFIE: The form of the order, and that's what we were essentially speaking to was the privacy concerns, what would be put in there to protect those, as well as the role of TekSavvy as an ISP. There were also submissions in there with respect to the issue of notice,

and again, I take your point about not wanting to give evidence, but I just flag that the issue about the fact that TekSavvy had given notice, there was actually a request that the Court address that fact and whether it was appropriate or not appropriate, whether it was to be commended, whether it was not. There was a request that that be addressed. It was not, ultimately, addressed by Prothonotary Aalto's order.

PROTHONOTARY ARONOVITCH: And who requested that?

MR. MCHAFFIE: We did. We did because we were in the position of feeling that notice ought to have been given, giving that notice which then allowed people to make the decisions that they needed to with respect to whether they wanted to attend or not. Nobody did, in the end, but they get that legal advice. Voltage said no, that's not required.

PROTHONOTARY ARONOVITCH: I understand Voltage's position. Mr. Zibarras -- I'm just going to interrupt you for a moment to say that I am essentially just leading Mr. McHaffie to -- please sit down.

MR. ZIBARRAS: Sure.

PROTHONOTARY ARONOVITCH: I am asking Mr. McHaffie to essentially give evidence, and so if you have anything to say about this, you will. We have your affidavit, but you may wish to address anything he's saying if it's contentious, and you will get a chance to do so.

MR. ZIBARRAS: Thank you.

MR. MCHAFFIE: I note and flag that these are matters that are in -- these days, now, with the digital reporting -- that are in the Court's file with respect to the extent that there's any matter of controversy with respect to what occurred at the hearing.

PROTHONOTARY ARONOVITCH: I don't think your friend will find it controversial.

MR. MCHAFFIE: So in that paragraph 136, this is that passage:

"There was evidence of notifications which TekSavvy had made available to its customers. TekSavvy also sought payment of its reasonable costs in the event it had to release information. Any dispute regarding those costs can be resolved by the Case Management Judge."

And that was your cue. So it's in that context that, at page 510, that we see the two material provisions of the order, and I draw your attention to the two material provisions. The first is three, itself, there is the operative part, and I underscore the reference to: "All reasonable legal costs, administrative costs, and disbursements," all as separate categories, not the costs of the motion or the narrower order as to costs, not a narrower order as to the costs of conducting the correlation in particular, but a broad language of: "All reasonable legal costs, administrative costs, and disbursements incurred by TekSavvy in abiding by this Order."

The second part is this, and this was something that was also put in at the request of TekSavvy,

this paragraph 4, that those reasonable legal costs and disbursements of TekSavvy be paid prior to the information being passed. And that was the result of a concern in the submission by TekSavvy that Voltage, as a foreign plaintiff, not to be in a position where they get the information and then not have the incentive to pay what was already going to be a considerable amount of costs. In my submission, that makes fairly clear the point that this was not intended to be a de minimus type of order, that this is a recognition that there are significant costs to be paid and that the timing of that, therefore, becomes important vis-à-vis the release information.

I'll broaden that out. My submission is that these aspects of the order were intended to be the same sort of an order that one sees in other Norwich cases that this was informed by, and there's no indication that it was intended to be anything different than. In fact, the reasons make it clear that it was intended to be a similar sort of order to those described in the other Norwich cases. So I'll take you to three of those, but we've referred to them in our memorandum. I'll take you to three of them in our book of authorities, if I could.

The first is Norwich Pharmacal, itself. This was the patent case, and the paragraph I'll refer you to is paragraph 100, about three or four pages from the end.

PROTHONOTARY ARONOVITCH: Who (inaudible), sir?

MR. MCHAFFIE: That was Norwich Pharmacal, tab 2 and paragraph 100.

PROTHONOTARY ARONOVITCH: I was instead in the (inaudible).

MR. MCHAFFIE: I will get there.

PROTHONOTARY ARONOVITCH: "Full costs of the respondent of the application and any expense --"

MR. MCHAFFIE: Exactly. So that language of putting the respondent to trouble -- and just to put this in context, this is Lord Cross of Chelsea's -- this is one of the House of Lords decisions where everybody gives a separate opinion. This one is of Lord Cross of Chelsea. One sees at the top, in paragraph 99, that he agrees --

PROTHONOTARY ARONOVITCH: What does he mean by "full costs of the application"? Is he talking about the proceeding on the merits?

MR. MCHAFFIE: He's talking about the proceeding on the merits as well as the expense in providing the information. And he's talking about --

PROTHONOTARY ARONOVITCH: Do the full costs go to the proceeding on the merits, however?

MR. MCHAFFIE: Sorry?

PROTHONOTARY ARONOVITCH: The full costs go to the proceeding on the merits?

MR. MCHAFFIE: Yes, of the application. The application would be the Norwich application. But he's talking about not the Norwich case, just for clarity. He's talking about the next case. He's talked about costs in

this case, but then he talks and says, you know, if you have an identical case the next time, maybe they might not need an order, and it could be done in this way, but for the next case the court will have to decide it, and in that case -- so that's what this is talking about is the next case, then the court would have to decide whether in all the circumstances it was right to make an order and deal with the strengths and so forth, and then at the end:

"... and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant(Norwich Pharmacal Company & Ors v Customs And Excise [1973] UKHL 6)."

So it's in the context they're talking about "for the next one," and in our submission we're sort of the "next one." This is the principle that he would be talking about is whether there is all expenses being paid by the applicant.

We will turn to BMG, but I'll turn, if I could, to the decision. This is from page 15 at tab 4. It deals a little bit more with the cost issues. In paragraph 10, again having done a review of Norwich Pharmacal and Glaxo Wellcome, at paragraph 10 he establishes the five criteria for the equitable bill of discovery, and in the italicized portion there -- and that's our italics, not his:

"The person from whom discovery is sought must be reasonably compensated for his expenses arising in compliance with the discovery order in addition to his legal costs(BMG Canada Inc. V. John Doe, [2004] 3 FCR 241, 2004 FC 488)."

So, again, it's that two-part aspect of it. He expands on that, then, at paragraph 29. Paragraphs 29 to 32 are under the heading of his Criterion D, and the first part I just flag just to point out that it's consistent with what it is that we see in this case at paragraph 29. He talks about the affidavits filed by ISPs in that case, that reveal that it's not an easy task to provide the name and address of the account holder who used the specific IP address at a given time, and at paragraph 30 he references the discussion from Telus saying all the things that have to be done, not to say that what Telus does is the same as what TekSavvy does, but just simply to flag the fact that it's consistent in the case law. There's recognition by the Court that this is not a one step, one easy process necessarily for an ISP.

PROTHONOTARY ARONOVITCH: He's speaking there to the legal costs of responding to the motion. Are those costs of the motion, in your view, that he's addressing? Are they reprised in the order of costs?

MR. MCHAFFIE: In this case, you're right. He says: "All respondent ISPs shall have their costs in this matter." I don't believe -- I'm not sure. I have no information on whether there was ever a determination of

those costs. As you know, it went up to appeal. There was an affirmation on slightly different grounds. The appeal, the costs were dealt with differently. There were, I think, no costs.

PROTHONOTARY ARONOVITCH: I'm not sure that that's relevant.

MR. MCHAFFIE: But I don't know how --

PROTHONOTARY ARONOVITCH: The question is what the disposition is of the order of legal costs is covered. I take it that isn't covered, the costs of the motion?

MR. MCHAFFIE: The costs of -- yes. Well, costs in this matter, it says, "...the respondent ISPs shall have their costs in this matter." I don't know if there were any preliminaries and so forth in that case, but the costs, in my submission, of getting to the stage where the order was given -- and you can see in paragraph 32 how it's described as the legal costs of responding to this motion.

The final case I'll take you to is the Leahy case, and that's a tab 10. This is a 2000 case of the Alberta Court of Queen's Bench that was affirmed on appeal, again, another Norwich case. If one turns to page 28 and paragraph 106, again, one sees that there has been a review of the Canadian and U.K. authorities: "The foregoing review demonstrates that (...)" in b, sub iv on the next page:

"The court will consider the following factors (...) Whether the third party can be indemnified for costs to which the third party may be exposed because of the

disclosure, some refer to the associated expenses of complying with the orders, while others speak of damages(...)"

So, as can be seen there, that's that concept of indemnity, that the costs order is intended to keep the third party whole, effectively, because they are an innocent third party to the litigation, and indemnifying them for the costs and expenses to which they have been exposed because of the disclosure. And that's described further in paragraph 159:

"Each Ex Parte Order that directed disclosure from the financial institutions provided that ATB's counsel or the Plaintiff would pay the reasonable fees incurred in complying with the order and there is no evidence before me to suggest ATB would not be in a position to indemnify the financial institutions for any associated costs. In any event, the four financial institutions that were directed by my Ex Parte Orders to disclose documents to ATB have never objected in this court to the orders on the basis of any actual or potential cost or damage(Alberta Treasury Branches v. Leahy, 2000 ABQB 575)."

So, in my submission, that's what the order for both reasonable legal costs, as well as administrative costs and disbursements, is intended to do. It's intended to do this in the context of --

PROTHONOTARY ARONOVITCH: I don't think I have the full -- it may be a printing issue. Is there no -- in that order, I don't see it.

MR. MCHAFFIE: There was, but in the decision, itself, there was a reference, I believe, to the orders that had been, the actual ex parte disclosure orders, that had been given.

PROTHONOTARY ARONOVITCH: But there's no disposition as to costs in this judgment.

MR. MCHAFFIE: Okay, I would have turned to the back just the way you would have done, but I realize that we don't have that. I will answer that question after the break to make sure that we've got it right.

PROTHONOTARY ARONOVITCH: Very good.

MR. MCHAFFIE: The one thing I do note is that this motion was a motion to set aside the ex parte order, so there were ex parte orders that included the costs indemnity aspect, and then this was a separate motion to set aside those orders, and so those costs --

PROTHONOTARY ARONOVITCH: Then you won't have the disposition on costs?

MR. MCHAFFIE: The disposition on costs might well have gone against those parties because they lost the motion to set aside, but this is the order -- this, paragraphs 159 and 106, talk about the costs in the actual Norwich Order rather than on the motion to set aside. Sorry about that. I'm not quite sure what happened there. I will look that up.

PROTHONOTARY ARONOVITCH: It happens.

MR. MCHAFFIE: I'll get back to the broader principle, that a Norwich Order is an extraordinary order

that one of the principles, one of the things that a court has to look at in determining whether to grant it, is whether the third party would be put to undue expense, will be put to expense that can be compensated by the moving party. And the notion there, in my submission, as it comes out of the cases, is that, as a third party to the litigation, the third party ought to be made whole, the costs of the litigation are for the litigants, and that the third party who finds itself stuck in the middle isn't just receiving costs on the ordinary scale. It's receiving the reasonable legal costs, the expenses to which it has been put, by virtue of having been brought into this, and that, in fact, an order ought not to be given if that cannot occur.

PROTHONOTARY ARONOVITCH: So you take these cases to stand for the proposition that the third party has to be made whole, definitely.

MR. MCHAFFIE: That the general principle is one of indemnity, subject to the reasonableness restriction, and that's the main restriction on it, and that's the restriction that Prothonotary Aalto put in there, that it be the reasonable legal costs.

On the issue of legal costs and that question of what's reasonable, we have flagged, admittedly in a different sort of circumstance, the -- not the Stoney First Nation case -- it's the Fontaine at tab 15. This is in a settlement agreement context, but it, again, deals with that notion of indemnity. One sees these sorts of

indemnities for legal costs always covered by questions of reasonableness in anything from a D&O policy to, in this case, a settlement agreement. There's a reference at paragraph 5 to this notion for "reasonable legal costs" and disbursements, and the court in that case notes that in that context, admittedly a different context, but a context also dealing with that notion of indemnification, "reasonable legal costs" isn't talking about a normal cost regime:

"It does not 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(Fontaine v. The Attorney General of Canada, 2012 ONSC 3552)."

In my submission, that is the goal of a Norwich Order and of the compensation aspect of a Norwich Order as is described, that that third party will not be put to unreasonable expense as the goal of the order in this particular case. And I note --

PROTHONOTARY ARONOVITCH: Let me interrupt you to ask you a question about Prothonotary Aalto's order that I asked about the adjournments and other proceedings. This cost phrase -- you were a party to the motion?

MR. MCHAFFIE: We were a party to the motion.

PROTHONOTARY ARONOVITCH: You appeared to it. You didn't make witness submissions. You made some submissions. Were costs raised, costs of the motion raised, before Prothonotary Aalto? I don't see a disposition of

costs, so, again, I'm asking you to give evidence, and I'll hear from your friend if he has anything to add.

MR. MCHAFFIE: My best recollection was this: That there was a recognition by the Court that the costs issues of Norwich Orders were one of the requirements that had to be given before there was a Norwich Order even issued. There was not extensive discussion about what the ins and outs of those costs were for two reasons. One, there wasn't evidence before Prothonotary Aalto. Second, as I recall it, during the course of it, it became clear that that was thinking a step too far ahead in terms of what was before Prothonotary Aalto, that there was not a "and those costs are going to be x, y, and z." There was some discussion of "there are significant costs," but I don't want to quote myself from memory. It was along the lines of --

PROTHONOTARY ARONOVITCH: I hear you, Mr. McHaffie, but really the costs are combined with the order. That's a distinct matter from the costs of the motion. My question to you is were the costs of the motion raised and dealt with by Prothonotary Aalto. He certainly didn't address them in his order, so there was no costs order of the motion which is quite distinct from whatever had to be done to comply with the order.

MR. MCHAFFIE: Well, my submission is that it was, and it was included in this paragraph 3, that the legal costs that were being talked about here when Prothonotary Aalto talks about "all reasonable costs in abiding by this

order" included the legal costs to the date of the motion, that that was intended, and one sees that from the discussion in the case as to this question of the costs that had been incurred, the principles of the Norwich Order cases, and that this is the way it was phrased, in a similar sort of way it had been phrased in other cases, that that actually was what was before Prothonotary Aalto was included in that. Because legal costs, as we mentioned in our written submissions, the prothonotary was aware that the correlation had already been incurred, had already been undertaken, that the only thing that needed to happen subsequent to the order to abide by it strictly was effectively to send a CD or send an e-mail that includes that information --

PROTHONOTARY ARONOVITCH: So the costs of the motion, in your view, were meant to be subsumed in legal costs of complying with the order; that's your position on this?

MR. MCHAFFIE: Absolutely, yes.

PROTHONOTARY ARONOVITCH: And the costs of the motion would normally be a Tariff B matter, would it not?

MR. MCHAFFIE: Only if it were a non --

PROTHONOTARY ARONOVITCH: Well, this is a motion that is outside the norm of the regular rules that would apply to appearances on motion, you maintain, don't apply. It's not a tariff. It's -- if I understand it, you're essentially seeking costs on a solicitor-client

basis.

MR. MCHAFFIE: Yes, on an indemnity.

PROTHONOTARY ARONOVITCH: On a full indemnity basis to be subsumed as costs of the motion and assuming that those costs are to be read as the legal costs of complying with the order?

MR. MCHAFFIE: Yes. It's a reference to "all reasonable legal costs," and that that was the way that costs were addressed and not in a separate costs order as an "under the rules" type of legal cost. And that's consistent with the approach to costs and the approach to indemnity, in my submission, of Norwich Orders generally, that the idea is not you're just a party to litigation. My friend has underscored we're not a party to litigation; we're an innocent third party brought into this in order to assist the plaintiff in bringing its case forward, and that the principles of Norwich Orders that -- and not only from Norwich Pharmacal, but also BMG and subsequent orders that we see -- go to this question of not causing expense to the innocent third party who has to deliver the information, that they're caught up in this not from their own volition and, therefore, ought to be indemnified for that.

And there's a reference to -- this aspect of "all reasonable legal costs" is not an ordinary forced costs award. It's a cost that's in language much more like the Fontaine case that we were talking about, that normally if you see a costs award, you would see "it shall be paid their costs of this motion" not "shall be awarded all reasonable

legal costs." That's much broader language, and I submit that it's consistent indemnificatory language that is reflected in the rest of the order.

I made the argument about it not being limited to post-order costs, and that's not to purely complying with the order in the sense of saying, you know, send over the information that's already there. It wasn't intended to be trivial. I did read you that passage from paragraph 136 that makes it clear that Prothonotary Aalto was well aware that notice had already been given and that the lookup had already occurred. There's no indication that this --

PROTHONOTARY ARONOVITCH: I take your point. No need to belabour this.

MR. MCHAFFIE: Okay. So the second is that there was no limitation to the technical cost of the correlation, and that's expanded on through the use of the legal costs, administrative costs, and disbursements all as being separate.

So, with that background to what our submission is on the scope of the order and the intended scope of the order, I would turn to the specific costs that we've outlined in the bill of costs. We've outlined them in accordance with the three categories that were identified by Prothonotary Aalto, the legal costs, administrative costs, and disbursements --

PROTHONOTARY ARONOVITCH: Mr. McHaffie, I'd like to interrupt you. We're going to take a short

15-minute break.

MR. MCHAFFIE: Thank you.

--- Recess taken from 10:30 a.m. to 10:45 a.m..

PROTHONOTARY ARONOVITCH: Mr. McHaffie, you were interrupted.

MR. MCHAFFIE: No problem at all. It's given me an opportunity to find the answers to a couple of the questions that you put to me earlier.

First, with respect to the orders of Justice O'Keefe and Justice Mandamin, Justice O'Keefe's order is found at page 431 of Volume 2 of my friend's materials, not ours. It's behind tab S in Volume 2, and it's a fairly brief speaking order and doesn't address costs at all. Justice Mandamin's, however, which is -- actually, maybe it's easier since we're there, it's in T; it's the next one -- it does. I had overlooked this. On page 436, it says no order as to costs, so I recognize that that may impinge on our ability to seek costs of that motion. I flag that, and I'm sorry that I hadn't put two and two together on that one.

The other thing we talked about was the Leahy case, the case that we're missing pages to, and I've looked that up online, and, as we talked about, there are two aspects. There was the original ex parte order and then there were the costs of the motion that were sought to be set aside, and that's the one that was at tab 10 of our brief of authorities. And so I can get you the full copy, or you may be able to find it online, but the two other

references to costs that I found were at paragraph 288, where the court noted --

PROTHONOTARY ARONOVITCH: It's not to the point.

MR. MCHAFFIE: It deals with the question of costs and what the costs of the ex parte order and this motion to set aside --

PROTHONOTARY ARONOVITCH: Let me start by saying this, Mr. McHaffie. It's not appropriate to be requesting the Court to find it online.

MR. MCHAFFIE: No --

PROTHONOTARY ARONOVITCH: I will expect you -- I will take your submissions, and I will expect you to, please, provide me the full text and reference as well. The other thing is that if you can find the orders that were the subject matter of the decision and were sought to be set aside, they will be helpful.

MR. MCHAFFIE: Absolutely. I am going to do that.

PROTHONOTARY ARONOVITCH: Now paragraph 288?

MR. MCHAFFIE: 288 reads as follows:

"To the extent that it is not already provided for in the Ex Parte Orders, ATB --"

which was Alberta Treasury Board,

"-- will be required to underwrite and provide indemnity to these financial institutions for all costs involved and for any damages that might occur(Alberta Treasury Branches v. Leahy, 2000 ABQB 575)."

And that's dealing with the context of the ex parte orders themselves, and then on the cost of the hearing itself, at the very end of the decision after paragraph 364, it simply says: "Costs may be addressed upon proper application." So I will also look to see if I find any decisions that deal with.

PROTHONOTARY ARONOVITCH: More to the point is the provision in the ex parte order if you're able to find that.

