

Court File No. T-2058-12

**FEDERAL COURT****BETWEEN:**

VOLTAGE PICTURES LLC

Plaintiff

- and -

JOHN DOE AND JANE DOE

Defendants

- and -

TEKSAVVY SOLUTIONS INC.

Appellant /  
Responding Party

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY  
AND PUBLIC INTEREST CLINIC

Intervener

**WRITTEN REPRESENTATIONS OF TEKSAVVY SOLUTIONS INC.***(Re: Motion for Leave to File New Evidence)*

July 17, 2015

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TekSavvy Solutions Inc.

## PART I - OVERVIEW

1. TekSavvy Solutions Inc. (TekSavvy) brings this unopposed motion for leave to file new evidence on an appeal pursuant to Rule 351 of the *Federal Courts Rules*.<sup>1</sup>
2. On February 20, 2014, Prothonotary Aalto issued a *Norwich Pharmacal*-type order requiring TekSavvy to provide the Plaintiff, Voltage Pictures LLC (Voltage), with contact information for TekSavvy customers associated with over two thousand internet protocol (IP) addresses (the “2014 *Norwich Order*”).<sup>2</sup> Prothonotary Aalto also ordered that Voltage pay TekSavvy “All reasonable legal costs, administrative costs and disbursements incurred...in abiding by this Order,” and left resolution of any dispute regarding those costs to the Case Management Judge, Prothonotary Aronovitch.<sup>3</sup>
3. TekSavvy submitted a claim for reasonable legal costs, administrative costs and disbursements of \$321,277, including \$157,203 in legal costs and associated disbursements.<sup>4</sup> Prothonotary Aronovitch disallowed the vast majority of TekSavvy’s costs, ordering Voltage to pay only \$21,557.50 in costs, of which \$4,500 represented legal costs (the “Costs Order”).<sup>5</sup> Prothonotary Aronovitch also ordered that there would be no costs of the motion before her (the “Costs Motion”).
4. TekSavvy has filed an appeal from the Costs Order (the “Costs Appeal”). Voltage has also filed an appeal with respect to the Learned Prothonotary’s disposition of costs on the Costs Motion. In the Costs Appeal, TekSavvy has submitted, amongst other grounds, that Prothonotary Aronovitch erred in refusing to allow the vast

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<sup>1</sup> SOR 98/106 (“*Rules*”).

<sup>2</sup> Reasons for Order and Order of Prothonotary Aalto, February 20, 2014 (“2014 *Norwich Reasons*” and “2014 *Norwich Order*”), Motion Record of TekSavvy Solutions Inc. on the Costs Appeal (“Costs Appeal Record”), Tab B(16).

<sup>3</sup> 2014 *Norwich Order*, para. 3, and 2014 *Norwich Reasons*, paras. 135-136, Costs Appeal Record, Tab B(16).

<sup>4</sup> TekSavvy’s original claim was for \$346,480, including \$182,406 in legal costs and related disbursements. However, TekSavvy withdrew its claim for costs associated with an adjourned hearing before Justice Mandamin at the hearing before Prothonotary Aronovitch. All references herein to claimed amounts reflect TekSavvy’s claim as amended.

<sup>5</sup> Order and Reasons for Order of Prothonotary Aronovitch, March 17, 2015 (“Costs Order” and “Costs Reasons”), Costs Appeal Record, Tab C.

majority of TekSavvy's legal costs, in part on the basis that they related to the motion before Prothonotary Aalto and thus were not encompassed by the 2014 *Norwich* Order. TekSavvy has also argued that Prothonotary Aronovitch made mistakes in fact regarding the evidence that was before her in this respect, violated TekSavvy's right to procedural fairness by refusing to accept responding submissions by TekSavvy in response to a submission by Voltage as to what was spoken to before Prothonotary Aalto, erred in disallowing costs on the basis that they were not addressed before Prothonotary Aalto, and erred in concluding that TekSavvy did not address certain claimed costs at the Costs Motion.

5. Certain aspects of TekSavvy's Costs Appeal thus relate to how costs were addressed before Prothonotary Aalto. To address these issues, TekSavvy seeks leave to file the transcripts of the hearings before Prothonotary Aalto (the "*Norwich* Transcript") and Prothonotary Aronovitch (the "Costs Transcript" and, collectively with the *Norwich* Transcript, the "Transcripts") for use on the Costs Appeal.

6. The Transcripts meet the test for admissibility under Rule 351: they are credible, they are practically conclusive of an issue on appeal, and they could not with due diligence have been presented to Prothonotary Aronovitch prior to the Costs Motion. Moreover, even if this Court finds that one or more elements of Rule 351 are not satisfied, it is in the interests of justice to admit the Transcripts for use on the Costs Appeal.

7. Granting TekSavvy leave to file the Transcripts will not result in any prejudice to any party and will ensure the most expeditious resolution of the Costs Appeal on its merits. Accordingly, TekSavvy submits that it ought to be granted leave to file the Transcripts for use on the Costs Appeal. Given the nature of the relief TekSavvy is seeking, and the fact that it is not opposed by Voltage, it proposes that this motion be heard at the outset of the Costs Appeal. For the same reasons, TekSavvy has provisionally included the Transcripts in its materials on the Costs Appeal. To the extent that the relief requested herein is not granted, such materials may be ignored by the Court on the Costs Appeal.

## **PART II - FACTS AND BACKGROUND TO THE CLAIM FOR COSTS**

8. The relevant facts are set out in the evidence filed on the Costs Appeal, most of which (*i.e.*, other than the Transcripts) were filed as part of TekSavvy's Motion Record on the Costs Motion. As TekSavvy is requesting that this motion be heard at the outset of the Costs Appeal, and to avoid unnecessary duplication and reproduction, TekSavvy has not reproduced those materials in its Motion Record for this motion but rather has referenced the Costs Appeal Motion Record. Similarly, TekSavvy has not reproduced those cases cited in its Book of Authorities for the Costs Appeal in its Book of Authorities for the New Evidence Motion, but rather has referenced the Costs Appeal Book of Authorities. However, should the Court desire a separate and complete Motion Record and/or Book of Authorities from TekSavvy on this motion duplicating the relevant materials from the Costs Appeal Motion Record and/or Book of Authorities, TekSavvy would be pleased to prepare same.<sup>6</sup>

9. The relevant facts and background leading up to the Costs Motion are set out in the reasons for decision of Prothonotary Aalto and Prothonotary Aronovitch.<sup>7</sup> TekSavvy provides below a very brief overview of the facts germane to the within motion.

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

10. On November 14, 2012, Voltage commenced an action alleging that unidentified "Doe" Defendants have engaged in illegal file-sharing over the internet and thereby infringed copyright held by Voltage in certain cinematographic works. Voltage claims to have identified IP addresses associated with alleged copyright violations, but had no name or address information to associate with the IP addresses.<sup>8</sup>

11. The costs at issue on the Costs Appeal were incurred by TekSavvy in connection with a Rule 238 motion brought by Voltage seeking disclosure of contact

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<sup>6</sup> Affidavit of Alexander Sarabura, sworn July 17, 2015 ("Sarabura Affidavit"), Motion Record of TekSavvy Solutions Inc. ("New Evidence Record"), Tab 2, at para. 6.

<sup>7</sup> 2014 *Norwich* Reasons, Costs Appeal Record, Tab B(16), at paras. 9-16; Costs Reasons, Costs Appeal Record, Tab C, at paras. 1-29

<sup>8</sup> Statement of Claim in Court File No. T-2058-12, Costs Appeal Record, Tab B(14).

information of TekSavvy subscribers whose customer accounts were associated with the IP addresses at the time of the alleged infringement.

12. Voltage provided TekSavvy with draft motion material containing a list of over 4,500 IP addresses for which it sought subscriber information, a list that was subsequently revised to contain 2,114 IP addresses.<sup>9</sup> After two adjournments, the motion was ultimately heard by Prothonotary Aalto on June 25, 2013 (the “*Norwich* Motion”).<sup>10</sup>

**B. The 2014 *Norwich* Order**

13. TekSavvy attended the hearing of Voltage’s request for a *Norwich* Order and made submissions on the terms that should be included in any order. TekSavvy raised the issue of costs, and requested that any order require that costs be paid before any subscriber information be passed to Voltage. However, Prothonotary Aalto confirmed that he would not be hearing submissions on costs at the June 2013 hearing, but rather that costs would be addressed through a subsequent process.<sup>11</sup>

14. On February 20, 2014, Prothonotary Aalto issued the 2014 *Norwich* Order, ordering TekSavvy to produce the customer information to Voltage, and providing for restrictions on its use and on the conduct of the proceeding. In his Reasons for Order, Prothonotary Aalto extensively reviewed the jurisprudence on *Norwich*-type orders in Canada, the United States and the United Kingdom, concluding that the list of considerations flowing from the cases included that “The party enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third-party.”<sup>12</sup> In keeping with this, Prothonotary Aalto ordered that “All reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by this Order

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<sup>9</sup> Affidavit of Marc Gaudrault, sworn June 27, 2014 (“Gaudrault Affidavit”), Costs Appeal Record, Tab B(2), at para. 12.

<sup>10</sup> Gaudrault Affidavit, Costs Appeal Record, Tab B(2), at para. 18 and Exhibit C (Tab B(2)(C)).

<sup>11</sup> Transcript of the hearing before Prothonotary Aalto, June 25, 2013 (“*Norwich* Transcript”), Costs Appeal Record, Tab B(19), at 106:4-107:28 and 125:10-127:12.