MR. MCHAFFIE: Ex parte order. Yes, I will, if they're not in there, themselves, in the decision, which I will hot side bar, I will make sure that I can get you those.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: And I note that the role of the financial institutions there was the same as the role of TekSavvy as an ISP here. The claim is between the plaintiff and a defendant, and the financial institution may be providing services to the defendant and therefore have information, but isn't a party to the active litigation. The same is true with TekSavvy, that it's an ISP, and that the people who get service, who use the Internet for whatever reason they have, are customers of TekSavvy, but they're the ones who are using the Internet. They are the ones who (inaudible) defendant and the Supreme Court has, as you know, reiterated the role of an ISP as being a neutral conduit, an independent third-party provider.

PROTHONOTARY ARONOVITCH: Does Justice Mason

in Leahy say what he means by "damages"?

MR. MCHAFFIE: He uses it -- he raises it in the context of page 29, paragraph 106b.

PROTHONOTARY ARONOVITCH: Right.

MR. MCHAFFIE: It talks about the question.

PROTHONOTARY ARONOVITCH: I saw that, but is there any further --

MR. MCHAFFIE: It comes up. It's a reference, if I recall, from the earlier cases that he was talking about that the damages that people might be exposed to as a result of having to disclose this information, so that's -- that some actually referred to that as "damages." I don't --

PROTHONOTARY ARONOVITCH: "Damages"?

MR. MCHAFFIE: Yes. And in my submission, what that is is a recognition that there is a potential broader impact than simply how long does it take you to go and get this information.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: But the other thing is that that terminology, he seems to equate -- he says: "Some refer to the associated expenses (...) while others speak of damages." I believe, as I read it and as I read that other paragraph, that he's sort of using them synonymously.

So, then, with that background, I was going to take you to the specifics of the bill of costs that we've put forward to the Court. As you know, we've got that behind tab 1 of our record. I'll take you through them --

PROTHONOTARY ARONOVITCH: Just stop there for a moment.

MR. MCHAFFIE: Sure.

PROTHONOTARY ARONOVITCH: All right.

MR. MCHAFFIE: Tab 1 of our Volume 1 of our record, there is the bill of costs, itself. So, as you see, we've itemized them in the same categories that Prothonotary Aalto had: The legal costs, administrative costs, and disbursements. By way of overview, we can see within each one there are two subheadings, subcategories, in each. The legal costs of Stikeman Elliott and of Christian Tacit, the administrative costs on the information technology side and the operations side, and then the disbursements of TekSavvy, itself, and of Stikeman Elliott. I'll take you briefly through each of those. You've got them. I don't want to belabour what is a fairly line-by-line kind of analysis, but the legal costs for Stikeman Elliott have been presented in just kind of bill of costs form. And I'll just flag a couple of points here. First, we've got two --

PROTHONOTARY ARONOVITCH: In Appendix A?

MR. MCHAFFIE: That's right, Appendix A, the legal costs.

PROTHONOTARY ARONOVITCH: And you're where exactly in Appendix A?

MR. MCHAFFIE: I'm starting at the timekeeper details. We've got two counsel -- two senior counsel or mid-level counsel, Stikeman Elliott, David Elder and myself, providing somewhat different services, but as you will see

in the task and details list in the detailed bill, most of the time is that of myself. We've set out the hours spent for each of the various tasks, the initial matters, the hearing before Justice O'Keefe which was adjourned.

PROTHONOTARY ARONOVITCH: I take it from what you've just said that the costs at item E would fall?

MR. MCHAFFIE: I think they have to, in light of Justice Mandamin's order. I think they have to.

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: And these proceed all the way up to the decision in K, and you can see post-decision matters in L. At the time that this brief was prepared, the initial list -- these were the initial post-decision matters dealing with costs, as you can see, and so those are all post-decision and deal with the pleading into the Case Management Judge, yourself, and the review and assessment of costs. Subsequent, then, to April 10, there were more costs with respect to this motion, this assessment, that we will deal with in the fullness of time, and you've asked us to deal with today.

And, looking through this, I do want to flag a couple of aspects. The first is the recognition that this was novel. This was an unusual case. This was a unique case.

PROTHONOTARY ARONOVITCH: Which novelty?

MR. MCHAFFIE: The novelty is in the --

PROTHONOTARY ARONOVITCH: In the scope?

MR. MCHAFFIE: The scope and size.

PROTHONOTARY ARONOVITCH: It's not because these issues haven't been ventilated before.

MR. MCHAFFIE: BMG, obviously, was and remained a leading case, but the privacy concerns that arose, and the litigation complexity aspects that arose were novel.

PROTHONOTARY ARONOVITCH: Litigation complexity?

MR. MCHAFFIE: Well, the court, itself, addressed the concern that what the court was facing was 2,000 potential claims. That was one of the reasons that a Case Management Judge was appointed. There were concerns about how the letters were going to be sent out, different issues with respect to BMG in terms of what the nature of the specific case was. There was greater concern in this case with respect to, as is described in the decision of Prothonotary Aalto, this notion of "speculative invoicing or copyright trolling." These are issues that came up and that made it something that was of significant attention in the online and media community. So this was something -- the scope is part of it, but that scope engages broader issues that also change the nature of it, as well. It was not simply a: May I have this one e-mail address? The result of it being 2,000 IP addresses changed aspects of it. And I think one can see that, in the context of Prothonotary Aalto's decision, it was not simply: This is the same as all the other cases; this is even the same as the other Voltage case from Quebec; this is the same as BMG. And so,

therefore, it required a fairly significant set of reasons that he set out. And the reason, in my submission, that he did that was because of these other concerns that were raised in the context of this particular case.

That resulted in a couple of things and required TekSavvy to take legal advice on it. That legal advice is reflected in this, and it included what were TekSavvy's obligations in responding; what were its obligations to its customers; how it ought to respond; all of these things that, frankly, it received a fair amount of commentary, and TekSavvy, in responding to that, needed to know it was providing its customers with correct legal information and was responding to both the motion and to its customers' inquiries correctly. That was not insignificant, as we'll hear when we deal with the operational side of things. There were, obviously, significant inquiries, significant feedback that it received.

My friend has talked about in his submissions this notion that it was always good for TekSavvy. He seems to suggest that TekSavvy got nothing but unlimited praise, and, in my submission, that's not reflected in the evidence. Mr. Gaudrault's affidavit, on which he was cross-examined, made it clear that there was praise, criticism, commentary across the board. TekSavvy, obviously, had to respond to that. He dealt with the concern about the reputation relations that required that response. There was a legal element on that and legal advice given on that.

We flagged in our memorandum -- and I'll

turn you to just a couple of aspects of the evidence and the case law just dealing with the legal costs. The first is in paragraph 40 of Mr. Gaudrault's affidavit, which is in that same volume at page 98. At paragraph 40, he talks about the legal advice, the legal costs. He talks about the roles of Mr. Tacit and Stikeman Elliott. He talks about, in paragraphs 41, 42, the legal advice that was received. In paragraph 43, he indicates that, from his perspective as the CEO of TekSavvy, those are legal fees that were reasonable in the circumstances of the unique and difficult situation that TekSavvy found itself faced with. That is not a -- that's not a -- that's a statement that he was cross-examined on, so, from the objective of reasonableness of the person who was paying the bills at the time they were paid, there's a statement, as we contradicted, that they were considered to be reasonable.

The other things that we flagged in our submissions are the Apotex and Janssen cases that are at tabs 13 and 14 of our book of authorities. I'll just pull up the Janssen v. Teva case which is at tab 48.

PROTHONOTARY ARONOVITCH: For which proposition?

MR. MCHAFFIE: For the proposition that it's not a hindsight exercise. And perhaps I don't need to pull it up. That's, ultimately, the submission that the question of what is reasonable in terms of legal costs:

"Is not a function of hindsight --"

and I'm just reading from the Teva case,

"-- but whether, in the circumstances existing at the time a litigant's solicitor made the decision to incur the expenditure, it represented prudent and reasonable representation(Janssen Inc. V. Teva Canada Limited, 2012 FC 48)."

My friend, I think, has engaged a little bit more in the hindsight weight: You shouldn't have done this; you didn't need to do this; you didn't need to do this. In my submission it doesn't really lie in my friend's mouth to say, my friend from Voltage, to say: We're going to put you, TekSavvy, someone with nothing to do with any of this, in this position, but then we're going to complain about the costs incurred in order to try to protect yourself during that process from both a legal and operational perspective.

Just one thing to flag with respect to Mr. Tacit: As we've explained in the affidavit, Mr. Tacit is on a regular monthly retainer, and so the fees that were put forward there were based on his best estimate of time spent on Voltage matters compared to other matters, and that's, again, not something that was cross-examined on. And, again, Mr. Tellier gives his evidence that these are fair and reasonable and is a reasonable amount incurred.

PROTHONOTARY ARONOVITCH: I'd like to ask you to drill down much more in detail into the evidence having to do with the operational and technical losses, and I'm going to start by asking you to summarize your evidence on why, not in terms of particular items, but who attests to what, and so on.

MR. MCHAFFIE: Right, sure. So what we have in terms of the technical end, operational costs, we have evidence from the CEO of the company who was actively involved in this process from start to finish, and that's Mr. Gaudrault. And Mr. Gaudrault gives his evidence on both sides because he was involved in both sides and aware of both sides. His affidavit is at tab 2, page 86.

PROTHONOTARY ARONOVITCH: I'm going to very carefully -- I want to hear how you would characterize the evidence, his involvement with respect to these matters, and essentially what he has to say about those costs.

MR. MCHAFFIE: Okay. There are two aspects to it, and I'm not sure -- I'm happy to address what my friend has a concern about with respect to whether this is inappropriate hearsay in his submission.

PROTHONOTARY ARONOVITCH: It would be good for you to address as you're going.

MR. MCHAFFIE: Yes, and then there's the, in particular, the technical aspects, and the operational aspects, and what they were. So the big picture is that we have Mr. Gaudrault's affidavit, and then we have the affidavits of Mr. Tellier on the technical side and Mr. Aube on the operational side. Mr. Tellier is the chief information officer and Mr. Aube is the chief operating officer. And so Mr. Gaudrault provides the overview of both and provides some details as to what was done, and he provides with -- we'll start with on the technical side -- he sets out, specifically, both the procedural history --

and then he says this is what we did, and he goes through the various steps that were undertaken by people who work for him and that he was aware of going on at the time. That occurs, the discussion of that is seen, starting at paragraphs 19, 20. In paragraph 19 he talks about who was involved, and he says at paragraph 19, he talked about the information systems:

"Are not set up to generate historic IP address information, especially in batches. Doing so required the involvement of senior officers of TekSavvy, including myself and Pascal Tellier, our Chief Information Officer; and of senior operations and IT staff who report to us, [particularly]: Patrick Misur, [Director of Corporate Systems]; Rick Glassford, [System Administrator]; Chris Sologuk, [Systems Support Technician]; and Pascal Gagnon, [Desktop Support](Affidavit of Marc Gaudrault sworn June 27, 2014)."

So that team is who he is then describing the costs that were incurred, including himself, and Mr. Tellier, and those four others. And then he describes, without getting into great detail, this -- he goes into detail, but without my submissions getting into detail -- he describes step-by-step all the various aspects of what needed to occur in order for this lookup to be undertaken.

On the technical side, then, as he says, he made the request that people track their time, and that time that was tracked is then put into Appendix A on the technical side. Now, I think what my friend is essentially

suggesting is that each of, in addition to Mr. Gaudrault and Mr. Tellier, each of Mr. Misur, Mr. Glassford, Mr. Sologuk, Mr. Gagnon ought to have also given affidavits in order to say I spent this number of hours on this and this number of hours on this. And, presumably, to take it to the next step on the operations side in order to satisfy my friend with respect to hearsay, it would involve an affidavit from almost every associate in the contact center saying I've sent this, and I've sent this, and I've sent this, and I've sent this; I've spent this amount of time. In my submission, we've got a very strong evidentiary base here, not just from Mr. Gaudrault, but from the specific chiefs in each of the two areas, that more than satisfies any concern about the hearsay. And the main approach to hearsay is the necessity and the reliability analysis. Here, the alternative to the way this evidence has been presented both from Mr. Gaudrault and from the two chiefs in the information and operational side would be to have a very large number of affidavits, driving up the costs of this assessment. Proportionality, in my submission, has to be taken into account when looking at that question of necessity when looking at hearsay.

The second side of things is reliability, and there's no indication in any of the information before you or the cross-examination that any of this is anything other than completely reliable, that the information given was that which was provided and that which was recorded. In my submission, to end up in a situation where the Court is

looking at 15 affidavits or maybe more for everybody to say: "Yes, these are the costs incurred, and this is the hour that I spent, this is the hour that I spent," is well out of the realm of proportionality and is not an appropriate or a feasible way to undertake the analysis of costs. As you know, costs are often dealt with on a much less-substantiated or -supported basis than even this. This is fairly extensive detail both in the descriptive side of things from the affidavits of both Mr. Gaudrault and Mr. Tellier on the technical side and Mr. Gaudrault and Mr. Aube on the operational side, as well as on the line-by-line, what each step was and what each step took.

PROTHONOTARY ARONOVITCH: Can you -- if I take you to Appendix A, to the affidavit of Mr. Tellier, I believe, can you correlate those costs? For example, the tasks that they related to and the steps that Mr. Gaudrault says that had to be carried out?

MR. MCHAFFIE: Yes. So the --

PROTHONOTARY ARONOVITCH: Tell me again who "Pat" is, and "Rick," and "Pascal"?

MR. MCHAFFIE: They're described in paragraph 19 of Mr. Gaudrault --

PROTHONOTARY ARONOVITCH: Just very quickly.

MR. MCHAFFIE: "Pat" is Patrick Misur, director of corporate systems.

PROTHONOTARY ARONOVITCH: And "Rick"?

MR. MCHAFFIE: "Rick" is Rick Glassford, system administrator. Chris Sologuk, systems support

technician, and Pascal Gagnon, desktop support. That's not Pascal Tellier. Pascal Tellier is in the senior staff column.

PROTHONOTARY ARONOVITCH: That's the next thing I was going to ask you is these are divided into senior staff and then these various people. The senior staff there are who?

MR. MCHAFFIE: Mr. Tellier. It's just Mr. Tellier.

PROTHONOTARY ARONOVITCH: It's Mr. Tellier, my apologies. All of that is Pascal Tellier?

MR. MCHAFFIE: That's correct. That can be seen in paragraph 4 of Mr. Tellier's -- as set out:

"In Appendix A is a table setting out the hours worked by myself, as senior staff at TekSavvy, as well as four employees in the IT area."

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: So, then, each of the various lines in there.

PROTHONOTARY ARONOVITCH: The "communications to customers affected," what are we talking about there? Which communications are those? Sending out --

MR. MCHAFFIE: That's the notice.

PROTHONOTARY ARONOVITCH: Sending out 1,100 notices?

MR. MCHAFFIE: Yes.

PROTHONOTARY ARONOVITCH: Okay. What is "public relations"?

MR. MCHAFFIE: That is responding to the inquiries from various -- that's the information, the folks on the information technology side being involved in the response to inquiries from the public or the customers, potential customers, general --

PROTHONOTARY ARONOVITCH: And so the tech side had, potentially, Mr. Tellier involved in the communication, the sending of communications, public relations, and preparation of information for court?

MR. MCHAFFIE: Yes. A little bit from Mr. Misur, but yes.

PROTHONOTARY ARONOVITCH: And a little bit from Mr. Misur. What is the "preparation of information for court"?

MR. MCHAFFIE: That was getting the information together in the format of the IP address --

PROTHONOTARY ARONOVITCH: The correlations?

MR. MCHAFFIE: Yes, the format of the IP address correlation, having it ready to present to the court.

PROTHONOTARY ARONOVITCH: Now, there's an "initial lookup" here and then the "second check." I followed that from Mr. Gaudrault's affidavit.

MR. MCHAFFIE: Sorry, just to clarify, that "initial lookup" and "second check" was all part of the pre-notice rather than the post-notice.

PROTHONOTARY ARONOVITCH: I understand that.

MR. MCHAFFIE: Sorry.

PROTHONOTARY ARONOVITCH: I got your point. You don't have to belabour the fact. I don't see this order as being limited to what happened after the order was issued, and I don't think we need to go back there. Let me understand about this "initial lookup" and "second check." Maybe we could follow those steps. There is, then, a period in which you send out notices, and that contributes to your refining of the numbers, finding out who you will send it to and who you ought not to have, and so on. Does that show anywhere here?

MR. MCHAFFIE: I don't, actually, believe it does. I think that that first "initial lookup" and "second check" QA verification is just the first lookup and that the second lookup or the correction of things doesn't actually show up in here. Some of that post would have been involved in the public relations, but the primary, the bulk of this, was all pre-December 10th.

PROTHONOTARY ARONOVITCH: Those corrections to place, did they not, before December 10th --

MR. MCHAFFIE: They took place --

PROTHONOTARY ARONOVITCH: No, December 10th, you send out your notices.

MR. MCHAFFIE: Yes, December 10th was the notice and, we really realized it by the night of Sunday, December 16th that the errors -- that's when the errors, really -- and then the 13th --

PROTHONOTARY ARONOVITCH: So that's helpful for me to understand because I'm not following your Appendix

A. So these costs are all incurred prior to December 10th or include costs following December 10th? Because you have, for example, the "communication to customers accounted, sending communication, public relations." I'm not understanding what that means in terms of dates and what you're doing there.

MR. MCHAFFIE: The hours and what's shown in Mr. Tellier's affidavit, the only evidence that we have is that these hours were all incurred in the period prior to January 11th, 2013. They have included some additional post-December 17th, but most of that would have been in that wake of the --

PROTHONOTARY ARONOVITCH: I don't remember that in Mr. Gaudrault's evidence. Do you want to take me to where he talks about the time period that covers Appendix A?

MR. MCHAFFIE: Yes, it's actually Mr. Tellier's affidavit.

PROTHONOTARY ARONOVITCH: I have that, right.

MR. MCHAFFIE: And so paragraph 6, there.

PROTHONOTARY ARONOVITCH: Very good, thank you.

MR. MCHAFFIE: And I believe there's a similar statement from Mr. Aube, and the timeframe is the same for the operational side which we'll turn to, I believe, behind tab 4, and the last paragraph of his affidavit also says that these were incurred prior to January 11th.

PROTHONOTARY ARONOVITCH: Let me have your summary of what the evidence says about the administrative costs: Who incurred them, how they were incurred. It will help me to better understand these categories.

MR. MCHAFFIE: Certainly. So this is the operations side of the administrative costs that we're looking at, page 208, and senior operations management here is described in Mr. Aube's affidavit. It talks about himself as well as Andre Cleroux, who is in the senior operations management, Olga Lusher, Olivier Cantin, and then there are two members of the marketing group, which are in the second category, Tina Furlan and Marvin Handsor. So we have four individuals in the senior operations --

PROTHONOTARY ARONOVITCH: Perhaps you can help me.

MR. MCHAFFIE: Sure.

PROTHONOTARY ARONOVITCH: If you go to the administrative costs, Appendix A.

MR. MCHAFFIE: Yes.

PROTHONOTARY ARONOVITCH: Perhaps you can correlate the evidence of Mr. Aube to the hours.

MR. MCHAFFIE: Line-by-line?

PROTHONOTARY ARONOVITCH: Do a line-by-line. I am not sure that I am sorting them out.

MR. MCHAFFIE: Sure. And part of it is -- and the hope was to try to avoid unnecessary duplication, but the description of all the steps is largely in Mr. Gaudrault's affidavit and Mr. Aube.

PROTHONOTARY ARONOVITCH: Then take me to whatever evidence allows me to understand, particularly what is happening in Appendix A.

MR. MCHAFFIE: Certainly. So, if we can turn to Mr. Gaudrault's affidavit, and it's at tab 2, he talks about the operations side starting at paragraph 56 of his affidavit, and he has, at paragraph 59, a further explanation of the five line items set out in the appendix. So it's got senior operations management, which refers to time spent by the the COO, Pierre Aube, together with three of his group: Andre Cleroux, Olga Lusher, and Olivier Cantin. So there are four individuals in there.