<sup>12</sup> 2014 *Norwich* Reasons, Costs Appeal Record, Tab B(16), at para. 134(d).

shall be paid by the Plaintiff to TekSavvy.”<sup>13</sup> In his reasons, he noted that any disputes regarding such costs could be resolved by the Case Management Judge.<sup>14</sup>

### C. The Costs Order and Subsequent Steps

15. Prothonotary Aronovitch, as Case Management Judge, directed that the issue of costs be addressed through a motion under Rule 406. On the Costs Motion, TekSavvy submitted a Bill of Reasonable Legal Costs, Administrative Costs and Disbursements incurred by TekSavvy, including \$157,203 related to legal costs and disbursements incurred in respect of Voltage’s motion, both before and after the hearing before Prothonotary Aalto.<sup>15</sup>

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

17. Prothonotary Aronovitch heard the Costs Motion on December 8, 2014. At the Costs Motion, Prothonotary Aronovitch raised the issue of whether Prothonotary Aalto had heard submissions regarding the costs of the *Norwich* Motion. This was the first time this issue, which was not addressed in either TekSavvy or Voltage’s written materials and had not previously been identified as being in dispute, had been raised.<sup>16</sup>

18. At the hearing before Prothonotary Aronovitch, Voltage asserted that TekSavvy had had the opportunity to seek costs of the *Norwich* Motion but missed that opportunity. Although she allowed this submission, the Learned Prothonotary did not allow TekSavvy to make responding submissions to correct Voltage’s statements regarding what had occurred at the *Norwich* Motion. The Learned Prothonotary also ignored submissions regarding this issue made by TekSavvy earlier in the hearing.<sup>17</sup>

19. On March 17, 2015, Prothonotary Aronovitch released her Order and Reasons for Order, assessing the “reasonable legal costs, administrative costs and

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<sup>13</sup> 2014 *Norwich* Order, Costs Appeal Record, Tab B(16), at para. 3.

<sup>14</sup> 2014 *Norwich* Reasons, Costs Appeal Record, Tab B(16), at para. 136

<sup>15</sup> TekSavvy’s original request (\$182,406) less its withdrawn costs (\$25,203): Amended Bill of Reasonable Legal Costs, Administrative Costs and Disbursements, Costs Appeal Record, Tab D(A).

<sup>16</sup> Sarabura Affidavit, New Evidence Record, Tab 2, at paras. 12 and 13.

<sup>17</sup> Costs Transcript, Costs Appeal Record, Tab B(19), at 137:18-138:11 and 138:12-139:19.

disbursements incurred by TekSavvy in abiding by [the 2014 *Norwich*] Order at \$21,557.50”.<sup>18</sup> Prothonotary Aronovitch disallowed all of TekSavvy’s claim for reasonable legal costs, save \$4,500 associated with a very limited subset of communications.

20. Prothonotary Aronovitch concluded that Prothonotary Aalto had not intended to allow TekSavvy to recover the costs of the *Norwich* Motion, including, in part, on the (factually incorrect) basis that the issue had not been addressed before him, based on TekSavvy’s “failure to address the costs of the motion.”<sup>19</sup>

21. Prothonotary Aronovitch also disallowed \$5,412 of TekSavvy’s costs related to “Preparation of information for Court” (\$1,190) and “Second check/QA verification” (\$4,322) at least in part because they were not identified and supported by the evidence and/or were not explained at the hearing of the Costs Motion.<sup>20</sup>

### **PART III - LAW AND SUBMISSIONS**

#### **A. Test for Inclusion of New Evidence on Appeal**

22. Rule 351 of the *Rules*, regarding “New Evidence on Appeal” provides that “in special circumstances, the Court may grant leave to a party to present evidence on a question of fact.”<sup>21</sup> Evidence will generally not be admitted on appeal unless it is:

- (a) credible;
- (b) practically conclusive of an issue on appeal; and
- (c) could not with due diligence have been presented to the judge who made the order under appeal.<sup>22</sup>

23. With respect to whether the new evidence is “practically conclusive”, it is necessary to determine whether the evidence “could reasonably be expected to affect

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<sup>18</sup> Costs Order and Costs Reasons, Costs Appeal Record, Tab C, at para. 1.

<sup>19</sup> Costs Reasons, Costs Appeal Record, Tab C, at paras. 72, 73.

<sup>20</sup> Costs Reasons, Costs Appeal Record, Tab C, at para. 118.

<sup>21</sup> *Rules*, TekSavvy’s Book of Authorities (“New Evidence Authorities”), Tab 1.

<sup>22</sup> *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10 (“*Shire Canada*”), New Evidence Authorities, Tab 2, at para. 17.

the result”. This does not entail that the evidence would have determined or changed the result, but only that it likely would have influenced the decision.<sup>23</sup>

24. The Federal Court of Appeal has held that “the Court has residual discretion, even if these three tests are not satisfied, to admit new evidence on appeal in the interest of justice.”<sup>24</sup> This discretion “may be exercised to avoid an undue burden on scarce judicial resources and ‘permit a complete record on the appeal so as not to leave the Court in any doubt as to the surrounding circumstances.’”<sup>25</sup>

25. In addition, the Federal Court of Appeal has held that a transcript may be relevant on appeal when a breach of procedural fairness is alleged:

...Generally, information about the parties’ oral submissions or discussions between counsel and the judge at a hearing on a motion is irrelevant on appeal because it cannot assist this Court in determining whether the grounds of appeal are well founded.

However, there is an exception to that general rule. If it is alleged on appeal that there was a breach of procedural fairness in a hearing and that the transcript of the legal submissions or discussions at the hearing provides evidence of that breach, the transcript may be relevant on appeal.<sup>26</sup>

26. With respect to the transcript of the hearing under appeal (the Costs Motion), there is some uncertainty as to whether same even constitutes “new evidence”:

[A]though not technically before Russell J., the transcripts of the hearing...should be included [in the appeal book]. Since they are simply a record of what transpired at the hearing, their admission should not be subject to the strict tests for admission of new evidence. Given the basis of the appellants’ allegations of bias, the transcripts may enable the panel hearing the appeal to obtain a more complete

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<sup>23</sup> *BC Tel v. Seabird Island Indian Band*, 2002 FCA 288 (“*BC Tel*”), New Evidence Authorities, Tab 3, at para. 29; citing, in part, *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 22, at para. 20.

<sup>24</sup> *Shire Canada*, *supra*, New Evidence Authorities, Tab 2, at para. 18.

<sup>25</sup> *BC Tel*, *supra*, New Evidence Authorities, Tab 3, at para. 30; citing *Glaxo Wellcome PLC v. Canada (Minister of National Revenue – M.N.R.)* (1998), 22 CPC (4<sup>th</sup>) 99 (FCA) at para. 12.

<sup>26</sup> *Collins v. Canada*, 2010 FCA 128, New Evidence Authorities, Tab 4, at paras. 2 and 3.



picture, and may be relevant to the disposition of the appeal. Even if the transcripts should be considered under the category of new evidence, I would have thought them sufficiently relevant to be included in the appeal book.<sup>27</sup> [Emphasis added]

27. It is also an open question whether the Transcripts form part of the public record that is available to the Court on appeal. In *Apotex Inc. v. Wellcome Foundation Limited*,<sup>28</sup> the Court held that “no new evidence should be admitted by the Court when hearing an appeal from a Prothonotary [citation omitted]. However, I do no[t] think that this prevents the Court from taking into consideration documents that are part of the public record...”<sup>29</sup> The Digital Audio Recordings (DAR) of the hearings are public records and, per *Apotex*, would be available to the Court to consider on the Costs Appeal (just as the DAR of the *Norwich* Hearing was available to Prothonotary Aronovitch at the Costs Motion). There is no principled reason why the Transcripts, which are merely physical transcriptions of the publicly-available DARs, should not also be considered public records available to this Court.

28. In any event, the Transcripts meet each element of the test for admissibility. They are undoubtedly credible, having been prepared directly from the Court’s own DAR of the hearings by certified court reporters. They are practically conclusive of one or more issues on appeal, showing clearly that the costs of the *Norwich* Motion were spoken to at that motion (in the case of the *Norwich* Transcript) and that Prothonotary Aronovitch both ignored the submissions before her and violated TekSavvy’s right to procedural fairness (in the case of the Costs Transcript). And they could not with due diligence have been presented to Prothonotary Aronovitch on the Costs Motion, either because there was no indication that the costs of the *Norwich* Motion itself would be in dispute on the Costs Motion (in the case of the *Norwich* Transcript) or because the transcript did not exist at the time (in the case of the Costs Transcript).

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<sup>27</sup> *Sawridge Band v. Canada*, 2005 FCA 259, New Evidence Authorities, Tab 5, at para. 11.

<sup>28</sup> 2003 FC 1229 (“*Apotex*”), New Evidence Authorities, Tab 6.

<sup>29</sup> *Apotex, supra*, New Evidence Authorities, Tab 6, at para. 10.

29. Moreover, the interest of justice militates in favour of granting TekSavvy leave to file the Transcripts. The use of same on the Costs Appeal will ensure that the Court has a complete and accurate record of the facts on which the Costs Appeal turns. Further, there will be no prejudice to any party if the Transcripts are used at the Costs Appeal, as shown by the fact that Voltage, the other party to that appeal, does not oppose the within motion.<sup>30</sup>

30. The relevance and necessity of each of the Transcripts is discussed in more detail below.

**B. The *Norwich* Transcript**

a) The *Norwich* Transcript is Credible

31. For the reasons set out above, there can be no dispute that the *Norwich* Transcript is credible. The *Norwich* Transcript is a certified transcript produced by A.S.A.P. Reporting Services Inc. from the DAR of the *Norwich* Motion obtained from the Federal Court.<sup>31</sup>

b) The *Norwich* Transcript is Conclusive of an Issue On Appeal

32. The *Norwich* Transcript will allow this Court to confirm whether, as TekSavvy submits, the issue of costs of the *Norwich* Motion was addressed before Prothonotary Aalto at the hearing of same in a manner that left the issue for later determination. The Court's finding in this respect will be dispositive of TekSavvy's ground of appeal relating to Prothonotary Aronovitch's alleged mistake of fact in that respect.