PROTHONOTARY ARONOVITCH: So that's the 180 hours?

MR. MCHAFFIE: That's the 180 hours.

PROTHONOTARY ARONOVITCH: Right. Marketing?

MR. MCHAFFIE: Marketing is two employees in the marketing group, Tina Furlan and Marvin Handsor, who were involved in this. He describes it:

"Developing and preparing communications and notifications to customers and potential customers, internal communications with TekSavvy staff, preparing responses to public inquiries, input to training teams, and responding to media requests (as read)."

Then e-Services -- now the one thing to be aware of is the 180 hours is for each of those. It's sort of a cumulative average of the four individuals described in senior operations management and the 192, the two

individuals in marketing.

PROTHONOTARY ARONOVITCH: So, I'm sorry, I missed that. Is the 180 cumulative or in respect of each of the individuals involved?

MR. MCHAFFIE: That's right, so that's how it then ends out to $217 hourly cost. That's a cumulative --

PROTHONOTARY ARONOVITCH: So 180 is multiplied by what?

MR. MCHAFFIE: Four.

PROTHONOTARY ARONOVITCH: And the 192 is multiplied by two?

MR. MCHAFFIE: Two.

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: But if one is going to multiply the 180 by four, one has to divide the hourly cost by four in order to get the same total.

PROTHONOTARY ARONOVITCH: Okay. E-Services?

MR. MCHAFFIE: So e-Services is --

PROTHONOTARY ARONOVITCH: Different individuals?

MR. MCHAFFIE: Yes, these are different individuals. These are the folks who actually respond to e-mail inquiries, online chat inquiries, social media inquiries. They are the front-line customer service folks on the e-Services side.

PROTHONOTARY ARONOVITCH: Do we know how many people are involved in that?

MR. MCHAFFIE: We don't have an individual

number other than to have Mr. Gaudrault's -- that basically everybody was involved at some point, and I do mean to --

PROTHONOTARY ARONOVITCH: This 672 hours is in total? It's not multiple?

MR. MCHAFFIE: It's total. For clarity, how these two numbers were derived, the 672 and the 817, they were derived by estimating based on increased call volumes. It was not an: "I spent a minute here on this, a minute here on this." It was a -- during this time period, there was a significant increase in call volumes compared to our usual baseline, and we know that 90 percent of them related to the Voltage matter from monitoring them. So this reflects an estimate of the increased call volume.

PROTHONOTARY ARONOVITCH: What is the evidence in which you identified the portion of this volume that was "usual" and what was Voltage?

MR. MCHAFFIE: So that comes up -- I think it came up in the cross-examination of Mr. Tellier -- sorry, Mr. Aube.

PROTHONOTARY ARONOVITCH: Can you just tell me without turning to it, necessarily, what it is that he had to say about how they identified what the increase in call volume, how they attribute it to Voltage?

MR. MCHAFFIE: Part of it was just pure timing that they know -- and they can predict with fair accuracy because they need to, for staffing purposes -- what the usual call volume is at a particular time. And in this time period, and this is generally in the wake of the

December 10th notice, there was a significant spike. I do want to be careful that I'm not going on what I know from speaking with Mr. Aube as opposed to what's on the record, so that's why I want to be very careful.

PROTHONOTARY ARONOVITCH: Yes, I expect that.

MR. MCHAFFIE: Exactly, so that's where I don't want to say I know that this is what, and that's why I say I believe Mr. Aube --

PROTHONOTARY ARONOVITCH: Let me look at that, then. Did Mr. Gaudrault address that in his affidavit? I remember he talks about the increased volume.

MR. MCHAFFIE: Yes.

PROTHONOTARY ARONOVITCH: I'm not sure he says what the exact period is during which you experienced it or how you attribute it to one way.

MR. MCHAFFIE: So, it was said at paragraph 59C on page 19.

PROTHONOTARY ARONOVITCH: 59C?

MR. MCHAFFIE: Yes, page 104. I should have given you that, sorry.

PROTHONOTARY ARONOVITCH: All right, thank you.

MR. MCHAFFIE: So it talks about these services, and says about halfway down starting on the right-hand side:

"By comparing the inquiry volume and time spent during this period, the vast majority of which was directly related to the Voltage motion, to the usual

baseline level of inquiries, we were able to estimate the number of incremental hours spent by E-Services staff to respond to these inquiries, and thus the cost to TekSavvy based on an average hourly wage of $16.82 per hour for these employees(Affidavit of Marc Gaudrault sworn June 27, 2014)."

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: So it's definitely a -- it's clearly an estimate. It's a best estimate based on this.

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: And so I've got the reference. It's actually the last page of that same volume, 245.

PROTHONOTARY ARONOVITCH: The "period of time in December 2012, as described above" would be after the notices go out?

MR. MCHAFFIE: Through the end of the year, effectively, I believe. I don't think there's any sort of time at which it stopped, but it was subsequent to December 10th.

PROTHONOTARY ARONOVITCH: Okay, and cross-examinations? I interrupted you.

MR. MCHAFFIE: Sorry, this is my friend's cross-examination of Mr. Aube, the very last page of this record.

PROTHONOTARY ARONOVITCH: Where are the cross-examinations?

MR. MCHAFFIE: I'm sorry, the very last page of the same record, that same Volume 1 of 2.

PROTHONOTARY ARONOVITCH: Behind tab 7?

MR. MCHAFFIE: Behind, yes, tab 7 is Mr. Aube's cross-examination.

PROTHONOTARY ARONOVITCH: Right, okay.

MR. MCHAFFIE: And the last page. It's a short cross-examination, but you can see at the top of page 7 of the examination:

"Q. And you compared that to what you say was an increase in volume of customer calls and inquiries after December 10."

"A. So after December 10 we had an increase of volume exponentially."

"Q. Okay."

"A. If I take a look at December 13, we polled the calls coming in, so we actually listened to the calls coming in, we received anywhere from 4 to 6,000 calls a day."

"Q. Right."

"A. And 90 percent of the calls coming in were Voltage related."

So that was what my reference in my submission was, to that.

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: So that estimate is a similar sort of estimate for the next line in this, which is the phone center, and the phone center is just the same thing for the telephone calls as opposed to the electronic calls. Then the last one is actually overtime hours for associates, as well. The e-Services and associates lines

are an attribution of the administrative costs of current TekSavvy employees, and then the last one is the overtime hours, the specific extras for that.

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: So that's a sort of line-by-line on each of those, and they all relate to this question of interactive communications with clients, trying to respond to things, trying to get things responded to.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: I can take you through the whole technical side of the process and what was done, and why it needed to be done, and why it was shorter than -- there's a lot about in the record in respect to it.

PROTHONOTARY ARONOVITCH: What I would like you to do on that, because I think you would have to set out the steps that you felt you had to carry out, what I would like you to do is address your friend's submissions about that process now instead of waiting for reply.

MR. MCHAFFIE: I would be happy to do that. We've got the various steps in there, and what we have from my friend, effectively, is -- sorry, I saw a note, and I'd like to take you to -- before we get there, if you don't mind --

PROTHONOTARY ARONOVITCH: I intend to stay with my question, Mr. McHaffie. I was wondering how on earth you're going to find your way back to the real order of submissions which will compare to this.

MR. MCHAFFIE: Well, it actually lead me

right to --

PROTHONOTARY ARONOVITCH: But I didn't give you the time.

MR. MCHAFFIE: It lead me right through the where I was going, but I would just like to address one thing because we were talking about the hearsay question.

PROTHONOTARY ARONOVITCH: Mm-hmm.

MR. MCHAFFIE: My friend makes reference to Roy one(ph) and a couple of cases. I just wanted to refer to the cases that he has as sort of, part of, addressing this in advance of reply. He has raised the Geoffrey case and the Stephens case in his submissions. The Geoffrey case is at tab 9, and the Stephens case is at tab 8. The tab 8 of his brief of authorities is the Stephens case, and this is one where if one looks at paragraph 28, what was happening was an affidavit actually from the applicant, but that was all about an information and belief from my solicitor. So that was the circumstance of that particular affidavit, and at paragraph 28, on page 7 of the decision the court makes a point that the whole -- that a large part of the concern is that he agrees with the position taken by counsel for the respondent:

"Rule 82 [of the Federal Courts Rules (SOR/98-106) explicitly] forbids a solicitor from both deposing to an affidavit and presenting argument to the Court based on that affidavit."

So he has a real problem with the affidavit filed by the applicant in that circumstance because it was

hearsay from the solicitor. And then it also talks about Rule 81:

"To the extent that an affidavit purports to provide hearsay [evidence], little or no weight ought to be afforded to it. I [also] note that Rule 81[(2) of the Federal Courts Rules] permits [the Court to draw] an adverse inference(Seymour Stephens v. Canada (Citizenship and Immigration), 2013 FC 609)."

So in that case we're talking about an application -- it was a final hearing on an application based on an affidavit from the applicant that was filled with hearsay on matters of controversy from the solicitor, so very different.

PROTHONOTARY ARONOVITCH: I thought I understood that the implication of your submissions was that you're essentially accepting that this is hearsay, and saying it's justified under the exceptions to the rule of necessity?

MR. MCHAFFIE: Well, I wanted to make two submissions, and I'm glad that I've got the opportunity to correct that because there is direct evidence. Mr. Gaudrault, Mr. Aube, and Mr. Tellier were directly involved in this, and they say: Based on my involvement, these are reasonable numbers and best estimates. Mr. Gaudrault also does say: I got the information from Mr. Aube on one side and from Mr. Tellier on the other side. So we have affidavits from Mr. Tellier saying this is what we did and from Mr. Aube saying this is what we did. But Mr. Tellier

was there, on the ground, doing it. I read you that passage which talks about senior operations: The team was me and these four. And he is there, in the process, doing it. So I say that is direct evidence, the same with Mr. Aube. He described how they did the estimating.

Then I say, with respect to hearsay, even if you're talking about hearsay with respect to Mr. Aube, who spent how many hours because people were tracking, and maybe they weren't all in the same room for every hour. Then we get into necessity and reliability, so it's both.

PROTHONOTARY ARONOVITCH: Very good.

MR. MCHAFFIE: And on the Geoffrey case, which is at tab 9 -- and I did note with respect to tab 8, which is dealing with solicitor's affidavit, it's my friend who has filed a solicitor's affidavit on, frankly, on matters of controversy, so for him to raise that case is actually a useful opportunity.

PROTHONOTARY ARONOVITCH: I was a little surprised that you didn't object to that.

MR. MCHAFFIE: I simply -- I sort of don't give it a lot of weight. I don't think you should. I don't think, frankly, that it's helpful to anything. This gets to, frankly, the whole issue of proportionality, and how one deals with a situation when one is faced with the affidavits that, in our submission, have a lot of irrelevant information. We felt we needed to cross-examine on them, but motions to strike, in the context of this assessment, I don't think would have been the way to go about things.

PROTHONOTARY ARONOVITCH: Not a motion to strike.

MR. MCHAFFIE: No.

PROTHONOTARY ARONOVITCH: It doesn't matter because the Court is well aware of the appropriate rules and if it is improper without (inaudible), and that's that.

MR. MCHAFFIE: So the Geoffrey case involved FOSS notes -- this was a new one on me -- Field Operations Support System notes in the operation context. The notes were not produced. The person who conducted the interview was also not produced, and then somebody else tried to come and say: Well, what happened was this, and what this meant was this. And so it was in that context that there was concern about hearsay information and it not being referenced. It is, even when you get to the question of hearsay and the question of weight to be given, it's context-specific, and context-driven, necessarily. The cases that my friend has put forward don't really help your assessment of that context in this case which is very specific to this case. And in Geoffrey, also, part of the concern was it was double hearsay, which didn't help either.

The other thing I do need to address on the hearsay point is about Pat Misur in particular, and I was surprised in my friend's submission at paragraph 37 he makes this allegation, particularly with respect to Patrick Misur, saying -- and this comes from paragraph 37:

"Misur is the TekSavvy employee that spoke to Logan before TekSavvy received notice that Voltage would be

bringing a motion. At that time Misur had told Logan that it takes 10 minutes to manually correlate an IP address. TekSavvy failed to bring Misur forward (as read)."

That -- I was surprised to see that submission, and I'll take you to the cross-examination to explain why. To start with, Mr. Logan does not talk about, in his affidavit, any suggestion that an employee of TekSavvy said it would take 10 minutes to correlate IP addresses. If that evidence had been there, that would have been front and center and critical. I mean, it's exactly on this point, and it's not in Mr. Logan's affidavit. Where it comes out is in cross-examination. In order to respond to this -- we responded to it a little bit in our materials, but we didn't have it as -- we were surprised to see it in my friend's response. I've got to take you through the cross-examination because this is -- it's astounding that it's in there, given the context, so I want to take you to the cross-examination, and it's in our --

PROTHONOTARY ARONOVITCH: At tab 8?

MR. MCHAFFIE: It is tab -- it's actually in Volume 2 and tab -- the affidavit is at tab 8, but the cross-examination is at tab 11, cross-examination of Mr. Logan. And it starts with the e-mail exchange which is at tab 1, page 393, so the Exhibit 1 to his affidavit, among the first exhibit was an e-mail exchange that has at the top: "Could you print for the Tokay room?"

PROTHONOTARY ARONOVITCH: Is this also an exhibit to the cross-examination?

MR. MCHAFFIE: It is the exhibit to the cross-examination.

PROTHONOTARY ARONOVITCH: So it was "1"?

MR. MCHAFFIE: Yes. It's Exhibit 1.

PROTHONOTARY ARONOVITCH: Rachel Williams?

MR. MCHAFFIE: Yes, that's the one. The Tokay room is where we were cross-examining Mr. Logan, so it was printed out. And so, if I can turn you to page 397, this is an exchange -- and I mentioned back in October, that there was an exchange between Mr. Logan, and Mr. Tacit, and Mr. Misur. This is now where we're at. And so, in the course of this at 397, Mr. Logan writes, and this is in the middle of the page:

"Dear Chris, My firm is a provider of digital evidence arising from online based fraud activities."

So this is the initial inquiry coming from Mr. Logan into TekSavvy, and he's suggesting that he is involved in online based fraud activities.

"We have collected a number of IP addresses material to ongoing investigation and pending litigation; the application will be filed next week."

There is a request for technical information. Technical information is provided, ultimately, by Patrick Misur on the first page of that exhibit -- so it scrolls backwards because it's an e-mail reading upwards -- and Mr. Misur provides Mr. Logan with some information regarding the technical sides of things on the DSL network and on the cable network. Mr. Logan follows up with a

clarification point asking, among other things, what the turnaround time for a single address search is, and the estimated turnaround time for an estimated block of 100 IP addresses. He doesn't ask about either 4,000 or 2,000, but he asks those questions, and there is no e-mail response. Now we turn to the cross-examination on this document.

PROTHONOTARY ARONOVITCH: There is no response?

MR. MCHAFFIE: No, there was no response.

PROTHONOTARY ARONOVITCH: Thank you, that's fine.

MR. MCHAFFIE: So until -- effectively, I suppose you can take my e-mail and talk about substantial time that would take later as a response, but there was no response in this e-mail trail. So, if we can turn to page 380 of the cross-examination -- sorry 380 of the record kept, sorry, page 113 of the cross-examination.

PROTHONOTARY ARONOVITCH: 113?

MR. MCHAFFIE: Yes, this is just where we're looking at this same e-mail, just to set that stage. Over on -- I'm just going to set that stage, and then over, on to 115, question 449. Mostly talking to him about the 2,000 and 4,000:

"Q. And, again, to your recollection today, subject to what we may find in your notes --"

and this was a reference to some notes that he had of conversations,

"-- do you recall speaking to ISPs and

expressly asking them about the lookup of 2,000 names or 4,000 names?"

"A. I'm sure I have."

"Q. Sorry, not names, IP addresses?"

"A. Yes, definitely I have."

"Q. But do you recall whether you did so with TekSavvy? It doesn't appear so from this exchange."

"A. Well, I mean, you're reading it, so, I mean, you got the answer."

"Q. Not in this -- sorry, what I have is this e-mail exchange."

"A. Yeah."

"Q. Right."

"A. Then I have no more -- I mean, this is -- what you see is the universe of --"

"Q. Okay, so that's it. Okay, that's fine."

And that continues and reiterates that this is "the universe" over on page 118.

He reiterates: "You've got the world right here (Transcript of Cross-examination of Barry Logan, held October 9, 2014)."

Mr. Zibarras asks --

PROTHONOTARY ARONOVITCH: There's no need to go further with this, Mr. McHaffie. All your friend has got is a submission and no evidence.

MR. MCHAFFIE: I won't, then, belabour it. He does have the statement from Mr. Logan in cross-examination that says Misur told me it was 10 minutes.

He has that, and I think that's what he's relying on is that Misur told him that it took 10 minutes, and he says that. But -- and this is at 513 -- the reason I set that was to say, look, that e-mail exchange was all we had. To cut to the chase. I'm going to do that. I'll cut to the chase. He says: Mr. Misur told me it would take 10 minutes. He had said this e-mail exchange is all we have.

PROTHONOTARY ARONOVITCH: It's not in evidence anywhere.

MR. MCHAFFIE: Anything other than his false statement, and we asked for his notes. An undertaking was given to provide his notes, and the undertaking was not fulfilled.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: So, then, the evidence that my friend has to respond -- unfortunately, I'm finally getting back to answering your question which is what my friend says about what TekSavvy did. And what he has in response to that is a) not cross-examination of the people who were actually involved, Mr. Gaudrault and Mr. Tellier, about what was required. As Mr. Tellier's evidence -- we've expanded on and made it clear why things were required, and he did a good job of that. What he has is the affidavit of Mr. Logan and the affidavit of Mr. Rogers. I submit neither of those are particularly helpful to you and can largely be ignored, big picture, for two reasons. One is that they don't speak to TekSavvy's reality. And we've quoted -- because I think it made sense; he was quite right. Mr. Logan said nobody

knows more about TekSavvy's systems than TekSavvy.

PROTHONOTARY ARONOVITCH: And their (inaudible).

MR. MCHAFFIE: Right? And that's exactly right, but, nonetheless, Mr. Logan and Mr. Rogers talk about other things. Mr. Logan talks about his discussions with other people. I start by saying Mr. Logan's evidence, despite his protestations, is opinion evidence. He is giving expert evidence on how long it ought to take to conduct a correlation, and he is not an expert. He has not been put forward as an expert, very deliberately, and can't speak to those issues, so, to start with, he's speaking to something to he ought not to be speaking to.

The second part is that what he speaks to is a bunch of discussions that he says that he has had with other ISPs about what other ISPs' systems are. Those aren't TekSavvy's systems. Those aren't TekSavvy's costs, and Mr. Logan was clear. I think it's worth taking into -- that aspect of his cross-examination, as well, that TekSavvy, the selection of TekSavvy as the respondent, here, was related in part to its size, that TekSavvy was "targeted" -- that's my word -- because of its size. I'll turn you, if I could, to question 155.

PROTHONOTARY ARONOVITCH: Of?

MR. MCHAFFIE: Of Mr. Logan's cross-examination.

PROTHONOTARY ARONOVITCH: Question 155?

MR. MCHAFFIE: Question 155 on page 363 of

the record, page 45 of the transcript. So I'm picking up in the middle of a conversation about why TekSavvy was picked:

"Q. Okay. So in what way -- I thought you said 'We picked TekSavvy because of the marketing, the volume,' so that was targeted on that basis?"

"A. Bell, too expensive. Rogers, too expensive. Telus, too expensive. I'm here in Ontario. I wasn't going to fly out there and spend my days and months sitting out in Alberta."

"Q. All right. So the 'we' is you, you and your company, you and Voltage, you and Mr. Zibarras?"

"A. No, I -- no, I tendered a report, and that's where it went. I mean, you know, they wanted to know numbers, like, you know, what types of file shares we're talking about, what's the volume."

"Q. When you did your -- when you did your monitoring, was it monitoring of only TekSavvy IP addresses?"

And he says, no, it wasn't. And then down at 160:

"Q. Well, I'm labelling you as 'we' because I still haven't --"

"A. Okay, I recommended, I recommended that we look at TekSavvy based on certain criteria."

"Q. Okay."

"A. The size of the company, the volume of its customers, the volume of file sharers, the fact that it was not a publicly-traded company, it was a privately held

company."

"Q. Why did that matter?"

"A. Subscriber base. TekSavvy, Bell."

"Q. So size? So the fact that they were smaller was one of the reasons --"

"A. No, no, the size of the subscriber base, not the size of the pockets."

"Q. No, no, no, but the size -- okay, it was a smaller ISP, they had 200,000-odd subscribers as opposed to a million, so there we're going to -- we're going to -- that was part of your recommendation to Voltage, that they go and name TekSavvy as opposed to others?"

"A. Did you want to go in at the smallest ISP...(Transcript of Cross-examination of Barry Logan, held October 9, 2014)."

PROTHONOTARY ARONOVITCH: What point do you want to make here?

MR. MCHAFFIE: The point that I want to make is that talk about what other, larger ISPs have as systems, how much it may cost Bell or Rogers to do this, is irrelevant to how much it cost TekSavvy to do this, how much it actually cost TekSavvy to do this, particularly in circumstances where they have deliberately taken on, as it were, deliberately sent their request to, a smaller ISP. They can't expect that systems will necessarily be in place, and, in fact, they were told that it was going to be a significant undertaking, so to come back and say, even if there were clear enough evidence of it: Well, Rogers and

Bell can do this really cheaply -- in the BMG case we saw that Telus, even Telus, was saying: We can't do this really cheaply, but that was a few years prior, and so it's not evidence in this proceeding -- but even if the evidence was clear enough that it would not cost Rogers or Bell a significant amount of information (sic) to respond to this, that's not relevant, and yet that's all that, effectively, my friend comes out with is: I spoke to a bunch of them, and they've not got a lot of information about it.

There are other flaws, and it sort of keeps going on --

PROTHONOTARY ARONOVITCH: We have your submissions on point and rely on them.

MR. MCHAFFIE: Yes. I don't want to belabour them, but the main issue for him --

PROTHONOTARY ARONOVITCH: Mr. Rogers, it seems to me, on cross-examination, essentially concedes TekSavvy's process. Can you take me to that?

MR. MCHAFFIE: Certainly. It's a fairly lengthy cross-examination getting into all of it, so I don't want to read everything through.

PROTHONOTARY ARONOVITCH: I don't want you to be getting through all of it.

MR. MCHAFFIE: No, but what there is, and I think maybe the best way to do it is to make reference to our written submissions, and maybe, because we try to --

PROTHONOTARY ARONOVITCH: You do cite the passage there, right?

MR. MCHAFFIE: That's what we try to do in each case, and there are some -- so if we look at paragraph 77 of our written submissions, we talk about Mr. Rogers.

PROTHONOTARY ARONOVITCH: I noted it from that. If you want to rely on your submissions from that, that's perfect.

MR. MCHAFFIE: I would. I just highlight two main parts to say these are particularly important things. I will rely on those, but he, Mr. Rogers conceded that his opinion was based on incorrect assumptions. To start with, he was assuming that TekSavvy had done a lot of these, and that this was the same requests, the same process, that was used for earlier requests for law enforcement. He became aware that it was not, that the 17 requests that TekSavvy had previously done for law enforcement took an hour or two each, and that this was not -- so to start with we had started from completely mistaken assumption that this is simply something that they could run.

And the second is to say that his evidence about how he would have done it effectively is of no help when how he would have done it would have been to query his own database, which is a proprietary database that took him 10 years to set up. How a forensic investigator might have done something on his own database is of no value compared to saying: Well, how does an active, operating, ISP have to do it? There's no question, in my submission, that when you've reviewed the evidence of Mr. Gaudrault and Mr. Tellier, and think about common sense -- that they were

doing this in the most efficient way that they could to minimize disruption to their business, and to minimize cost -- to come along and say, well, really it should have taken you a couple of hours and a few hundred bucks is simply not tenable. It bears no relation to the reality of the ISP.

The other aspect of Mr. Logan's affidavit is all this stuff about TekSavvy encouraging online piracy, and Mr. Logan gets into a -- we've responded to it in our materials.

PROTHONOTARY ARONOVITCH: You have?

MR. MCHAFFIE: Because it is irrelevant, I make a submission that it's irrelevant, I felt that we had to cross-examine on it anyway, but the order -- if the issue of TekSavvy's role in all of this were in any way at issue, in my submission, it ought to have been raised before Prothonotary Aalto, and it was not. Instead, there was an undertaking given as to costs. TekSavvy is the innocent third party to this, according to the order that we're now looking to do, so for my friend to now come and say, well, somehow you ought to lower things because of what is -- and we've talked about how, frankly, on its face its irrelevant; on its substance, if you actually look behind it, it's unsupported, as well, which makes it doubly unhelpful.

One of the things that goes into this operational costs were -- the response, I guess, to this issue of operational costs is the notice of what was going on. Was TekSavvy engaged in unabashed self-promotion or

creating a media circus? Again, similar sorts of submissions -- we make submissions in our factum, and I don't want to spend a lot of time on them, but they're not supported. In fact, some of the submissions that my friend makes in his written submissions, that were received after filing ours, are, in fact, contrary to the evidence. They're simply not backed up. And I do want to flag one as an example because my friend makes heavy weather of this, and I think it's important to recognize what the actual evidence was and how and why this was done in this way.

At paragraph 9 of my friend's fact --

PROTHONOTARY ARONOVITCH: I have it, thank you.

MR. MCHAFFIE: So it talks about the question of notice. And it says:

"After receiving a positive response for being so transparent, TekSavvy proceeded to notify all 200,000 of its customers to the motion. TekSavvy was overwhelmed by its customers' response (as read)," suggesting that that overwhelming response was in response to the 200,000 customers.

Now, as Mr. Logan conceded, and I talked about this earlier, not all of the response was positive. Some of it was positive. Some of it was negative. This all has to be speaking to that. Mr. Gaudrault mentions that. But, more to the point, in cross-examination, Mr. Gaudrault was very clear on this. And his cross-examination is at tab 5 of our first volume.

His evidence at 220 to 223 says why the 200,000 was. It was, in fact, the opposite of what my friend was putting to him, and continues to insinuate.

PROTHONOTARY ARONOVITCH: Good, that raised the question for me, so let me see what he has to say.

MR. MCHAFFIE: Page 226 of the record, tab 5, Volume 1.

PROTHONOTARY ARONOVITCH: 226 of the record. Mm-hmm.

MR. MCHAFFIE: So at question 220 it talks about this:

"Q. Okay. One other thing while we have 30(b), you say on December 13, 2012 you sent an e-mail notice to all of your customers, like 200,000 people."

"A. Yeah."

"Q. Right? Advising of the existence of the online tool, and providing information about the motion by Voltage. So now you didn't just notify affected people based on the spreadsheet, you actually notified probably over 200,000 people of the motion?"

"A. We had to."

"Q. Right. That resulted, at paragraph 31, of an incredibly high volume of calls and e-mails, right? Everyone freaked out, I guess. Is that fair to say?"

"A. No, we were -- we were under -- we were getting a huge amount, that was already happening. That e-mail was sent out to quell it."

"Q. Right."

"A. It's the opposite.(Transcript of Cross-examination of Marc Gaudrault held on October 8, 2014.)"

So the evidence is clear that this was not sending out the message to generate more response or that it did generate more response. To the contrary, it was sending out in reaction to the huge response in order to quell it, in order to try to address everybody at once as opposed to addressing one at a time.

My friend also suggests that as a result of this "marketing stunt" TekSavvy was able to increase its customer base from 200,000 to 300,000, an increase of 30 percent, he says. I don't think my friend's math is right. 200,000 to 300,000 is actually 50 percent, but again, there's no basis for that ascription of that growth to its involvement in this case, and in fact, the evidence is to the contrary. Mr. Gaudrault's affidavit at paragraph 5, footnote 1 -- this is page 87 of the record. Paragraph 5, he talks about the number of employees, and then the footnote:

"TekSavvy has worked hard to continue to succeed and grow, continuing a general trend of growth over the past number of years, such that TekSavvy currently has somewhat under 300,000 subscribers and approximately 450 employees (Affidavit of Marc Gaudrault sworn June 27, 2014)."

He was not cross-examined on that. There was a general trend of growth. And my friend is going to start

saying that there was this massive increase that was due to Voltage. In my submission, he ought to a) have evidence of that. He ought to have cross-examined Mr. Gaudrault on it, and not to be contrary to the evidence that is on the record. All of which, if my friend had concerns about how things were going, ought to have been raised before Prothonotary Aalto and said this shouldn't have been -- you shouldn't grant TekSavvy their costs because "a, b, c, d, e." None of that was done. Prothonotary Aalto made no order as a result.

Do you want to hear me further on the issue of notice and the -- I did make -- I talked about the time before and after, and I don't want to do that again, but just on the question of the importance of notice as a principle in the court and, in particular, how that notice plays into the role of an ISP when asked for IP address correlations. The only thing I flag on this is to say that --

PROTHONOTARY ARONOVITCH: I have your submissions. Do you want to be adding to it?

MR. MCHAFFIE: No, I just want to highlight them, so I think that may be enough on that.

Finally, we're down to the disbursements, Stikeman Elliott's disbursements. Some of those will be associated with Justice Mandamin's order, and so some of those -- they've been highlighted and itemized, and I do know that some of them are associated with travel to and attendance at Justice Mandamin's -- I would have to be

estimating in order to say how much it was, but the information is broken down. On page 7 of our materials, there's a breakdown: "Travel re hearings, and it says travel to Toronto times three, hotel in Toronto times two, and taxis." One of those travels to Toronto and cab -- so this is Volume 1 of our main record, the bill of costs itself.

PROTHONOTARY ARONOVITCH: I have a few of them. Which one of these appendices are the disbursements of TekSavvy?

MR. MCHAFFIE: Yes? Just the one -- there's one disbursement of TekSavvy which is the $55,000.

PROTHONOTARY ARONOVITCH: Right.

MR. MCHAFFIE: That's at the hardening.

PROTHONOTARY ARONOVITCH: The hardening?

MR. MCHAFFIE: The hardening of the system.

PROTHONOTARY ARONOVITCH: I was going to ask you if that is all that appendix is concerned with?

MR. MCHAFFIE: Is all?

PROTHONOTARY ARONOVITCH: If that is all?

MR. MCHAFFIE: Yes. So the only cost, or the only disbursement of TekSavvy that is in the claim for costs is the hardening of the system claim. The document itself is Exhibit J to Mr. Gaudrault's affidavit. He describes the need for it, and Mr. Tellier --

PROTHONOTARY ARONOVITCH: My question was whether those costs were exclusively the hardening of the system, and I think you're saying they are?

MR. MCHAFFIE: Yes, yes.

PROTHONOTARY ARONOVITCH: Very good.

MR. MCHAFFIE: So, again, it sounds like I don't need to reiterate my submission on why those were necessary, what happened with it, did (inaudible).

The final point I'd make, just sort of in conclusion, but in order to respond to one of my friend's conclusions -- I reference this notion of proportionality and where this number fits in compared to the total number of IP addresses and the total number of pieces of litigation or total number of claims. My friend says that he has a bona fide intention to assert. The flip side of that is to respond to my friend's statement (inaudible) more than that about a chilling effect, a claim that paying TekSavvy there is a reasonable legal cost, administrative cost, it said that it incurred as a result of being involved in this would have a chilling effect on other plaintiffs. And in my submission there's no evidence of that at all either in this specific case or in the general case. There was no evidence put forward from Voltage itself. No witness from Voltage came forward at all, let alone to say if we have to pay --

PROTHONOTARY ARONOVITCH: Do we have evidence on that?

MR. MCHAFFIE: I think so, yes, because a chilling effect is an actual -- my friend makes or made the general submission, but --

PROTHONOTARY ARONOVITCH: I intend to ask your friend on what basis he makes the submission, and I'm

sure it's a matter for evidence.

MR. MCHAFFIE: In my submission, it is because of the nature of the litigation, and it goes back to this question of proportionality because what my friend is saying is that if companies like Voltage have to pay significant legal costs and significant administrative and operational costs they will not pursue their cases. That's, I think, the chilling effect that he's referring to. But if that's the case, surely there would be evidence that in fact Voltage would not be pursuing this, or won't pursue the next one for the sake of $164 and a piece of copyright litigation which, you know, may well have -- not quite more than that, half of that in filing fees --

PROTHONOTARY ARONOVITCH: What do you think the effect that this proposed legislation is going to have in that regard?

MR. MCHAFFIE: "Notice and notice" is a bit of a different thing, and I say that for two reasons. First, "notice and notice" does not require disclosure to the plaintiff of anything. What it does is require that ISP to provide notice to their customer, similar to what has happened in this case. The result is -- and now I'm definitely telling tales out of school if I speak in specifics, so I'll speak in generalities -- that ISPs have had to deal with this. There is some evidence with respect to "notice and notice" in this allegation that this is all worked in. There is no evidence, in fact, again I believe Mr. Gaudrault said --

PROTHONOTARY ARONOVITCH: Well, I'm going to ask your friend to explain this to me because I'm not following it, and so --

MR. MCHAFFIE: ISPs bill --

PROTHONOTARY ARONOVITCH: Why not let me hear from you in reply.

MR. MCHAFFIE: Sure, sure. This does not -- "notice and notice" doesn't transplant the possibility of Norwich Orders at all. It provides for a separate approach to, typically, questions of takedown of ongoing issues like defamation or copyright infringement that are on the web, as opposed to a single download occurrence, which is what has happened here.

That's not to say, however, that a "notice and notice" may be an exactly appropriate response to saying: Hey, look, we've got a whole bunch of people who we allege are involved in this; can you let them know that that's inappropriate, send this notice to them? Something along those lines is one approach that's possible. Parliament has set things up to say ISPs have to take on that cost, themselves, of setting up a "notice and notice" structure. It's kind of an unusual way in which they've done it. They've provided with a possibility of setting fees and regulations. Let's say if there are no regulations then there are no fees, and there are no regulations, so there are no fees for "notice and notice," but that doesn't affect the possibility of getting a Norwich Order.

Now, it may well be that the systems that

ISPs put in place in order to effect "notice and notice" will decrease the technical costs of responding to a Norwich Order because those will already be in place. That would alleviate, certainly, a significant amount of any chilling effect in that those costs would be expected to be low. But it doesn't have any retroactive effect that what TekSavvy, for example, is doing for "notice and notice," what Bell may be building for "notice and notice," what anybody else may be building for "notice and notice." It is no help to them in responding to a request for information in December of 2012.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: Thank you.

PROTHONOTARY ARONOVITCH: We're going to adjourn for lunch. We're going to take a little bit more than an hour and resume at 1:15 p.m. Mr. Zibarras, I will ask you to explain what you say will be the effect of this legislation and say a little bit more about it in your submissions.

MR. ZIBARRAS: Thank you, Madam Prothonotary.

--- Recess taken for lunch from 12:13 p.m. until 1:15 p.m.

PROTHONOTARY ARONOVITCH: Please sit down.

UNIDENTIFIED SPEAKER: This is Toronto office. For some reason we cannot see the Court. That's better.

PROTHONOTARY ARONOVITCH: Good afternoon.

SUBMISSIONS BY MR. ZIBARRAS:

MR. ZIBARRAS: Good afternoon, Prothonotary.

I'm going to start off with addressing the "notice and notice" provision. Just before I do that, in case I forget, I did want to just, also, reference Rule 82 of the Federal Court rules, just dealing with Mr. Philpott's affidavit. The rule states that a lawyer can swear an affidavit provided they don't also argue the motion. Mr. Philpott is not here today, and we're relying on that rule.

PROTHONOTARY ARONOVITCH: And so you're relying on rule?

MR. ZIBARRAS: Rule 82, Prothonotary, and the case law below it --

PROTHONOTARY ARONOVITCH: Sorry to interrupt, but I'm referred to as "Madam Prothonotary."

MR. ZIBARRAS: Sorry, Madam Prothonotary.

PROTHONOTARY ARONOVITCH: Or Your Honour, whichever.

MR. ZIBARRAS: Thanks, Your Honour.

PROTHONOTARY ARONOVITCH: Now, you're relying on relating to sub b, did you say?

MR. ZIBARRAS: No.

PROTHONOTARY ARONOVITCH: I don't have my rule book here.

MR. ZIBARRAS: It's just Rule 82. I can read it to you, Madam Prothonotary.

PROTHONOTARY ARONOVITCH: No. I just want you to give me the precise citation for it: Rule 82 --

MR. ZIBARRAS: Period.

PROTHONOTARY ARONOVITCH: 82 period, very

good. And you're relying on that rule to say that the affidavit is admissible?

MR. ZIBARRAS: Of Mr. Philpott, that's right.

PROTHONOTARY ARONOVITCH: Right. And you considered the case law?

MR. ZIBARRAS: Yes, and, in fact, if Your Honour was going to look, there's a case cited under that rule of Twinn v. Poitras, Twinn, T-w-i-n-n and Poitras, P-o-i-t-r-a-s which says that: "The proper practice for a lawyer who has to give evidence is to have another lawyer act as counsel on the motion." Which is what we're doing in this case.

PROTHONOTARY ARONOVITCH: Thank you.

MR. ZIBARRAS: Just to clarify, as well, the same case: It is acceptable to have another lawyer from the same firm argue the motion, in case that was an issue for Your Honour.

So, Madam Prothonotary, maybe I can start with the big picture, and what really takes us there is the "notice and notice" provisions. The context of the "notice and notice" provisions is the massive problem that piracy is in North America and most of the world. The "notice and notice" provisions --

PROTHONOTARY ARONOVITCH: I don't want you to editorialize, embellish, give evidence. Just get very quickly to what the provisions are meant to do in your view. Are they included in your materials?

MR. ZIBARRAS: I think they are attached to

Mr. Logan's affidavit. I think it's a tab T. Just to summarize, Your Honour, what they intended to do, any rights holder who identifies IP addresses that are involved in the illegal downloading of either music, or movies, or any other copyrighted content can write to the ISP and ask the ISP to send a notice to the customer associated with that or those IP addresses, depending on how many there are. It could be one. It could be several thousand. The legislation then requires the ISP to send a notice to its customers without charge to the requesting party. In order to provide its customer with notice, the ISP will have to go through exactly the process that TekSavvy just went through.

"Notice and notice" never requires the ISP to disclose the customer information to the complainant, so, really, the process stops pretty much where we are today. In other words, offending IP addresses are delivered to the ISP. Those have to be correlated, and then notice is sent to the customers, and that's where it stops. What's important though --

PROTHONOTARY ARONOVITCH: Let me ask whether your view is that this will obviate the need for Norwich Order.

MR. ZIBARRAS: It may well do.

PROTHONOTARY ARONOVITCH: But you're talking about a chilling effect of the cost order or a possible potential chilling effect of the cost order. I take it, therefore, that this legislation is not going to be obviating the need for Norwich Orders, and so we have to be

careful that, notwithstanding this legislation, parties are going to continue to have recourse to Norwich Orders if they want to know the identify of the individuals. Is that the idea?

MR. ZIBARRAS: That's exactly correct. It's two different tracks. A Norwich Pharmacal will still always be required if I, as the victim, want to find out the contact information of the offending IP address so that I can begin a law suit, or send correspondence, or get an injunction, or seek damages.

PROTHONOTARY ARONOVITCH: Thank you.