33. With respect to the costs of the motion before Prothonotary Aalto, Prothonotary Aronovitch concluded that TekSavvy had "conflated the legal costs of the motion with the legal costs of abiding by the Order", and disallowed any legal costs associated with addressing and attending on Voltage's motion.<sup>32</sup> Prothonotary Aronovitch determined that "[h]ad Prothonotary Aalto intended TekSavvy to be

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<sup>30</sup> Email from A. Weissman to N. McHaffie dated July 7, 2015, Exhibit A to the Sarabura Affidavit, New Evidence Record, Tab 2(A).

<sup>31</sup> Sarabura Affidavit, New Evidence Record, Tab 2, at para. 10.

<sup>32</sup> Costs Reasons, Costs Appeal Record, Tab C, at paras. 69-73.

compensated, in full, for any costs that it would have incurred ‘but for the motion’ or ‘in connection with the motion’, I am confident he would have so ordered” and stated that TekSavvy has not provided any cases to the contrary.<sup>33</sup>

34. Prothonotary Aronovitch’s assumption that Prothonotary Aalto’s order for “all reasonable legal costs...incurred by TekSavvy in abiding by this Order” did not include costs related to the motion itself (including the motion to intervene and motions to adjourn) was based in part on the mistaken assumption that there was a “failure to address the costs of the motion” before Prothonotary Aalto.<sup>34</sup>

35. At the appearance before Prothonotary Aalto, the issue of costs was in fact spoken to. During submissions of Voltage, Prothonotary Aalto indicated that he was “not going to decide [the issue of costs] today and I won’t decide it as part of the order, other than if I grant your order there will be a costs component and we will have to figure out how to make the calculation.” He also noted that at the moment, he had “bigger fish to fry” than costs.<sup>35</sup>

36. Similarly, during TekSavvy’s submissions, counsel referred to the costs that had been incurred, citing a figure from the earlier hearing date. Prothonotary Aalto recognized that quantum was going to be an issue, and recognized the some mechanism would be necessary to address them, but in response to discussion about potential submissions on costs, said simply “Let’s leave that for another day.”<sup>36</sup>

37. The passages cited above demonstrate that Prothonotary Aronovitch was mistaken regarding whether costs had been addressed before Prothonotary Aalto, and thus whether he intended to include the costs of the *Norwich* Motion in the scope of the 2014 *Norwich* Order, and erred in accepting Voltage’s submission that TekSavvy had missed the opportunity to request costs of the *Norwich* Motion. The *Norwich* Transcript is therefore conclusive of this issue on appeal.

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<sup>33</sup> Costs Reasons, Costs Appeal Record, Tab C, at para. 55.

<sup>34</sup> Costs Reasons, Costs Appeal Record, Tab C, at paras. 72-73.

<sup>35</sup> *Norwich* Transcript, Costs Appeal Record, Tab B(19), at 125:10-127:12.

<sup>36</sup> *Norwich* Transcript, Costs Appeal Record, Tab B(19), at 106:12-108:4.

c) The Norwich Transcript Could Not with Due Diligence Have Been Before Prothonotary Aronovitch

38. TekSavvy does not dispute that the DAR of the *Norwich* Motion was available before the hearing of the Costs Motion, and a transcript could therefore have been prepared and placed before Prothonotary Aronovitch.<sup>37</sup>

39. However, prior to the Costs Motion, there was no indication that whether or not the costs of the *Norwich* Motion were included within the scope of the 2014 *Norwich* Order would be in issue, nor that Voltage would suggest that TekSavvy had the opportunity to request costs at the *Norwich* Motion but failed to do so. Neither TekSavvy nor Voltage provided any written submissions in this respect,<sup>38</sup> while TekSavvy's Bill of Reasonable Costs clearly included the costs of its attendance at the *Norwich* Motion.<sup>39</sup>

40. Moreover, the wording and intent of the 2014 *Norwich* Order did not create any reason to believe that the costs of the *Norwich* Motion would not be encompassed therein. Prothonotary Aalto ordered that “[a]ll reasonable legal costs, administrative costs and disbursements incurred by TekSavvy in abiding by this Order shall be paid by the Plaintiff to TekSavvy.”<sup>40</sup> [emphasis added] Prothonotary Aalto generally used expansive language, referring to “all” costs and enumerating each of legal costs, administrative costs and disbursements as eligible heads of expense. Prothonotary Aalto also:

- (a) stated that “TekSavvy will be reimbursed for its reasonable costs in providing the information”

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<sup>37</sup> Sarabura Affidavit, New Evidence Record, Tab 2, at paras. 10 and 11.