MR. ZIBARRAS: One thing I'll raise while I'm on this point, and it's in our factum, Your Honour, but we pointed out the developing jurisprudence in Europe, which seems to be a bit ahead of us in terms of these issues with dealing with ISPs and getting IP addresses correlated, and it's in our factum at paragraph 44. The case we refer to is at tab 12 of Voltage's brief of authorities. That's an English case, and the relevant paragraph is at paragraph 32. I just want to read starting from the second sentence. In this case, in a similar context, both sides, the victim and the ISP, were claiming that the other side should be responsible for the costs of implementing the order, and the court wrote: "The studios --" that's the rights holders.

"-- are enforcing their legal and proprietary rights as copyright holders and exclusive licensee and, more specifically, their right to relief under article 3. BT --"

which is the equivalent of the ISP,

"-- is a commercial enterprise which makes a profit from the provision of the services which the operators and users of News Bin 2(ph) use to infringe the studio's copyright. As a result, the cost of implementing the order can be regarded as a cost of carrying on that business (as read)."

It goes further to say these costs must not be excessively costly. They have to be modest and proportionate. To follow up on that point, Your Honour, my friend repeatedly referred to TekSavvy as the "innocent party." Now, we all agree that TekSavvy isn't one of the downloaders, but even in our cases they are not typically referred to as "innocent parties." They are commercial enterprises that facilitate the activities for gain and profit, so they are more than mere witnesses, and that is why the Canadian legislation, and as you can see the European jurisprudence, which I would say is a bit ahead of where we are, are taking this position that these are costs of their business that they have to bear. And that British decision is also authority for the proposition that if systems have to be installed by these ISPs in order to provide that information, it has to be borne by the ISP. And the mischief they're trying to get around is ISPs intentionally retaining archaic technology just as a form of preventing rights holders from pursuing their claims. One has to keep in mind that ISPs profit from downloading, and they profit from their customers being up all night downloading rows upon rows of content because it increases

the bandwidth that is being used by those customers, on which basis the ISPs charge their fees.

We've taken our position in our materials that much of TekSavvy's response in this motion is, in fact, a collateral attack on the order, and we say that the costs they are seeking to recover are prohibitive. Your Honour is aware --

PROTHONOTARY ARONOVITCH: Can I -- I'm going to interrupt you for a moment, which is very hard to do in this medium.

MR. ZIBARRAS: Okay.

PROTHONOTARY ARONOVITCH: Is your mic on? A small technical issue. I'm hearing you not very well, not as well as I should.

MR. ZIBARRAS: Is that better, Your Honour?

PROTHONOTARY ARONOVITCH: That's much better, but it puts on you the onus of having to bend forward somewhat, but just bear in mind that I'm not hearing you very well.

MR. ZIBARRAS: Okay, I will try and speak closer, and I'll try to slow down.

PROTHONOTARY ARONOVITCH: Just a moment. It turns out that we can alleviate the need for you to contort yourself in some different way by just raising the volume. Thank you very much. Small technical things. Go right ahead.

MR. ZIBARRAS: All right, Your Honour.

PROTHONOTARY ARONOVITCH: Beginning your

submissions and talking about these costs which you find prohibitive.

MR. ZIBARRAS: Yes. So the point I was going to make there, Your Honour, is a $350,000 cost associated with identifying 1,100 names is cost-prohibitive, especially when one considers that under the new legislative regime costs for copyright infringement are kept at $5,000 as the maximum fine. Typically, I will also say, that a lot of copyright holders, when they do seek the assistance of the court, aren't necessarily out to get damages. They recognize that often the defendants or perpetrators are not even going to be in a position to pay damages. Often what they want is injunctive relief and/or the gathering of information so that they can, for example, target the true perpetrators that set up the systems that allow individuals to download. So there are considerations that rights holders have before starting an action that sometimes go beyond damages to injunctive relief and/or information to go after bigger defendants.

So, having said that, a $350,000 bill before a defendant has been named is, effectively, cost-prohibitive. No plaintiff is in a position to pay those kind of expenses, and it would end the litigation. Just to put it in a different context, Your Honour, because of course, any decision you make would set a precedent, if I'm pursuing a fraudster, and I need to go to the Royal Bank to get bank statements which are going to allow me to trace the flow of funds that we say the fraudster has engaged in,

it is not conceivable or reasonable that in response to my Norwich Pharmacal order to a bank, a bank would voluntarily send notice to all of its customers of my order and then charge me for the time it took them to deal with and respond to those customers calling the bank. It is also not reasonable or conceivable that a bank that is familiar with these types of orders and has repeatedly dealt with them would hire a team of lawyers, three senior lawyers, and charge me time, as the victim, for doing research on privacy, Norwich Pharmacal orders, research about me, research about my client, and attending and doing press conferences about potential plaintiffs coming to third parties trying to get access to information by way of a court order under an established case.

Just to put it in perspective, these kinds of orders are sought and granted all the time. They are cheap. They do not cause large expense. Most third parties provide information at no charge, and the legislation has now, essentially, codified that and agreed that, in fact, these are negligible expenses that must be borne by the enterprise that has facilitated the complaint of activity whether it's tortious, defamatory, illegal under the criminal code, or a violation of copyright.

That gives you a bit of an overview of the context, Madam Prothonotary. What I would now like to do is actually look at some of the costs that are being sought by Voltage (sic), and go through them. And, really, where I want to start is our origin correspondence. My friend took

you to the original e-mail chain, and that's at tab 2(b) of my friend's motion record, Volume 1. My friend took you to page 115 of that motion record, and he pointed out that in our original communications he had said that: "It is a substantial undertaking for TekSavvy." All right. We got that, and in fact, he said it would take 10 to 15 days, and we were fine with that. What's interesting is that he didn't say anywhere in this letter that he was going to charge us for legal fees because by this point -- and when I say by this point, before Mr. McHaffie even got involved Mr. Tacit, who is Voltage's (sic) in-house counsel had already told us that they would not oppose the motion. They wanted an order, but they would not oppose the motion. And just to be clear, Madam Prothonotary, their policy of requiring a court order in these circumstances predated Voltage. They had that policy in place before us, and that policy was applied in 17 previous similar requests. The only difference with our request was the scope, the volume of IP addresses, 2,000 as opposed to previous incidents where it was just one or two at a time. But the law is exactly the same. The law we applied was the same law under BMG. We didn't change the law. We just avoided some of the errors that the plaintiffs made in applying the BMG test. In other words, we made sure that our evidence was recent. We made sure that we had proper affidavit evidence. We avoided the errors that the previous plaintiffs ran into, so we didn't change the law. We just met the test, and it's the same test that's been applied since Norwich Pharmacal

orders became available, so there was nothing novel. Really, the only issue was the greater number of IP addresses.

We always expected that there would be some cost of correlating the IP addresses, and we remain happy to pay for that cost, provided it's reasonable, which is what the courts require. We'll look at the issue of reasonableness, but I just want to turn to the page, the next page in the sequence of e-mails at page 114, so it's the previous page in the record, but it's the next date in the series of correspondence. In that letter, what I want to raise, Your Honour, is our response to Voltage's (sic) notice to us that they wanted to provide notice to their customers, and I raise this because a large portion of the costs sought to be recovered today is for dealing with the consequences of providing notice to their customers.

Before I get into this, let me just maybe explain what happens in the usual course. In the usual course, a rights holder will approach an ISP and say it would like an order. The ISP may consent or they might, more typically, say we need a court order. The rights holder goes to court and typically argues the case either ex parte or without opposition and gets that order. That order then requires the ISP to deliver the contact information, and it is the rights holder who then communicates with the customers once that information has been received. That typically goes by way of a demand letter saying: We are Voltage; we received your name by way of a court order;

attached is our statement of claim; please do not destroy any evidence; it will be used as evidence in a trial, etc.

Why that's important, Madam Prothonotary, is that the barrage of e-mails and publicity, etc. is then directed at the rights holder. It's Voltage that sends the letters out and Voltage that gets the barrage of e-mails and publicity. What TekSavvy chose to do in this case is voluntarily put themselves right in the line of fire, and we said to them -- and I'm going to go back to page 114 -- we said you're not required to give notice. There is no authority requiring you to give notice, and no authority has been provided to date.

And we said if you want to give notice, we'll consent to that provided that it's without prejudice to Voltage. That's at paragraph 2, at page 114 where we specifically said we are happy to cooperate with TekSavvy -- it's the last sentence of paragraph 2 -- provided it does not delay or otherwise prejudice our client. And this was a condition of going forward on that basis.

We put in one more condition, Madam Prothonotary, and that's found in the fourth paragraph where we said if you want to give them notice, please also add this paragraph because we want to make sure that evidence is preserved. Our biggest concern about them giving notice was that between the time that they gave notice and the time that we could start proceedings evidence would be destroyed. We said: I don't care whether I'm telling them to preserve or you're telling them, but someone has to tell them.

And we say in the last paragraphs: "While we are open to granting this indulgence on the conditions outlined above," and it's conditions with an "s" -- and that was the three: Do not delay us, do not prejudice us, and make sure that notice is in there -- we said go ahead.

That was the agreement, so, certainly, to be presented with a substantial amount of costs for the result of consequences of their voluntary, without prejudicial decision to notify their customers, to put that on our plates, we say is improper. Not only is it not contemplated by the case law, but it wasn't even contemplated in terms of their agreements.

Now, before I get into the three heads of costs that my friend has carefully taken you through, I, too, just want to start by looking at the order, itself, which is, if I recall correctly, at tab 14.

PROTHONOTARY ARONOVITCH: Where are you?

MR. ZIBARRAS: Sorry, Madam Prothonotary. I'm actually going to start with the order, itself, so at page 510 of the record.

PROTHONOTARY ARONOVITCH: Whose record?

MR. ZIBARRAS: Sorry, I'm at Volume 2 of TekSavvy's record, tab 14.

PROTHONOTARY ARONOVITCH: Thank you. Are you talking about the reasons or the order?

MR. ZIBARRAS: Sorry, it's the reasons, but it's the back of the reasons that the order is granted that everyone's been referring to, so I'm at page 510 of the

record, at tab 14. It says: "All reasonable legal costs, administrative costs, and disbursements incurred by TekSavvy in abiding by this order." And we think that's the clearest terms, that this was a forward-looking order for costs, which is the typical course in Norwich Pharmacal orders, that the courts will always say that whatever the reasonable cost of that information being provided, that will be paid by the --

PROTHONOTARY ARONOVITCH: I don't know how you can maintain this line of argument. Prothonotary Aalto was very well aware that a lot of the correlation work had already been done.

MR. ZIBARRAS: I'm not making that argument.

PROTHONOTARY ARONOVITCH: He orders the correlated information, essentially, to be produced, and I'm not sure how you can take the position that it's only forward-looking.

MR. ZIBARRAS: Well, let me address that.

PROTHONOTARY ARONOVITCH: The correlation was done, and the correlation is the object of the order. How can it be that the order doesn't catch whatever work was done, whenever it was done?

MR. ZIBARRAS: Let me address that briefly, Madam Prothonotary. It's an interesting question that is very specific to the facts but might apply going forward because the question becomes if that information is available -- for whatever reason, right, because we requested it or because it was available -- do they get to

charge the reasonable cost of doing that work if it's already available. And I'll tell you what I mean by that. Let's go forward to next year. Next year, it's January 1. I sent "notice and notice" request to TekSavvy for 2,000 names. TekSavvy is required by the legislation to correlate those IP addresses and send notice out, all right? They have to do that at their own expense. I, then, two months later bring a Norwich Pharmacal order saying that I now actually want that information because we want to take further steps. This is the hypothetical. I'm not sure I know the answer, but we're going to be in the same position going forward. They've already done the work, and the legislation says that they cannot charge us for it. When I, then, want that list that they've created, do I have to pay for it when I go and get my relief under Norwich Pharmacal when the work has already been done? That's the hypothetical. To bring it back to this case, we saw in the correspondence that Voltage (sic) voluntarily wanted to give its customers notice. We told them, fine, without prejudice to us; if you want to take those steps, it's without prejudice to us. In other words, don't charge us for it. If you want to do it, you do it. They did it on those terms. If we hadn't won our order, if we had lost the motion, Madam Prothonotary, there would be no recourse for TekSavvy to come and get those costs from us because that correlation would never have been ordered. In other words, they voluntarily did it. They assumed the cost, and they assumed the risk. That's the only point I'm going to make

on that issue.

PROTHONOTARY ARONOVITCH: Thank you.

MR. ZIBARRAS: The stronger point I do want to make is, certainly, at no point in the motion, whether it was at any of the adjournments or at the conclusion of the motion, did TekSavvy ever seek costs of the motion. Now, this is important because most of the costs they are seeking is for the legal fees of the motion. Maybe what I can do is take you to tab 1 of Volume 1 of the TekSavvy materials. I'm at page 3 of the motion record, Madam Prothonotary, which is Appendix A, legal costs. This was the biggest surprise to us because, from the very beginning, Mr. Tacit, in-house counsel, said that they were taking no position on the motion. When Mr. McHaffie was hired, he confirmed and reiterated that they were taking no position on a motion. As I understand motions, if parties take no position they're not entitled to any costs. I think that's established beyond any doubt, so we're in a situation where this Court is being asked to move away from the established rules regarding costs. Interestingly, and I don't know why, Mr. McHaffie seems to be taking the position that not only do we move away from the usual cost regime, but in this one instance that isn't replicated or echoed anywhere else in our courts or in our law, his kind gets to get full indemnity costs for a motion that they didn't participate in, which I've never heard of, and certainly I didn't see any cases from Mr. McHaffie that say that.

What Mr. McHaffie has done is he didn't take

any opportunity at any of the adjournments or at the motion to seek costs of the motion. He missed those opportunities, and, in fact, no costs of the motion were ordered, so, instead, what Mr. McHaffie is doing is he tries to piggyback onto the cost regime for delivering evidence and use it to claw back into the underlying motion which he never participated in.

I don't want to belabour the dynamic here, and tell me if I'm hammering this nail too much, but we take the position that none of these costs can possibly apply to giving effect to Prothonotary Aalto's order. These are expenses that have nothing to do with "abiding by the order" which is the language Prothonotary Aalto used.

I just want to point out a couple of other things about these legal costs. You can see at the top of the page you have two senior counsel involved, David Elder and Nicholas McHaffie. No need to have two senior counsel involved on a run-of-the-mill Norwich Pharmacal order where TekSavvy is taking no position. They apply their actual rates. If you do the math with the number of hours, actually, if you just multiply it by their actual rates you get the numbers, so it's really -- you wouldn't even get this if you won the motion. In a way, and I don't know why, it's punitive. It's punitive on Voltage, for some reason, even though Voltage is the rights holder that is just trying to enforce its rights, and TekSavvy is the commercial entity that benefits from these activities.

There is, then, a breakdown, Madam

Prothonotary, of the time that was spent, and, for example, on page 1, here, items A through to E are all either to do with the motion, itself, which TekSavvy didn't participate in, or the voluntary notice to customers and dealing with that, which we say they were to do without prejudice to us.

PROTHONOTARY ARONOVITCH: Let me correct you, Mr. Zibarras. They took no position on it is one thing.

MR. ZIBARRAS: Right.

PROTHONOTARY ARONOVITCH: That they didn't participate, I believe is incorrect.

MR. ZIBARRAS: All right.

PROTHONOTARY ARONOVITCH: So you might just want to state it as it is.

MR. ZIBARRAS: Well, let me, maybe, address that because there are two descriptions of "participate." One, did they show up at CIPPIC's adjournment requests? Yes. Did they need to be there? No. Okay, so if they chose to be there, we have no objection, but certainly they can't impose the costs of that on us because there was no requirement that they be there.

Secondly, Madam Prothonotary, did Mr. McHaffie participate at the hearing itself? Well, this is interesting because he did. He stood up. As my recollection serves, it was only at the end of the -- final submissions had been made by me and CIPPIC -- that he was invited to make any comments he wished to make because he was there. But, of course, as you noted, there were no materials.

I will just take you to paragraph 134(d) -- sorry, let me just check my reference, first, before I take you to it. All right, sorry, it's paragraph 136. Paragraph 136 at tab 14, which is the endorsement at Volume 2 of TekSavvy's motion record. So it's Volume 2, tab 14.

PROTHONOTARY ARONOVITCH: We're in Prothonotary Aalto's reasons?

MR. ZIBARRAS: Yes, Madam Prothonotary, and at paragraph 136, which is on page 507 of the record. Now, Prothonotary Aalto actually took the time to detail what TekSavvy's submissions were about, and I'm just going to read what he wrote:

"Counsel for TekSavvy helpfully put in perspective the issues TekSavvy has with respect to revealing information, and there was evidence of notifications which TekSavvy had made available to its customers."

Now, we all knew about the fact that TekSavvy had already notified its customers, but Mr. McHaffie stood up and explained again to the court why he took that step, but he also explained that that step had been taken. We say that didn't add anything to the substantive issues underlying this motion. It didn't deal with the test for BMG. It didn't deal with anything. And then it continues:

"TekSavvy also sought payment of its reasonable costs in the event it had to release information."

And, again, that was limited to: If we have to release information, we want the costs of doing that. TekSavvy never sought -- given that Mr. McHaffie was there, and even though he stood up -- he never sought costs of the motion. In fact, it would have been absurd if he had because he hadn't done anything.

So, when we say they "participated," we use it in the sense that they chose to be present. That is not something that anyone can be compensated for in the amount of over a hundred thousand. I don't think my legal fees were that high.

The part that they can claim for is at page 2 of tab 1, Madam Prothonotary, which is item K. This is, again, Appendix A, legal costs, and I am at item K.

PROTHONOTARY ARONOVITCH: Start at the beginning. Where are you? Volume?

MR. ZIBARRAS: Sorry, I'm at Volume 1 of TekSavvy's record. I'm at tab 1, and I'm now on the second page of Appendix A which is at page 4 of the record.

PROTHONOTARY ARONOVITCH: Right, and you had started to say that some of these costs, in your view, ought to be claimed?

MR. ZIBARRAS: Correct.

PROTHONOTARY ARONOVITCH: And they are.

MR. ZIBARRAS: What I'm specifically referring to is item K. Now, item K is time that was billed after the order came out advising the client about their obligations under the order. We say that that's fine

provided it's reasonable. Now, I just want to look at the actual dockets for item K because we can see that even there there are some items that really shouldn't be billed, so I'm now going to ask you to turn -- it's in the next tab, tab A. I'm going to ask you to turn to page 40 of the record.

PROTHONOTARY ARONOVITCH: Sorry?

MR. ZIBARRAS: I'm going to ask you to turn to page 40 of the record, and this is the actual Stikeman Elliott dockets for that same period I just identified under item K. What we have, Madam Prothonotary, is the first two items are both senior counsel reviewing the order and doing an analysis or e-mailing the client. We say that's duplicative. We say that either Mr. McHaffie or Mr. Elder, both of who are senior, seasoned lawyers could have performed that role, so it only needed one lawyer to perform that obligation.

What's interesting, though, is what's added into this bill starting at the fourth entry:

"Reviewing draft and revised press releases; reviewing and revising draft blog posts; reviewing comments from others redraft post; conference call with client, reviewed talking points."

These are talking points for the media.

"Interviews; correspondence call re media lines; review and comment on blog; review boards and articles; e-mail with Mr. Gaudrault."

The next page is interesting: "Review Zibarras interview." I don't know why I'm being billed for

that. Then: "Reviewing e-mail correspondence among client team re blog and media review."

Then what's also interesting: "Discussion of cost recovery." All right, that's part of this motion, right. That's not part of what they're seeking to recover. If there's, now, discussion about cost recovery, this is today, so are they now tacking on discussions about costs onto a bill that they're giving us for time supposedly spent correlating IP addresses?

"Review media coverage; interviews; review letters from Zibarras," etc. The point I'm trying to make, Your Honour, is you can't do that. Costs have to be related, properly related, to a motion or to an order. You have to show that they're related, and they have to be reasonable. What's happened in this case is TekSavvy has taken this as a carte blanche. They seem to be of the view that just because they're a third party responding to a Norwich Pharmacal order that they can use their discretion to bill any charge they want. They can upgrade their systems. They can do legal research. They can attend interviews. They can prepare for interviews.

And then the submission being made to you is: Listen, we're a third party; that has to get covered, and not only covered, at full indemnity. So when they're watching Mr. Zibarras' interview, the lawyer watching it is being paid full indemnity. And why should he get it? He says: Because look at Prothonotary Aalto's order; he says all reasonable legal costs, and we think it's all

reasonable; why do we think it's reasonable? Because Mr. Gaudrault signed an affidavit saying I think it's reasonable.

Now, we all know, Madam Prothonotary, that Mr. Gaudrault cannot replace your role or be the final adjudicator of what is reasonable. That's your decision. His affidavit stating that these expenses are reasonable has absolutely zero weight.

In our submission, Madam Prothonotary, everything you see in tab 1, Appendix A, under legal costs you can put a line through because it's trying to claw back into a motion that no costs were awarded for, and there's no authority that allows them to do this. If they get to do this, this will be the first time a court has ordered this relief in these circumstances, ever.

Further, given the amount that they are allowed to bill, we say it's about one hour, which would be the one lawyer reviewing that order and speaking to the client. And everything that comes after that has nothing to do with abiding by Prothonotary Aalto's order.

If I may move on, Madam Prothonotary, if you turn over the page, then, still at tab 1 to page 5. We're at tab 1. It's page 5 of the record. We then see that on top of Mr. Elder's and Mr. McHaffie's legal bill for the motion -- and I should point out that even for these legal bills, Mr. Gaudrault's own affidavit says that all this time that was put in was actually time spent leading up to the order being issued. There really is almost no time, other

than those two hours I showed you, being claimed for legal time following the issuance of the order, just to be clear. But what we also have is, besides the two external counsel, we have Mr. Tacit's time being put in, as well.

Now, interestingly, Mr. Tacit is a set-rate, in-house employee. He gets paid $25,000 a month regardless of what he does. He doesn't keep dockets. He is claiming -- and bear in mind, as well, his first communication with us was to say that he is taking no position -- he is claiming an additional $54,000, and we don't know what it's for. There's no affidavit from him. Mr. Gaudrault says it's reasonable, but we don't actually know what Mr. Tacit did that racked up $54,000 when Mr. Tacit never appeared, never prepared any materials, and was being paid $25,000 just to be in-house counsel. This number, by his own admission, is also a "best estimate," which we say is wholly deficient. "Best estimate" is his own words at the second paragraph. Well, I don't know whose words it is. There's no affidavit, but it says: "The following represents Mr. Tacit's best estimate." So we say that this has to be excluded entirely, as well, as having nothing to do with Prothonotary Aalto's order.

Can I move on to the next page?

PROTHONOTARY ARONOVITCH: Absolutely.

MR. ZIBARRAS: Okay, thank you.

PROTHONOTARY ARONOVITCH: I'm following you.

MR. ZIBARRAS: Okay, good. The next page is page 6 of the record, and I'm going to deal with those.

Really, what we're going to get into is the actual technical costs which we say is the costs of correlating the IP addresses. We believe we have to pay something for that, but it's not entirely what they're claiming, and I'll go through that.

PROTHONOTARY ARONOVITCH: You're in the Appendix B, administrative costs?

MR. ZIBARRAS: Yes. Maybe I should address these now because these really are the meat of this matter, Madam Prothonotary. Maybe what I can do to address these is actually turn to Mr. Tellier's affidavit which is in Volume 1.

PROTHONOTARY ARONOVITCH: You heard the exchange this morning between myself and Mr. McHaffie.

MR. ZIBARRAS: Yes.

PROTHONOTARY ARONOVITCH: He answered very specific questions, so take those as answered when you make your submissions. Let's not go over that.

MR. ZIBARRAS: Okay. Let me just take you to tab 3, and at tab 3, Appendix A is the evidence that's been put in by Voltage (sic). I'm in Volume 1. I'm in the same book you're in, if you just go to tab 3. And this is Voltage's (sic) evidence of the time it took them to correlate the IP addresses, all right. And the only thing --

PROTHONOTARY ARONOVITCH: You were here for the discussion this morning, Mr. Zibarras.

MR. ZIBARRAS: Yes. I was going to say the

only thing this dovetails with is Mr. Gaudrault's affidavit, but the problem with Mr. Gaudrault's affidavit is when he explains the process, he didn't have personal knowledge of the process. He was told about the process, and then wrote out the steps which, again, unfortunately, is hearsay.

But let me point out a couple of things about Appendix A that are of concern to Voltage. First of all, Appendix A is attached to the affidavit of Mr. Tellier, but it wasn't prepared by Mr. Tellier. This is entirely hearsay received by Mr. Tellier, and I specifically asked him questions about that in his cross-examination. His cross-examination is at tab 6, and at tab 6, if you look at questions 6 and 7 I say:

"Q. Okay, so you didn't create this --"

PROTHONOTARY ARONOVITCH: Just a moment.

MR. ZIBARRAS: Yes.

PROTHONOTARY ARONOVITCH: What page of the record are you at?

MR. ZIBARRAS: It's page 236 of the record.

PROTHONOTARY ARONOVITCH: Right. And what is the question, again?

MR. ZIBARRAS: And the question is question 6.

PROTHONOTARY ARONOVITCH: Thank you.

"Q. Okay. So you didn't create this appendix?"

"A. I -- this appendix was created from the notes of Pat Misur, who was managing the team, and --"

"Q. Okay. So he created the appendix for you?"

"A. He did."

All right, I know we covered the hearsay issue earlier, and I know my friend said it was based on necessity. There's no defence on necessity here because Mr. Misur was available. There's no evidence he wasn't available. Mr. Misur is the gentleman who would deal with these types of IP correlation requests. He was the guy. The evidence of that is also at tab 6, question 58, which is at page 239 of the record. And I start at question 58, Madam Prothonotary, where I said:

"Q. Okay. There have been previous times when there has been a request for this type of correlation to be completed for a third party. Right?"

"A. From law enforcement."

"Q. From law enforcement, that's correct."

"A. Yes."

"Q. And has there been one individual that responded to those in the past?"

"A. Yes, Patrick Misur."

"Q. Okay."

"A. Patrick Misur is --"

"Q. So Patrick. When those would come in, you would give it to Patrick, he would deal with it?"

"A. Yes."

So he's the guy. So what, really, to comply with the rules of evidence -- because Patrick is the

gentleman who always complies with this and because Patrick was the gentleman that actually correlated these, he should have provided an affidavit. Everything you have is hearsay.

I'm going to point out a couple of other things, Madam Prothonotary. You see that at the top there's one, two, three, four, five people. There's the senior staff which my friend correctly said is Mr. Tellier, so Mr. Tellier was putting his own time in on this. The evidence about Mr. Tellier is that this was the first time he was ever involved in this kind of project. And that's, again, at tab 6, question 69, and that's at page 239 of the record:

"Q. Have you ever been involved in this correlation process before, or is it the first time you got involved in that?"

"A. It was the first time I got involved in that."

All right, what's the problem with that? It's unreasonable to bring in someone that's never been involved in it at the rate they want to charge him out at, which is $125 an hour, and have him helicopter a process that he knows nothing about and that Pat Misur regularly deals with. So we now have four, eight, four and then eight, eight, sixteen, and eight by a gentleman who has never done this before. So we say all that time --

PROTHONOTARY ARONOVITCH: I take it you were reading from the appendix?

MR. ZIBARRAS: Yes, sorry, I'm back at Appendix A. I'm just kind of flipping between the two, so

I'm at page 204 of the record.

PROTHONOTARY ARONOVITCH: Are you talking about the senior staff charges?

MR. ZIBARRAS: Yes. Four hours, eight hours, four hours, eight, eight, sixteen, eight. It's a total of 56 hours. We say it's not what we should consider reasonable under the circumstances. Those should be excluded. It's overkill. If they want to overkill, they can do so. They just can't charge for it.

PROTHONOTARY ARONOVITCH: And on what basis are they to be excluded?

MR. ZIBARRAS: Well, again, Madam Prothonotary, the courts look at -- this cannot turn into a profit center for ISPs. They have to do it as cost-effectively as possible and for a minimum cost. The way you do that is you get the most experienced person in and let them run it. What they did is -- Pat's the most experienced person, but they brought someone senior in who has never done it before, and they get him to charge 56 hours in a process he's never been involved in before when he's not typically the gentleman who responds to these kinds of requests. I would also say, just off the bat, Madam Prothonotary, that the whole section that starts with communication to customers affected and goes down to preparation of information for court, those one, two, three, four, line items, I've kind of put them in a box, and I'm saying that those aren't proper costs of this either. We can just put a line through those, as well. Those, again,

are -- and I think my friend tried to, kind of tried to, separate the types of expenses out, but these are generated by providing notice, which they did voluntarily, and the consequences of dealing with that. And, before I forget, we say that that was intentionally done by TekSavvy to try and generate interest in their ISP. And the way they generate interest in their ISP is they emphasize for customers and potential customers that they are transparent, that when anyone tries to get their customers' contact information, they will take these kinds of steps and, essentially, not allow the information to be handed over without the customers' knowing.

So what happened is it generated a lot of positiveness about their transparency, and by Mr. Gaudrault's own admission, Your Honour -- and this is very important because we have the one case that talks about damages -- in this case, by their own admission, the customer base increased from 200,000 customers before Voltage's motion to 300,000 customers after we brought our motion. That's a massive increase in customers as a result of the media attention they got and the position they took, so at the end of the day TekSavvy benefited from all these steps it took which it did voluntarily and without prejudice to us. So, on any analysis, they shouldn't get a double benefit by also having the expense of it paid for by us, right, because then the expense gets paid and the benefit remains.

It's the same argument, of course, to the

upgrading of their systems. They voluntarily upgraded their systems. That had nothing to do with upgrading for the purpose of correlating. That was just a systems upgrade, unrelated. They retain the benefit of that system upgrade which will remain with them. They want us to pay the expense of it, and, again, there's no basis in law or under Norwich Pharmacal orders for third parties to do that. Again, it's like the Royal Bank, because I bring a Norwich Pharmacal order, updating all its systems and then charging me.

The other real kind of duplication that I want to focus on, because it's a big one, is the two items: "Initial lookup" and "second check." Now I'm back on page 204 of the record and around the middle of the page. It says: "Initial lookup; second check." Before I get into the details of that, if you look at the number of hours, the bulk of the time spent was on those two activities, and the time for each of those line items is about the same. This is what happened, and this is uncontested, Your Honour, and I think Mr. McHaffie explained it the same way I'm going to explain it. There's an initial request by us. TekSavvy spends some time getting their systems organized, and what that means is it's really a two-step process. One is they have to retrieve the log files. So they have all this information gathering every day, and it's stored in log files, so before they can correlate anything, the first thing they have to do is retrieve the log files.

That all occurred before November 28, which

is when we gave them the shortened list. By their own admission, they said before November 28, when they got our shortened list, they had just gone and retrieved log files. The other thing they did is they wrote an SQL program that allows for automation of data recovery from the log files. Basically, by November 28, they had those two things in place. They had retrieved the log files, and they had a program that allowed for the information from the log files to be automatically extracted.

Then they received our shortened list on November 28, and, by their own admission, by December 4th, they had correlated all of the IP addresses, so it's a maximum of six days, four business days. The job is done, which we said is quick. But this is what they did during those six days. They did their whole exercise twice, and they say, well, we ran it once and then we wanted to be sure, so we ran it again. So they chose to do the exercise twice, and that's where you see the second line item being the "second check," but they charge us as much as the first go-around for their choice to do it twice. This is the problem. By their own admission, they run this thing twice then they give notice, and after giving notice they realize that there's a bunch of errors. There were 95 names that were wrong and 50 this, and not only that, at the end of the whole thing they could only correlate 1,100 of the 2,000. So why are we being billed twice for one job when the second go-around didn't even identify the errors? I guess the point I'm making, Madam Prothonotary, is a simple one.

Again, what's reasonable? Why did you do it twice? We didn't ask you to do it twice. We just asked you to do it once, and the courts don't require that anyone does it twice. It's like me going to a bank and I say I want five boxes of documents, and they do two copies of it and give me ten boxes. Well, why did you do ten boxes? The order says give us five. You voluntarily gave us ten and want to charge us for it.

So my submission on this is we've got to put a line through the "second check" because it wasn't requested, it wasn't required, and it actually was of no value because it didn't identify the errors. So, really, what we're left with, Madam Prothonotary, when you get rid of the section on communicating with customers, when you get rid of Mr. Tellier's time, who has no background in this, and when you get rid of the second check, you're really left with Pat Misur's time and the time it took to do the initial lookup. So now what you have is two kind of bodies of information that you can compare. You can compare that, those two columns, and the time that Mr. Rogers, Steven Rogers, says it should have taken. Mr. Rogers' affidavit or report kind of tracks the same processes, but, for example, just off the top of my head, when it says "analysis of request," Mr. Rogers says: In my experience that should have taken one hour. They took eight hours, so, Madam Prothonotary, you are trying to decide now where it should land, but the reality is that we're not actually that far apart if we're focused on the same thing, if we're comparing

apples and apples. One of the reasons we're so far apart, as Mr. McHaffie indicated when he started, is that we're dealing with apples, they're dealing with apples, oranges, and bananas, and we say, of course, that the oranges, the bananas don't form any part of this. Let's just compare apples to apples.

So, really, when we compare apples to apples, it's those two columns. And we say if you have to pick between Mr. Rogers and Appendix A -- the rules of evidence, first of all, don't allow you to rely on Appendix A -- and if you have any concern about Mr. Rogers, the legislation which, in being passed, carefully scrutinized this entire area and the costs associated with this type of correlation, the legislation is tied a lot closer to Mr. Rogers than to Appendix A, so we say that this Court has to prefer Mr. Rogers and find that this should have taken a maximum of 14 hours based on his expert evidence.

In response to Mr. McHaffie's comments and his cross-examination that Mr. Rogers didn't know TekSavvy's systems as well as TekSavvy we say this: The principles -- and Mr. Rogers stuck firmly to this -- are exactly the same. Log files are log files. It takes so long to recover them. Writing an SQL program to automate the recovery of information from log files is a simple process. It doesn't take long to write one. Pushing the hit button and allowing it all to get done isn't a long process. There was nothing about Mr. Rogers' evidence that would be materially changed by any of his admissions that he might not know the intimate

workings of their systems because what he did know is they store log files. And what he does know is that an SQL program can automate the search of log files, so it doesn't matter what other niceties and specific items they may have, the result is very much the same. So we say you don't have anything that would show you why or how Mr. Rogers' findings should be detracted from.

The last thing I will point up before I move away from Appendix A is that this entire section until the "initial lookup," so everything starting from analysis of request to optimized searches and building indexes, TekSavvy chose to do those steps with 4,000 IP addresses. That means that when they were retrieving log files, they were retrieving log files associated to 4,000 IP addresses. That's double the amount of IP addresses that the order relates to, so it is fair to say that this entire section until "initial lookup," when you're looking at Mr. Misur's time, it should be halved. Why should they eat that? Because they wanted to jump in right away and send notice, so they voluntarily undertook to start correlating before the final numbers had been confirmed by Voltage. They didn't spend time on the actual lookup dealing with 4,000. They did 2,000 because by then they had the revised list, but they most certainly spent time retrieving log files which I think is actually one of the more time-intent or labour-intensive parts of it. They were dealing with 4,000, and they did that at their own risk.

Those are my submissions on Appendix A to Mr.

Tellier's affidavit. Just for your reference, Madam Prothonotary, in terms of the fact that when they started they were dealing with 4,000 names, and they were actually pulling log files associated with 4,000 names, if you want to reference on Mr. Gaudrault's cross-examination to confirm that, it's at tab 5 of this record, questions 133 to 135, and questions 190 to 201. I won't take you and read it, but it does confirm that they started their process using 4,000 names, and it was only once they got the 2,000 that they did the actual correlation, but they retrieved log files for 4,000 names.

Now I'm going to ask you to turn to tab 4 of this same record, Madam Prothonotary, and that's Appendix A attached to Mr. Aube's affidavit. I won't take very long with this at all. I'm at page 208 of the record. So the concern Voltage has with this is none of this has anything to do with correlating IP addresses. Our position, it strongly remains that if they chose to set up these systems to handle e-mails and phones after they decided to notify their customers then it's at their expense. I do want to emphasize one thing, Madam Prothonotary. TekSavvy went beyond just notifying the 1,100 customers that it identified through our request. They gave notice to 1,100 people on December 10th. On December 13th they notified every single customer they had at that time, which was 200,000.

PROTHONOTARY ARONOVITCH: I'm just finding it, Mr. Zibarras, the referring of the date on which the second notice was sent. December 13, you say?

MR. ZIBARRAS: Yes. I could find you a reference.

PROTHONOTARY ARONOVITCH: The timetable is at the back of Mr. McHaffie's submissions, and that's the timetable I've been working from. Let me just look at it.

MR. ZIBARRAS: That date is missing from this timetable, but I'll see if I can find you a reference.

PROTHONOTARY ARONOVITCH: It is missing from here. What's the reference?

MR. ZIBARRAS: Paragraph 30 of Mr. Gaudrault's affidavit, which is at tab 2 of Volume 1.

PROTHONOTARY ARONOVITCH: And the date is December 13, so a couple of days after the service of the motion record.

MR. ZIBARRAS: No. So what happened on December 10th, they gave notice of our motion to the affected customers.

PROTHONOTARY ARONOVITCH: That's what I'm saying. A couple of days after you served your motion record.

MR. ZIBARRAS: We served our motion record on December 2nd, I think.

PROTHONOTARY ARONOVITCH: December 11th.

MR. ZIBARRAS: Sorry, December 11th. You're right.

PROTHONOTARY ARONOVITCH: All right.

MR. ZIBARRAS: I can also say that throughout, Madam Prothonotary, TekSavvy posted all their

materials and all of CIPPIC's materials on its website and invited people to review them there. In fact, a lot of the disbursements --

PROTHONOTARY ARONOVITCH: Sorry to disturb you. Does the Gaudrault affidavit actually -- is it in his cross-examination or is the number of people to whom they sent notice, is that in the cross-examinations or in his affidavit?

MR. ZIBARRAS: It might be a combination. At paragraph 30 of his affidavit he says: "On December 13, 2012, we sent an e-mail notice to all of our customers --"

PROTHONOTARY ARONOVITCH: So that's where you're getting your 200,000?

MR. ZIBARRAS: Right.

PROTHONOTARY ARONOVITCH: At the time, all right.

MR. ZIBARRAS: There's another reference where, in a footnote, he had said that they had 200,000 customers around this time and that increased to 300,000.

PROTHONOTARY ARONOVITCH: Right. Thank you. I have it.

MR. ZIBARRAS: I should add that it was on -- TekSavvy complains about a DDoS attack, which is an attack where your website gets overwhelmed. It's an orchestrated attack, the purpose of which is to overwhelm one's website and take it down. That happened on December 15th. We say that that was directly related to TekSavvy giving notice to 200,000 people that Voltage was pursuing its rights.

I just want to say for the record that Voltage and Canipre, which is the investigative agency that helped Voltage identify the illegal downloaders, got attacked as well. We say that that was as a result of TekSavvy's actions, and, in fact, Voltage and Canipre suffered through that. We, again, find it bizarre that TekSavvy is seeking some kind of remedy against Voltage for a result caused by its very own ill-advised actions.