<sup>38</sup> Voltage's written submissions on the Costs Motion stated in the introduction that Prothonotary Aalto “never awarded the costs of the motion”, but this submission was not addressed in any detail in the submissions and was not supported by any evidence. See Written Representations of TekSavvy Solutions Inc., Costs Appeal Record, Tab B(17) and Memorandum of Fact and Law of Voltage Pictures LLC, Costs Appeal Record, Tab B(18).

<sup>39</sup> Sarabura Affidavit, New Evidence Record, Tab 2, at paras. 12 and 13.

<sup>40</sup> 2014 *Norwich* Order, Costs Appeal Record, Tab B(16), at p. 56, para. 3.

- (b) noted that cases in the US, UK and Canada have held that the “party enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third party”;
- (c) stated that the terms of the Order were designed so “production of such information will not...cause expense to TekSavvy or others”;
- (d) referred to TekSavvy’s request for “payment of its reasonable costs”, leaving any dispute regarding “those costs” to be resolved by the Case Management Judge; and
- (e) stated that “[t]he reasonable legal costs, administrative costs and disbursements of TekSavvy in providing the information will be paid to TekSavvy prior to the information being provided.”<sup>41</sup>

41. The jurisprudence surrounding *Norwich* Orders generally further supported TekSavvy’s belief that the 2014 *Norwich* Order encompassed the legal costs of TekSavvy’s appearance at the *Norwich* Motion. As Prothonotary Aalto noted, a *Norwich* Order is a “discretionary and extraordinary order”,<sup>42</sup> as it may compel an innocent third party to incur costs in respect of a proceeding to which it is not otherwise a party, and over which it has little control. Recognizing the potential unfairness of foisting such costs on the third party, Courts have consistently ordered the moving party to indemnify that third party for its reasonably incurred costs. For example, in *Norwich Pharmacal*, the House of Lords described the principle of indemnification as being that “the “full costs of the respondent...and any expense incurred in providing the information would have to be borne by the applicant””<sup>43</sup> [emphasis added].

42. Similarly, in *BMG Canada v. Doe*, the Federal Court of Appeal affirmed the motion Court’s statement that “the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery

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<sup>41</sup> 2014 *Norwich* Reasons, Costs Appeal Record, Tab B(16), at paras. 46, 134-136 and 138.

<sup>42</sup> 2014 *Norwich* Reasons, Costs Appeal Record, Tab B(16), at para. 35. See also *Temelini v. Royal Canadian Mounted Police Commissioner*, [2009] OJ No 4447 (Ont SCJ), TekSavvy’s Book of Authorities re: Costs Appeal (“Costs Appeal Authorities”), Tab 7, at para. 18.

<sup>43</sup> *Norwich Pharmacal Company and others v. Commissioners of Customs and Excise*, [1974] AC 133 (HL), Costs Appeal Authorities, Tab 2, at para. 100.

order in addition to his legal costs”<sup>44</sup> [emphasis added].

43. Thus, given the nature of the discussion before Prothonotary Aalto, the written submissions of the parties, the nature of the 2014 *Norwich* Order and the underlying jurisprudence, TekSavvy very reasonably had no expectation that the question of whether costs of the *Norwich* Motion had been addressed before Prothonotary Aalto would be in issue, and no amount of due diligence would have led to that conclusion.<sup>45</sup>

44. A similar situation arose in *Armstrong v. Armstrong*, a 1992 decision of the British Columbia Court of Appeal.<sup>46</sup> The Court of Appeal found that the trial judge introduced an unexpected element to the hearing; as a result, “what initially seemed to be the very clear position of both parties developed into a somewhat different position.”<sup>47</sup> The Court of Appeal thus found that the “question of due diligence must be approached from a somewhat different perspective. There is no doubt that this evidence could have been made available...Certain passages from the transcript, however give a reasonable explanation [of] why this evidence was not available at trial.”<sup>48</sup> The Court in *Armstrong* further held that even if the three-part test for the admission of new evidence had not been satisfied, the evidence would have been admitted in the interest of justice.<sup>49</sup>

45. TekSavvy submits that this is a similar situation to *Armstrong*, in that unexpected circumstances, and the intervention of the Court, meant that evidence that was technically “available” was not reasonably available for the purpose of Rule 351.

46. TekSavvy this submits in the circumstances, each element of the three-part test regarding the admissibility of new evidence has been satisfied with respect to the *Norwich* Transcript.

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<sup>44</sup> *BMG Canada v. Doe*, 2005 FCA 193, Costs Appeal Authorities, Tab 8, at para. 35, aff'ing *BMG Canada v. Doe*, 2004 FC 488, Costs Appeal Authorities, Tab 9, at paras. 10(d) and 32.

<sup>45</sup> Sarabura Affidavit, New Evidence Record, Tab 2, at paras. 12-14.

<sup>46</sup> *Armstrong v. Armstrong* (1992), 74 BCLR (2d) 273 (CA) (“*Armstrong*”), New Evidence Authorities, Tab 7, at paras. 16-26.

<sup>47</sup> *Armstrong*, *supra*, New Evidence Authorities, Tab 7, at paras. 17 and 23.

<sup>48</sup> *Armstrong*, *supra*, New Evidence Authorities, Tab 7, at para. 17.

<sup>49</sup> *Armstrong*, *supra*, New Evidence Authorities, Tab 7, at para. 25.

d) Admitting the *Norwich* Transcript is in the Interest of Justice

47. TekSavvy submits that if this Court finds that the *Norwich* Transcript does not satisfy the test under Rule 351, the Court should nonetheless grant TekSavvy leave to file the transcript in the interest of justice and to ensure the fairest determination of the Costs Appeal.

48. Voltage does not oppose the use of the *Norwich* Transcript at the Costs Appeal,<sup>50</sup> so there is no prejudice to any party if the Court grants leave.

49. In addition, as set out above, Prothonotary Aronovitch based a considerable portion of the Costs Ruling on an assumption regarding the *Norwich* hearing that is incorrect, and is shown to be by the *Norwich* Transcript. It is in the interests of justice to allow TekSavvy to file the *Norwich* Transcript to correct this error.

**C. The Costs Transcript**

50. As discussed above, it is not clear that it is necessary to seek leave to include the Costs Transcript for use on the Costs Appeal. However, whether or not a motion is necessary, it is clear that leave to use the Costs Transcript should be granted. TekSavvy notes in this regard that Voltage has also referenced the Costs Transcript as a document on which it intends to rely on its appeal of the Costs Order.<sup>51</sup>

a) The Costs Transcript is Credible

51. There can be no dispute that the Costs Transcript is credible, for the same reasons that the *Norwich* Transcript is credible.<sup>52</sup>

b) The Costs Transcript is Conclusive of an Issue On Appeal

52. The Costs Transcript is potentially conclusive of at least three issues on appeal. First, TekSavvy has argued that Prothonotary Aronovitch violated TekSavvy's right to procedural fairness by failing to allow TekSavvy to respond to submissions Voltage made as to whether the issue of costs of the *Norwich* Motion was addressed before

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<sup>50</sup> Sarabura Affidavit, New Evidence Record, Tabs 2 and 2(A), at para. 7 and Exhibit A.

<sup>51</sup> Notice of Motion of Voltage Pictures LLC, dated April 2, 2015, Affidavit B to the Sarabura Affidavit, New Evidence Record, Tab 2(B).

<sup>52</sup> Sarabura Affidavit, New Evidence Record, Tab 2, at para. 10.

Prothonotary Aalto. Second, TekSavvy has argued that Prothonotary Aronovitch erred by failing to give appropriate weight to submissions made by TekSavvy earlier in the Costs Hearing regarding the same issue. And third, TekSavvy has argued that Prothonotary Aronovitch factually erred in concluding that TekSavvy did not address certain claimed costs at the Costs Motion.<sup>53</sup> Reference to the Costs Transcript is necessary to understand and correct those errors.

53. Prothonotary Aronovitch did not have the transcript of the hearing before Prothonotary Aalto before her at the Costs Motion, for the reasons set out above. It was only at the hearing of the Costs Motion that counsel for Voltage suggested for the first time, surprisingly, that TekSavvy had had an opportunity to request costs but missed the opportunity.<sup>54</sup>

54. Unfairly, though, having received Voltage's assertion that TekSavvy had missed the opportunity to request costs—submissions that are not reflective of what transpired before Prothonotary Aalto—Prothonotary Aronovitch refused to allow counsel for TekSavvy to respond to that assertion by clarifying that before Prothonotary Aalto, costs had been left for another day, such that there was no “opportunity” to request costs that had been missed:

MR. MCHAFFIE: The question of not requesting costs, my friend said we did not request costs at the hearing. Again, I was surprised to see that what was said at the last hearing before Prothonotary Aalto is at issue now. The Court does have its record of it. I think we may even have filed a transcript, [un]official transcript, with the Court to the extent that it was a decision.<sup>55</sup> There was direct discussion [of] costs, Madam Prothonotary. I took a look. I don't want to give evidence, but I think it's in the Court file. If I'm going too far, then please.

PROTHONOTARY ARONOVITCH: You are, indeed, going too far.

MR. MCHAFFIE: Okay.

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<sup>53</sup> Written Representations of TekSavvy (*Re: Appeal of Costs Order*), Costs Appeal Record, Tab D.

<sup>54</sup> Costs Transcript, Costs Appeal Record, Tab B(19), at 96:28-97:7; 120:11-14 and 136:14-19.

<sup>55</sup> Mr. McHaffie was incorrect on this point as no transcript had been filed.