I think that I was back at page 208 of this motion record, Madam Prothonotary, which is tab 4, and I was at Appendix A to Mr. Aube's affidavit. I was just saying that the concerns that Voltage has with this affidavit is that it's also hearsay. There are no time sheets. By their own admission, these charges -- which are significant; it's $81,000 that they're claiming -- are estimates that were determined by comparing the number of calls to a baseline. That's it. We don't know what the baseline is. We don't know how this calculation was done. We don't have any documents that show the baseline and show the supposed increase from the baseline, and I guess the point I'm making is we heard a lot of argument from Mr. McHaffie, but we don't see a lot of evidence, and, unfortunately, our courts rely on evidence.

This Appendix A has no evidentiary value to this Court, and, certainly, hearsay that relies on estimates based on diversion from a baseline when none of that information is provided cannot be relied on. There is no reason provided why the proper evidence admissible to this

Court was not provided since it must be easily available to TekSavvy. In other words, it's like when you're in school and there was a math exam, and you can't just put the answer. You have to show your working.

So, in summary on these administrative costs/operations, one, we say that it has nothing to do with the order that we were granted and certainly cannot be tacked on. Secondly, we say that it is not proper evidence admissible by this Court and therefore cannot be relied on, so we say all of these operational costs should be excluded.

So, in summary, Madam Prothonotary, I think our position is relatively simple. We say that TekSavvy never claimed the costs of the underlying motion, cannot claw back into it now. The fact that they're doing that is why they have this legal dilemma. The process they're employing is creating these anomalies or abnormalities where they're trying to take the position that somehow a cost of abiding by the order covers the cost of the underlying motion, and, of course, it's getting them tied up because it can't possibly be right that they get full indemnity coverage on a motion that they didn't participate in, in the sense that they didn't prepare materials and have submissions before the court.

They also can't get around the fact. The fact is that no costs were ordered for the motion. In accordance with Norwich Pharmacal orders the thing that was ordered, and it's plain language, is the costs of abiding by the order issued in February. We say, as a result, when you

look at all these appendices, the only thing you're left with is what I referred you to already at tab 3(a), which is the administrative costs, information technology, which we say has to be passed down in the way I described to avoid the unnecessary billings and the unreasonable costs.

Now that I've covered a lot of the factual issues there, if I can just cover some of the law, as well, that replies to the reasonableness that's required in these motions, just as a starting point, Madam Prothonotary --

PROTHONOTARY ARONOVITCH: I'm going to interrupt you now.

MR. ZIBARRAS: Yes.

PROTHONOTARY ARONOVITCH: We will take a short break. We're going to take 15 minutes, and you'll recall where you've left off?

MR. ZIBARRAS: Yes.

PROTHONOTARY ARONOVITCH: You're going to address reasonableness.

--- Recess taken from 2:45 p.m. until 3:00 p.m..

PROTHONOTARY ARONOVITCH: Mr. Zibarras?

MR. ZIBARRAS: Thank you, Madam Prothonotary. For the balance of my submissions I'm going to be referring to my memorandum of factum law, and I'm going to be starting at page 8 at paragraph 16. There, we have a court of appeal decision which stands for the proposition that where a non-party is involved in litigation, either as a witness or to produce documents, a civic duty is engaged the performance of which often involves some inconvenience and

expense which will not be completely recouped. That is the law in Canada. My friend had taken you as part of his submissions to the Norwich Pharmacal case, and he had taken you to paragraph 100 of that case which is at tab 2 of his brief, and they had said:

"The full costs [of the respondent] of the application and any expense incurred [in providing the information] would have to be borne by the applicant (Norwich Pharmacal Company & Ors. V. Customs And Excise [1973] UKHL 6)."

That was dicta, as my friend pointed out, but that hasn't been how the courts in Canada have applied Norwich Pharmacal orders. There's a recognition that just like witnesses are called to the stand in civil actions and it's at their own expense in terms of time that they have to be there in order to help the court process, similarly, on Norwich pharmacal orders, it's the same civic duty that's being triggered where expenses may be incurred, but they're not going to be fully recouped.

PROTHONOTARY ARONOVITCH: Do I take it -- now I haven't looked at these closely. You're making the point that Norwich Pharmacal has not been followed here in terms of costs. That's not a case that relates to a Norwich Order.

MR. ZIBARRAS: That's right.

PROTHONOTARY ARONOVITCH: So can you take me to -- I mean, that's a page that talks generally about the obligation of third parties.

MR. ZIBARRAS: Right.

PROTHONOTARY ARONOVITCH: So when you make that sweeping statement that Norwich Pharmacal orders, that the costs disposition of them, or the costs of the third party complying with the order, has been dealt with differently in Canada, what cases are you referring to?

MR. ZIBARRAS: Well, I'll take you to some cases that -- actually, the limitation of the court -- the way the court imposes the limitation is through the word "reasonable." I'm going to take you through a series of cases that follow, in my factum, where, in determining what's reasonable, the court shaves off any excessive time put in by lawyers, any excessive disbursements that were not necessary. The point I'm trying to make --

PROTHONOTARY ARONOVITCH: And are those cases that deal with Norwich Order?

MR. ZIBARRAS: Yes.

PROTHONOTARY ARONOVITCH: Very good.

MR. ZIBARRAS: And the point I'm trying to make, Your Honour, is that my friend started very strongly relying on some kind of older authorities that all expenses have to be covered, and he left the impression that it was kind of at the third party's discretion that if they chose to spend in a certain way it would all be covered, and he was purporting to state that there was authority for that. We are saying that there absolutely is no authority. The court engages in a very limiting exercise to ensure that any expense incurred is reasonable.

As a starting point, I just wanted to make the point that this is similar to a witness being called a trial. They cannot demand that they are made fully whole for the time they've spent being part of this process. I'll go from there. Other general principles that apply always to costs awards is that costs have to be proportionate and a reflection of what's reasonable in the circumstances. The fundamental objective, Your Honour, of having the reasonableness limitation is to ensure that we do not obstruct access to justice.

This is where we say in our submissions that we have to be careful that costs awarded are not made so high that they have a chilling effect on future litigants thinking of bringing similar claims. I also want to keep in context that what we tendered was a relatively simple motion with established court of appeal case law, and, in my experience in courts to date, costs for a motion are never in the hundreds of thousands of dollars. Courts just don't award that much for a motion. I've done trials where the costs award hasn't been that high. The principles of proportionality are not thrown out of the window just because we're dealing with a Norwich Pharmacal order.

One other principle that applies, Your Honour, is that -- and it's just a principle, but it shows how the courts deal with these things -- in a Norwich Pharmacal context, if information has to be provided, the providing party can't profit off it. In other words, it can't charge the cost plus a markup for the profit. I'm not

saying that TekSavvy has done that, but I'm just saying that's the principle that applies. It can only really charge the costs. So, for example, if they're producing paper, they can't say, well, it costs us five cents for the paper, but I'm going to charge 25 cents. It has to be the actual cost of the paper if, for example, documents are being produced.

All right, just to take you to some of the case law, one of the cases I want to take you to, Your Honour, is at tab 7 of Voltage's brief of authorities which is the Fontaine case. Now this was not in the context of a Norwich Pharmacal, but it was in the context of an application to add two parties to sit on the discussions in the aboriginal law context, and the principle that was applied here was -- and I just raise this because we have a lot of charges for radio interviews, and TV interviews, what have you.

The court specifically considered, in this case, what are reasonable costs, and it's at paragraph 7 of that case, which is at tab 7 of our brief. It says: "In my view, the term 'reasonable legal costs'--" which is a term we're considering here, so we raise this case, "-- is not synonymous with the full, substantial or partial indemnity regimes used to fix costs in court proceedings." Basically, what it's saying is that costs have to be reasonable, and it goes on further to say at paragraph 9:

"I also agree with Canada's submissions to the effect that some items included in the Moving Parties'

dockets, such as conducting radio interviews and copying binders, should not form part of a claim for 'reasonable legal costs'(Fontaine v. The Attorney General of Canada, 2012 ONSC 3552)."

So the reason I raise this is we have a whole section of, you know, responding to inquiries, etc., etc. and certainly those don't form part of "reasonable legal costs." Another authority, at page 12 of our brief, deals with proportionality. The paragraph I want to read is at page 12 of our memorandum. It's the second quarter paragraph:

"From my perspective, if lawyers wish to expend such grossly inordinate amounts of billable hours on relatively routine matters, they may feel free to do so subject to their clients' approval, but they cannot expect judges to encourage such inefficient expenditures of time when their costs are to be fixed following trial(as read)."

So this is a general proposition, again, but what it speaks to is the duplication by senior counsel, the use of senior counsel, to do ordinary tasks which should be delegated to junior counsel and just general principles of proportionality which, in response to my friend's submissions, have not been given any effect to in this motion.

The same principle is applied at page 13 of our memorandum. There, in a British -- A. L. Scott, which is at tab -- I think it's at tab 8 of our brief. Sorry, tab 6 of our brief -- the other point was made that in the usual

case -- and this is halfway through the second-last paragraph at page 13:

"If an ultra-cautious third party consults solicitors, that's an (inaudible) of corporate counsel, and counsel charge two tenths of an hour for a stock response, it would not be appropriate that the fee be passed on to the litigant requesting the documents(as read)."

The point being made in this case, Your Honour, is that to comply with Prothonotary Aalto's order raises no legal issues. The order says that 1,100 IP addresses are to be correlated, period. If a party wished to expend --

PROTHONOTARY ARONOVITCH: The order does specify, though, "legal costs." What content do you give that?

MR. ZIBARRAS: Well, this is what I'm saying. Norwich Pharmacal orders are orders for discovery, and the reason the term "legal expenses" typically pops up when people are citing the law on these orders is that, traditionally, discovery was oral, so what would happen, for example, is a third party was ordered to attend to be discovered. If that third party was required to go through that process, they were entitled to have a lawyer sit with them through the discovery. If a lawyer was sitting with them, they were entitled to recover the legal costs of having the lawyer sit through the discovery.

That, however, would not apply on documentary discoveries. In documentary discoveries the third party

would gather bank statements, photocopy, and they would be reimbursed for the cost of copying the documents because a lawyer would not really be triggered other than, maybe, reviewing the order, which is a simple process. So legal -- being reimbursed for "legal costs" just doesn't apply in this case. It doesn't apply in this case because TekSavvy did not have to hire a lawyer to correlate the IP addresses, nor did the lawyer get involved in that. Certainly, there were no oral discoveries required by Prothonotary Aalto's order. If they were, then our position would be that Mr. McHaffie could attend with his client, and we would be "on the hook" for his reasonable costs of attending the discoveries.

Just on that point, we make the point at paragraph 32, Madam Prothonotary, that, for example, if one looks at David Elder's fees, he is advising on telecom privacy matters. Now, interestingly, when I cross-examined Mr. Gaudrault, Mr. Gaudrault was intimately familiar already with these matters. During his cross-examination he was aware of PIPEDA legislation. He was aware of the governing case law, and that all pre-dated Voltage. I can take you to those references.

The point I'm trying to make is because our request was the same that ISPs deal with regularly, we didn't trigger any new legal analysis that had to be conducted or incurred in order to comply with the order. That's why, in this case, we say no legal costs can be ordered, and that's why we say our friend is incorrectly

trying to apply the law in this area to claw back into the motion, which is just not how it's done.

I will also say, though, that the only novelty in this case is the number of IP addresses, and we just don't have precedents in Canada before where requests are being made for this many IP addresses, but we say that the only novel issue that triggers, Madam Prothonotary, is that instead of doing one manual search which an individual can do and give the information back, we engaged a process where TekSavvy set up an automated system so that they can efficiently get the information to us, which they did, and the real fight is how much should that have cost or did it cost. Our position, acting reasonably, based on Mr. Steve Rogers' affidavit, based on what the legislature has reviewed, that should have been a very negligible amount.

Really, the best case I can take you back to is the British decision which deals with exactly this situation. It's not a Canadian case, of course, but I think that given that we don't have any Canadian cases exactly on point it's, certainly, very persuasive.

As I said earlier, Your Honour, this case ties in with the intent expressed by our own legislation, and that's the case at tab 12 that I took you to earlier which says that because ISPs are commercial enterprises that benefit from providing the service, that they should bear most of the cost of responding to these orders.

In that case the costs of correlating and giving information were pushed entirely onto the ISP, and

there was a separate issue about the costs of the application, but the ISP was an active participant in responding to the application, and there, I think, the costs were split between the parties, as well. One party had to pay for some of it, and the other party had to pay for the rest of it.

We say, in this case, no costs have been awarded from the underlying action, and, of course, TekSavvy was not an active participant or respondent in the underlying action.

In conclusion, Your Honour -- our conclusion is at paragraph 45 of our memorandum -- based on the British decision, which basically says that the time to set up its systems should be absorbed by the ISP, what we did is we went back to Mr. Rogers' estimate of what it would take, which was 14 hours, and three of those hours were time that he had attributed to TekSavvy for setting up its systems, setting up an SQL program, based on the British decision, we say even those three hours should really be, again, left with TekSavvy. If they're going to be in this business, they have to have the systems to identify IP addresses. Really, that left an estimate by Mr. Rogers of about 11 hours of work. He also found that this type of work can be done by an entry level technician that typically earns about $35,000 to $45,000 a year. That translates to an hourly rate of about $19 an hour, so using 11 hours at $19 per hour, you get to a cost of about $209, total, for this to be done, for us to get 1,100 names from TekSavvy.

Now, we say that's in line, as well, with what we see is the case, currently. So, for example, at paragraph 61 we see the article based on an inquiry that was made about searches done by the Canadian Border Services Agency, and the report that tracked this showed that, over a year, there were 18,849 requests, and the Canadian Border Services Agency was charged approximately $18,000 for all those searches, so it ended up being about $1 per search. Sorry, at paragraph 61 I go back to this issue. There's an earlier paragraph where we actually reference the article and the exact numbers. Sorry, so that's at paragraph 13 where we say that the Canadian Border Services Agency, alone, submitted 18,849 requests. The total cost charged to them for correlating those addresses was $24,000, so just over a dollar per request. That, again, confirms what Mr. Rogers is saying and what the legislature is saying about how much it costs to correlate IP addresses.

The last point we make, of course, is ripple effect of any decision by this Court. Besides the Canadian Border Services Agency, the same article indicated that in 2011 there were approximately 1.2 million government requests for customer information. Now, this is by law enforcement, primarily. Besides that, in the private sector there is -- we have no way of knowing how many, but any time there's a fraud action or a defamation action where people are posting on the Internet anonymously, there are similar types of requests. I guess the point I'm trying to make is if TekSavvy would have it its way, you are being asked to

massively change what really is the status quo right now with these types of requests. They say, well, look, it's not a big deal, you know, so what if -- I think the number my friend used is he said it's $164 per IP address. It's actually more than that because $164 is if you divide their number by the 2,000. Because we're actually only getting 1,100, his number, when you divide it by 1,100, is $314 per IP address. But this is the thing: For government agencies, if there's a precedent that $314 as opposed to $1 is appropriate, ISPs will jump on that. This will turn into a profit center for ISPs that would match their underlying business, and, of course, what, then, will happen is two things will happen. Either enforcement will stop because government agencies won't be able to afford those kinds of charges. If you were to multiply $350 by 18,000, for example, for the Canadian Border Services Agency you'd have an astronomical amount. Either they just couldn't do it or that money would be pushed on to taxpayers who would be left with a bill charged by ISPs, commercial entities that are making profits --

PROTHONOTARY ARONOVITCH: Let me ask you about these numbers. In respect of the the CBSA the 18,849 requests, are they requests for the identification of single users?

MR. ZIBARRAS: I would be --

PROTHONOTARY ARONOVITCH: Or multiple users?

MR. ZIBARRAS: Well, you mean was it 18,000 at a time or 18,000 separate requests? Probably --

PROTHONOTARY ARONOVITCH: Well, there are, obviously, 18,849 separate requests.

MR. ZIBARRAS: Correct.

PROTHONOTARY ARONOVITCH: What we don't know is what each request comprises.

MR. ZIBARRAS: Each request is one correlation. That's what it is.

PROTHONOTARY ARONOVITCH: And you know this from what? What do we know this from?

MR. ZIBARRAS: Well, IP addresses are unique identifiers at a certain time and date, so today, this minute, my IP address is connected to me, so if someone has a date-stamp of illegal downloading at this exact minute --

PROTHONOTARY ARONOVITCH: I'm not asking for your evidence on this. I'm saying what supports your interpretation of that. This is from one of your affiants; isn't it?

MR. ZIBARRAS: Yes. IP addresses are unique, so there's only one person associated with an IP address at any one time, so if there are 18,000 IP addresses that are being identified, it's because those IP addresses have engaged in some activity that required someone to find out who was associated with it.

PROTHONOTARY ARONOVITCH: That's what I'm asking you, Mr. Zibarras, whether you're talking about the identification of 18,000 users.

MR. ZIBARRAS: Correct, I am.

PROTHONOTARY ARONOVITCH: Okay, as opposed to

18,000 requests that asked for, let's say, 10 users apiece.

MR. ZIBARRAS: No, no. It would be one person per IP address. It would be 18,000 users.

PROTHONOTARY ARONOVITCH: Thank you.

MR. ZIBARRAS: So, subject to any questions you have, Madam Prothonotary, those are my submissions. I'll leave it at that.

PROTHONOTARY ARONOVITCH: Thank you. I have no other questions. We'll hear from your friend in reply.

MR. ZIBARRAS: Thank you.

PROTHONOTARY ARONOVITCH: And then I will come to the parties' submissions on costs.

REPLY SUBMISSIONS BY MR. MCHAFFIE:

MR. MCHAFFIE: Thank you. Just to end with the beginning, since I've got it up, the article that is being referred to is Exhibit R to Mr. Logan's affidavit which is in my friend's record, Volume 1 of 2.

PROTHONOTARY ARONOVITCH: Exhibit R?

MR. MCHAFFIE: Exhibit R on page 237 of his record.

PROTHONOTARY ARONOVITCH: Yes.

MR. MCHAFFIE: And the one thing that I think is -- I'm trying to find it in the cross-examination, but the one thing that was clear from Mr. Logan's cross-examination on this, first, was that this talks about telecommunications and social media companies -- the article as a whole covers a variety of things -- and that he actually didn't have any knowledge of the underlying stats,

so all we have here is this information, and one sees on the second page that the Canadian Border Services Agency made almost 19,000 requests. Then Mr. Logan speaks to it in his affidavit at paragraphs 26 and 34, apparently. It's a math, frankly, that isn't borne out either by the article or by information, actually, that he can speak to. Paragraph 26 talks about this article as a whole, and then in paragraph 34 he talked about for example, the CBSA has stated that it spent this amount on requests in 2012 to 2013. So it's this report on which he hasn't really got any information as to what it is, how many requests, and so forth. That, I just flag. I'm not sure you can rely much on it.

Ultimately, in my submission, all of that about what government may or may not do, what it may or may not ask for, what ISPs may or may not charge for either in the particular case or in the "notice and notice" regime is not relevant to this case. My friend is, I think, trying to raise a bit of a "boogie man" that if you, following the order that's already been given, actually award the costs that TekSavvy has actually incurred in this, that suddenly there will be a breakdown of our ability to prosecute child pornography or something. There's no evidence of that at all.

On the specific question my friend did make a reference to "notice and notice" saying that the new process is that regardless of the reason, whether it's defamation, or fraud, or copyright there is this "ISPs do it for free." "Notice and notice," just to clarify, is a Copyright Act

regime only. It is not a defamation, fraud, "anything else under the sun" regime. It is a Copyright Act regime.

Now, I have a number of submissions that I sort of wrote down in reply as we were going through, so they'll go in chronological order of my friend's submissions. I'm trying to limit it to ones that really need reply and ones that directly focus on the main parts of the submission that he raised, so I'm trying to get through them fairly quickly.

With respect to the 20th Century Fox case, which is the U.K. case from 2011 that my friend took you to twice where he suggested that the U.K. court is saying copyright owners ought to -- sorry, that ISPs ought to be providing this, if my friend wanted to change the Canadian law and say that costs of all of this ought to be borne by TekSavvy and not by Voltage, in my submission, they ought to have made that submission to Prothonotary Aalto at the time that the issue arose, and they did not do so. The order has now been made.

The second point is that my friend said well, it's often the case that plaintiffs aren't out to get damages. Without drawing it up, I'll draw your attention to tab 16, which is the statement of claim in this case, they are out to get damages, and this brings us to the whole notion that this, the case that we are talking about, is this case and the order that was given in this case with respect to the facts before both Prothonotary Aalto and then yourself.

With respect to the question of notice and the fact that it was all costs that would have -- that were the result of the notice being given by TekSavvy and not costs being incurred, two aspects of that: One is Mr. Gaudrault's affidavit at paragraph 37 makes it clear that these are costs that would have been incurred anyway, before or after, and he was not cross-examined on that. And they were then -- there was the suggestion by my friend that if notice hadn't been given, and this had just come from Voltage, then all of these things would have been directed at Voltage as opposed to the ISP of the individuals who were receiving this.

In my submission, again, there's no evidence to support that. It's a bit of a strange assumption, frankly, when you've got 2,000 or 1,000, regardless, all coming from one ISP, the ISP is going to be subject to inquiries. They're going to have to deal with this.

"Notice and notice," I've addressed. 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, an official transcript, with the Court to the extent that it was a decision. There was direct discussion 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.

If there is some different -- it's an extremely important point, and I am not pleased that the issue has not been addressed in the motion record, so if you have anything to say about whether there was any discussion on costs of the motion -- not costs of implementing the order, but costs of the motion -- then a) it should have found its way into this motion record, and, if it hasn't, I'm going to take the position that no costs were sought and none were awarded, as that is the case.

MR. MCHAFFIE: Okay. The best I can do in that case is point, simply, to the decision, itself, and I've taken you to the passages that, in my view, show that the costs to the date of the motion, including, in my submission -- but it does require me to interpret the reasons of preparing for the motion -- were what was at issue in dealing with costs. And this question of legal costs could only have relevance in dealing with the legal

costs of the motion because, as my friend says, the legal costs --

PROTHONOTARY ARONOVITCH: If you want to make that argument, and if you are, in fact, making that argument based on the record, that's fine and good.

MR. MCHAFFIE: And that is my submission. I've made it before, but I do want to flag that -- and it goes back to your question to my friend -- that there was an order for all reasonable legal costs, and that, in my submission, where that comes up and where the bulk of that is is the costs associated with appearing, ultimately, before Prothonotary Aalto, and that that "all reasonable legal costs" was not intended to be trivial, or it wouldn't have been put in that form, and that, therefore, to capture what the legal costs that TekSavvy incurred were is to deal with that issue. So that's the submission. That is all on the record. That is in the proceeding.

PROTHONOTARY ARONOVITCH: If that's your argument, then I have it.

MR. MCHAFFIE: Thank you. My friend suggested that there was no affidavit with respect to Mr. Tacit's costs. They were directly referenced in Mr. Gaudrault's affidavit, paragraphs 44 to 46, and he was not cross-examined on that, so Mr. Gaudrault spoke to it, spoke to, specifically, what Mr. Tacit spent time on, attached his e-mail, and that was in there, and that wasn't cross-examined.

He also suggested that with respect to Mr.

Tellier's affidavit that there was no information in Mr. Tellier's affidavit dealing with the process. It was only in Mr. Gaudrault's affidavit. I am drawing your attention to Mr. Tellier's affidavit at paragraph 2 where, in order to avoid duplicating exactly the same facts, Mr. Tellier says:

"I have reviewed the affidavit of Marc Gaudrault, CEO of TekSavvy, and believe that it fairly describes the process that TekSavvy undertook in identifying subscriber accounts associated with the IP address provided by Voltage(as read)."

My friend is just not correct to say that Mr. Tellier did not speak to it. He spoke to it by referring to and adopting it as his evidence with respect to those technical issues.

With respect to the suggestion that because Mr. Misur had dealt with past requests, he is the one who matters and ought to have done the correlation, that's, again, not what the evidence is. The evidence is that this is the first time anyone at TekSavvy was involved in this kind of project and that Mr. Misur had been involved in these one-by-one, 2-hour processes. So, again, if this were to be done by Mr. Misur's method, we would be looking at thousands of hours and not the hours that were saved. Mr. Tellier, who was the chief information officer, was involved in setting up new processes to allow this to be done more efficiently.

There is also no evidence to support the suggestion that this will or could become a profit center,

either for TekSavvy or otherwise. Mr. Gaudrault's affidavit at paragraph 51 made it clear that the costs will not be completely recouped, and I take issue with the fact that my friend suggests that this is like a witness at trial. It's not like a witness at trial. It's a witness on third party discovery subject to a Norwich Order which has its own procedures.

With respect to the question of undertaking a process twice in order to be accurate about it, my friend asked, rhetorically, why are we being billed, why did you do it twice. Those are not rhetorical. Those are evidentiary questions, and the answer is found in paragraph 21 and following, in Mr. Gaudrault's affidavit. It was done twice the first time. The first pass consisted of two lookups to try and be as accurate as possible, and then there was a second time once the errors had been identified.

The importance of getting this information right is something that TekSavvy was very concerned about, and, frankly, that Voltage ought to be concerned about, as well. It's important to get this information right when you're looking at the sort of information being requested.

With respect to -- the final point is a technical one dealing with retrieval of log files and this question of the retrieval of log files being with respect to 4,000 IP addresses as opposed to the 2,000. Mr. Gaudrault -- again, this is an evidentiary point. In Mr. Gaudrault's cross-examination, questions 86 and 87, Mr. Tellier's cross-examination -- the log files are one per day

per server. It doesn't matter how many queries are then being sent against them. It's the time period that matters. You need to cross-reference the RADIUS log files for each day during the time period regardless of how many queries are then undertaken.

So my friend's suggestion that they can just cut in half the log files that were being retrieved is directly contrary to the evidence as to what the process was. Those log files were retrieved on a per day, per server basis in order to then run the either 4,000 or, as it happened, 2,000 queries against it, so there was no savings to be earned there.

I wanted to nail off those. I think the rest of our submissions, you have, and I'll leave you with them.

PROTHONOTARY ARONOVITCH: Thank you, Mr. McHaffie. I was going to propose a short break before we get your submissions on costs. Let me ask you how long you're going to be.

MR. MCHAFFIE: I would say 10 minutes. I don't think that's something we ought to belabour. I have three submissions.

PROTHONOTARY ARONOVITCH: And yourself?

MR. ZIBARRAS: We'll keep it short, as well, Madam Prothonotary, since we've taken up most of the day.

PROTHONOTARY ARONOVITCH: Very good. Then let's just keep moving on. Mr. McHaffie, on costs?

SUBMISSIONS ON COSTS BY MR. MCHAFFIE:

MR. MCHAFFIE: Okay. My submissions on costs

are that they ought to follow the same principle of indemnity as we see in the other cases with respect to Norwich Orders, and I say that based on -- and the underscoring reasons behind the Norwich Order and the principles in the Norwich Order -- and I realize that as I got through that that one of the things I wanted to do is pass up a copy of this Leahy decision which was the full decision that you had asked for. I can either do that now or I can send it in to the Court later. We have, over the lunch break --

PROTHONOTARY ARONOVITCH: I'll take it now, thank you.

MR. MCHAFFIE: So, over the lunch break we managed to get copies, and I'll certainly -- sorry, should I?

PROTHONOTARY ARONOVITCH: One to her and one to me.

MR. MCHAFFIE: Okay, thank you.

PROTHONOTARY ARONOVITCH: Thank you.

MR. MCHAFFIE: So this is the full decision, and there are two aspects of it that I think I can help. The first is that, as you can --

PROTHONOTARY ARONOVITCH: Your friend doesn't have it, so --

MR. MCHAFFIE: He doesn't have a full -- that's right.

PROTHONOTARY ARONOVITCH: And so I hesitate to hear any further submissions on this.

MR. MCHAFFIE: All I can say is that we weren't able to find the specific terms of the order.

PROTHONOTARY ARONOVITCH: The order that was being sought to be set aside?

MR. MCHAFFIE: Except as it is described in the paragraph that we had already highlighted, which says that in each of the orders there was this compensation provision. The other thing is that on --

PROTHONOTARY ARONOVITCH: What paragraph is that? You can note that, Mr. Zibarras, and I take your general objection to this.

MR. MCHAFFIE: This is actually in one that is in our original, so it is in paragraph 159. It says:

"Each Ex Parte Order that directed disclosure from the financial institutions provided that ATB's counsel or the Plaintiff would pay the reasonable fees incurred (Alberta Treasury Branches v. Leahy, 2000 ABQB 575)."

Now, all that I point to this case -- so 159. All that I point to this case for is the general principle of indemnity rather than specifically with respect to legal costs, and I say that because in this case the financial institutions were not represented. I don't know if they even attended.

This fight, here, I'm setting it aside, was between the plaintiffs and the defendants in the case rather than between the financial institution and the plaintiffs, so it's the general principle of indemnity I refer to here and not specifically on costs. The costs of this were to be

spoken to, but, again, those were as between the plaintiff and the defendant and not the third party.

So, I go back, then, on that principle as expressed there, as well as expressed in the other cases, this notion of the innocent third party coming into it to provide information that would assist the plaintiff in their case against the defendant, an order being made pursuant to an undertaking that there be costs, legal costs, reasonable administrative costs, and disbursements, and that there are, then, more costs to be incurred with respect to finding what those are at the end of the day, and, again, as a non-party to the litigation, not a plaintiff, not a defendant, but the innocent third party, that TekSavvy ought not to be in a position where they are further "behind the eight ball" in terms of overall costs that would be incurred. My first submission is that that ought to be on an indemnity basis.

PROTHONOTARY ARONOVITCH: What does that mean? Solicitor implying costs for this motion?

MR. MCHAFFIE: Yes. I say it on the "reasonable legal costs" of this motion simply because the case law suggests that this is -- and that's different than any standard of costs. My friend took you to the Fontaine case, as well, so I would say "reasonable legal costs" of this motion on that basis rather than -- but it amounts to that indemnity principle.

PROTHONOTARY ARONOVITCH: So, that said, with the rubric that you intend to apply to it, I understand. However, in fact, what you're asking for is solicitor

implying costs.

MR. MCHAFFIE: I think it amounts to the same thing. That's right.

PROTHONOTARY ARONOVITCH: Okay.

MR. MCHAFFIE: My alternative submission is that there ought to be costs of the motion to TekSavvy on the ordinary scale with some elevation of that scale to account for the fact that the costs of the motion were driven up considerably by affidavit evidence and resulting cross-examination evidence that we say ought never need to have been addressed, and the resulting drafting, as well. Much of -- not much of -- a fair amount of our written submissions, certainly a lot of time in cross-examination, and in reviewing affidavits had to do with responding to affidavit evidence from Voltage that we say had nothing to do with the case of what were the costs incurred by TekSavvy, and that drove the costs up, and suggests that even on an ordinary costs order there ought to be a higher level of costs awarded.

PROTHONOTARY ARONOVITCH: And what is the elevated level that you are talking about? Column 4?

MR. MCHAFFIE: Column 5. Top end of column 5.

PROTHONOTARY ARONOVITCH: Top end of column 5. Mr. Zibarras, are you ready to speak to costs?

SUBMISSIONS ON COSTS BY MR. ZIBARRAS:

MR. ZIBARRAS: Yes, Madam Prothonotary, I am. Let me start by saying that my friend's position that they

should be fully indemnified for the costs of this motion just, again, highlight the absurdity of this principle that my friend suggests applies in these circumstances where the third party can act unreasonably, take forced steps to follow from that unreasonableness, and then require that we pay the costs of them acting unreasonably.

Just to put it in perspective, again, we're dealing with 1,100 IP addresses. Their highest number to actually correlate those addresses was $27,000, if you just look at the IT costs. $27,000, that's just over $20 per IP address, but then what they did as part of their bill of costs, they did this -- I still don't understand it -- they tried to add on an extra $330,000 of legal fees, and time spent with marketing, and dealing with the media, and notifying their customers, forcing this motion because, of course, I don't think any moving party would ever accept what we refer to in our materials as an outrageous amount.

My submission is that the unreasonableness of TekSavvy must be considered by this Court. We say that we have shown throughout that the numbers that are being claimed are horribly inflated and fly in the face of every case that discusses principles of reasonableness, proportionality, etc. that have to be applied in the circumstances. We are asking for our partial indemnity costs of this hearing. We think there is no basis on which, whether we win or lose, they should get costs. It just doesn't work that way. This is a costs motion, and the regular rules apply to it. We were forced to take this

extra step, and just to clear the record, Madam Prothonotary, we had to respond to their materials. They are the moving party. They filed several affidavits which contained improper evidence. Not only that, though, but if you read the affidavit of Steven Rogers, they didn't even indicated in their materials what systems they had, which is why Steve Rogers starts off by saying: I cannot identify what systems they have, but I know that they have log files, and I know that you did an SQL, and this is how much it should cost. So we had to actually go and hire an expert because of the absence of evidence from them about what systems they had and why it took so long. And the expert, of course, gave an opinion that's in line with everything else you read.

Just in case there's any confusion from my friend's submissions earlier, the article about the Canadian Border Services, the reference to the actual cost that it was to them is at tab S of Barry Logan's affidavit at page 344 of the motion record -- because my friend took you to tab R. The actual information is at tab S.

Anyway, in conclusion, Your Honour, we were forced to get an expert. We were forced to put in responding affidavits. We were forced to conduct cross-examinations. We are seeking partial indemnity costs of $61,000.

PROTHONOTARY ARONOVITCH: And how do you arrive at your $61,000?

MR. ZIBARRAS: Well, I have a costs outline

that was -- I guess you don't have it in front of you, Madam Prothonotary, but basically there were --

PROTHONOTARY ARONOVITCH: Have you put in a bill of costs for your submissions?

MR. ZIBARRAS: No. We have a copy here, but --

PROTHONOTARY ARONOVITCH: Then I don't know how you can refer to it before the Court.

MR. ZIBARRAS: All right. I'll put that aside. We arrived at that number just adding up the costs of preparing the affidavits, conducting the cross-examinations, attending so that our witnesses could be cross-examined. There was a total of number of six cross-examinations on affidavits.

PROTHONOTARY ARONOVITCH: I have no idea what all of this is about. There's no bill of costs. There's no evidence on point. I don't see the utility of you continuing to make submissions.

MR. ZIBARRAS: Okay, give me is second.

PROTHONOTARY ARONOVITCH: When the Court orders that you come prepared to make submissions on costs, the order is, certainly, that, to the extent that you're going to be relying on any evidence, you serve it and file it and put it before the Court, so I don't see that I can accept any of your submissions on costs.

MR. ZIBARRAS: As I understand it, Madam Prothonotary, we received the request to come prepared to make costs submissions recently, on Thursday night, so we

did prepare something to bring with us today. I don't think we had time to prepare and file something. We didn't appreciate that we'd be doing cost submissions that quickly, but we are here today, and we did bring a costs outline with us, but it hasn't been filed.

PROTHONOTARY ARONOVITCH: Well, then, you can't have reference to it, and I don't have it before me.

MR. ZIBARRAS: Would it be --

PROTHONOTARY ARONOVITCH: It's a cautionary tale, Mr. Zibarras.

MR. ZIBARRAS: Yes.

PROTHONOTARY ARONOVITCH: When there are submissions on costs, you can't just stand up and make submissions without a bill of costs to support it.

MR. ZIBARRAS: Would I be able to request that we provide brief submissions in writing?

PROTHONOTARY ARONOVITCH: That is what this was meant to avoid, and you can ask for leave to do that, and we'll hear from your friends whether that's appropriate, and whether leave should be granted.

MR. MCHAFFIE: The Court did indicate that they wanted to hear from us today, and I think -- my assumption, at the time when I received that, was that the idea was to get it over with, that we not have submissions on costs, about costs, about costs, so I'm somewhat inclined to say that we'll not be sticking with the tariffs or the submissions at a level that we have put them rather than trying to say "and it's this, and it's this," recognizing

that there may need to be a determination of what the dollar value is, subsequently. But if, obviously, my friend is going to make written submissions, we would ask for the opportunity to respond to them and make our own.

PROTHONOTARY ARONOVITCH: That's fair enough. I'm not going to -- that direction was meant to have you make your submissions today.

MR. ZIBARRAS: Okay.

PROTHONOTARY ARONOVITCH: And prove them today.

MR. ZIBARRAS: Right.

PROTHONOTARY ARONOVITCH: And it was made following receipt of the draft order by your friend, who included a provision that submissions on costs were to be made after the fact. I don't allow for submissions on costs after the fact, and so you were going to have to tell me -- you are going to have to have them taxed. I am not inclined to grant you leave to speak to the costs. If you want to recoup your costs including your disbursements, which would include your expert reports, then you make submissions to me about how you want your costs taxed, and you can do that; go up and get them taxed, but I am not going to receive further submissions from you.

MR. ZIBARRAS: That's fine, then, thank you, Madam Prothonotary. And, just so that I am clear, I don't believe that any --

PROTHONOTARY ARONOVITCH: That may be fine, but you still have to say to me --

MR. ZIBARRAS: Right.

PROTHONOTARY ARONOVITCH: You have to address the tariff and say to me what you think is the proper end of the tariff, and then I will order, depending on how I view the matter, that costs are to be taxed at that level.

MR. ZIBARRAS: Okay. So we're asking for column 4.

PROTHONOTARY ARONOVITCH: On what basis? You know that the ordinary tariff is mid-point of column 3. Your friend made a "pitch" in his case for elevated costs, top of column 5, and he gave reasons for it.

MR. ZIBARRAS: Right.

PROTHONOTARY ARONOVITCH: Now, I take it that your reasons are what you've already mentioned which is that you had to respond to the case that was put before you, that you had queries about what the system was, and that you -- in other words, I take all of the submissions that you've made this far, that your need to respond as you did to this motion is justifying your claim for column 4?

MR. ZIBARRAS: Right. And I will include, just the flavour of the proportions of what was being claimed for the underlying action. In our materials, in my memo at paragraph 65, we cited a case where, of course, the courts, in determining issues of costs, they have discretion to look at where parties have acted wholly unreasonably, and take that into consideration in either awarding low costs to a successful party or higher level costs to a successful party, so we rely on that, Madam Prothonotary.

PROTHONOTARY ARONOVITCH: Thank you.

REPLY SUBMISSIONS ON COSTS BY MR. MCHAFFIE:

MR. MCHAFFIE: If I might make two sentences in reply on costs. We agree with my friend on the notion of reasonableness, that that was the underlying feature of both Prothonotary Aalto's order and any principle on costs, and what we say ought to be reasonable indemnity is limited by that, as the Fontaine case says. My friend seems to assume on reasonableness and assume that what we are looking for is unreasonable, when we agree that the limitation is reasonable.

On my friend's request for column 4 costs, the one thing I would flag is the expert report, that, obviously, you're the one who is going to make a determination as to the value of that expert report. We've made our submissions with respect to it. In our submission it ought not to be considered a recoverable disbursement.

PROTHONOTARY ARONOVITCH: We have your submissions on that.

MR. MCHAFFIE: And they talk to costs, as well. Thank you.

PROTHONOTARY ARONOVITCH: The order will be for costs and disbursements. If there is an order as to costs, it will cover disbursements to both parties. Thank you very much.

--- Whereupon the proceeding concluded at 4:10 p.m. The matter is reserved.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Shorthand and transcribed therefrom, the foregoing proceeding.

_____

Helene Vallee, Shorthand Reporter

December 16, 2014