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.<sup>56</sup>  
[Emphasis added]

55. Earlier at the hearing, Prothonotary Aronovitch had asked TekSavvy for, and received, brief submissions regarding what had occurred before Prothonotary Aalto, including in particular with respect to the request for costs, and was expressly advised that “during the course of it, it became clear that [addressing costs] was thinking a step too far ahead in terms of what was before Prothonotary Aalto.”<sup>57</sup>

56. It follows that Prothonotary Aronovitch’s conclusion that Prothonotary Aalto did not intend her to address the costs of the motion was based on a misapprehension of the facts, as well as procedural unfairness, which are both evident from the Costs Transcript.

57. In addition to refusing to accept submissions regarding the costs of the *Norwich* Motion, the Learned Prothonotary excluded TekSavvy’s technical costs for “Preparation of information for court” (\$1,190) and half of the costs of “Second check/QA verification” (\$4,322), at least in part because they were “not identified and supported by evidence”, and because at the hearing of the Costs Motion TekSavvy did not explain what was meant by “QA verification.”<sup>58</sup> This was an error and a conclusion contrary to the evidence.

58. These costs were in fact clearly identified and supported by evidence. With respect to the “Preparation of information for court”, Mr. Gaudrault’s affidavit clearly explained the term;<sup>59</sup> Prothonotary Aronovitch also asked a question regarding this

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<sup>56</sup> Costs Transcript, Costs Appeal Record, Tab B(19), at 137:18-138:11 and 138:12-139:19.

<sup>57</sup> Costs Transcript, Costs Appeal Record, Tab B(19), at 27:25-29:19; see also 15:25-17:28 and 99:18-25.

<sup>58</sup> Costs Reasons, Costs Appeal Record, Tab C, at para. 118.

<sup>59</sup> Gaudrault Affidavit, Costs Appeal Record, Tab B(2), at para. 53.

line item during the hearing, and it was further explained.<sup>60</sup>

59. Similarly, Mr. Gaudrault's affidavit made clear what was involved in the search and correlation process.<sup>61</sup> During the course of the hearing, Prothonotary Aronovitch stated that she "followed that [*i.e.*, what was involved] from Mr. Gaudrault's affidavit," and further clarity was also provided in response to a question from the Prothonotary.<sup>62</sup> The Learned Prothonotary was therefore incorrect to assert that TekSavvy failed to explain what was meant by "QA verification" at the hearing,<sup>63</sup> an error which is shown by the Costs Transcript.

c) The Costs Transcript Could Not with Due Diligence Have Been Before Prothonotary Aronovitch

60. The Costs Transcript could not have been before Prothonotary Aronovitch, as it only came into existence after the hearing of the Costs Motion.

d) Admitting the Costs Transcript is in the Interest of Justice

61. As with the *Norwich* Transcript, TekSavvy submits that if this Court finds that the Costs Transcript does not satisfy the test under Rule 351, the Court should nonetheless grant TekSavvy leave to file the Costs Transcript in the interest of justice and of ensuring the fairest determination of the Costs Appeal.

62. Voltage does not oppose the use of the Costs Transcript at the Costs Appeal and in fact has cited it as a document to be relied upon in its own appeal of the Costs Order, so there is no prejudice to any party if the Court grants leave.

63. Moreover, given TekSavvy's claim of a violation of procedural fairness by Prothonotary Aronovitch, it is vital to have a copy of the transcript so that this Court

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<sup>60</sup> Costs Transcript, Costs Appeal Record, Tab B(19), at p. 47:13-20.

<sup>61</sup> Gaudrault Affidavit, Costs Appeal Record, Tab B(2), at para. 21 and Appendix A – Administrative Costs – Information Technology.

<sup>62</sup> Costs Transcript, Costs Appeal Record, Tab B(19), at p. 47:21-48:17.

<sup>63</sup> Costs Reasons, Costs Appeal Record, Tab C, at para. 118. To the extent that Prothonotary Aronovitch's reference was to not knowing the common abbreviation "QA" for "quality assurance", no questions were asked on this, as shown by the Costs Transcript. In any case, the term is irrelevant, as the evidence was clear that the line item related to the second correlation and comparison exercise.

can determine for itself what transpired at the hearing. It is therefore in the interest of justice to allow TekSavvy to file the Costs Transcript to correct this error.

#### **PART IV - CONCLUSION**

64. The Transcripts satisfy each of the elements of the test under Rule 351 to be admitted as new evidence on the Costs Appeal. The Transcripts are credible, dispositive of one or more issues on the appeal, and could not have been before Prothonotary Aronovitch at the Costs Motion with due diligence. Even if the test under Rule 351 is not satisfied, the Transcripts ought to be admitted in the interest of justice, particularly considering that the within motion for leave is not opposed.

#### **PART V - ORDER REQUESTED**

65. TekSavvy seeks an Order permitting TekSavvy to file the Transcripts as evidence on the Costs Appeal.

66. In the alternative, TekSavvy seeks an order in such form as this Honourable Court deems just granting TekSavvy leave to file such evidence on the Costs Appeal as this Honourable Court may determine on such terms as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



**NICHOLAS MCHAFFIE**  
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